

2023

# THE LONG TRIP FROM BERNE TO BREXIT

An evolutionary case for copyright harmonisation in the European Union



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Justine Mitchell

# ***THE LONG TRIP FROM BERNE TO BREXIT***

**An evolutionary case for copyright harmonisation in the European Union**

**by**

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**A thesis submitted in partial fulfilment of the requirements for the degree  
of  
Doctor of Philosophy at the University of Central Lancashire**

**February 2023**

# STUDENT DECLARATION FORM

**Type of Award**                      **Doctor of Philosophy**

**School**                                      **School of Justice**

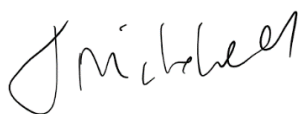
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## **Abstract**

There is considerable interest in reforming copyright law within the European Union. Critical analysis in this thesis in Chapters 3-6 highlights gaps in EU copyright harmonisation in key areas: originality standards, notions of a work, fixation, moral rights, permitted exceptions and works in the digital single market. Despite current attempts at harmonisation, there has not been a satisfactory proposal to harmonise EU copyright law; nor have these differences been explored sufficiently, both in breadth and depth, to form such proposal.

This research investigates the viability of implementing an EU-wide unitary Copyright Regulation, encompassed within a single document. The core central question is whether or not an EU copyright legislative instrument is feasible. A secondary consideration is, if so, whether the proposed EU Copyright Regulation could, and should, annex to the new EU-UK Trade and Cooperation Agreement to supplement EU-UK copyright trading relations.

The thesis is evaluated in the context of the EU's legislative powers, predominantly TFEU, Arts. 114 and 118, but with particular respect paid to Arts. 4 and 5 in terms of subsidiarity and proportionality. All proposed reforms must satisfy these legislative provisions.

Chapter 2 focuses on historical considerations and will reveal that the Commission prioritised the harmonisation of industrial property, without consideration of copyright, which will be shown to have been erroneous.

The author's research centres predominantly on using the Draft Wittem European Copyright Code (2010) as a theoretical framework for two points: critical analysis of selected issues of copyright and as an architectural structure for drafting the posited EU Copyright Regulation. Critical analysis in Chapters 4 and 5 will reveal that a Copyright Regulation is possible. Moreover, the research will reveal that the CJEU has been instrumental in bringing about this possibility through its creative interpretation of EU directives, regulations, EU treaties and international treaties.

Moreover, evaluation of the Trade and Cooperation Agreement in Chapter 6 will reveal that, whilst there are still differences between EU and UK copyright laws, it is possible to annex the proposed Regulation to the Agreement to better support trading relations in copyright works. The thesis will show that it should annex to the Agreement for improved trading relations.

Reforms are recommended in Chapter 7 to continue harmonisation in areas as yet, unharmonised. Moreover, reforms will also seek to strengthen protection in current directives/regulations that have already been passed to harmonise certain areas of copyright law but which, over the passage of time, could be improved. A draft skeleton of the proposed EU Copyright Regulations is appended to this thesis (Appendix A).

*Justine Mitchell*

## Glossary of Terms

ACT	will be used interchangeably with ACT OF PARLIAMENT/STATUTE
AI	artificial intelligence
ANNE	Statute of Anne 1710
AO	Appellation of Origin
AV	Audio-visual
AVWKS	Audio-visual Works
BERNE	the Berne Convention for the Protection of Literary and Artistic Works 1886 (latest version in force: Paris Act 1971 as amended in 1979)
BIRPI	United International Bureaux for the protection of Intellectual Property (succeeded by WIPO in 1967)
BREXIT	the UK referendum decision to leave the EU decided by the people's majority on 23 June 2016
B-VoD	Broadcaster Video on Demand
CDPA	Copyright, Designs and Patents Act 1988
CDR	Community Design Regulation 2002
CFREU	Charter of Fundamental Rights of the European Union
CIVIL LAW	is used to denote countries which incorporate the following into their laws: Germanic, Austrian, North Germanic, Scandinavian, Nordic, Dutch, Roman and Hungarian civil law, as well as the civil Napoleonic Code and the Civil Code of Quebec
CJEU	Court of Justice of the European Union
CMOs	Collective Management Organisations also known as CS
CoA	Court of Appeal
COMMON MARKET	informal name referring to the EEC
COVID-19	the new mutant strain of one of the coronaviruses that spread globally from November 2019 through to the majority of 2020
CPs	Contracting Parties
CS	Collecting Societies also known as CMOs

CTM	Community Trademark Regulation (former terminology)
DCMS	Department for Digital, Culture, Media and Sport
DRM	Digital Rights Management
D-R-Ms	Dispute Resolution Mechanisms
DSMD	Digital Single Market Directive (EU) 2019/790
EAEC	European Atomic Energy Community
EASTERN BLOC	collective term for the group of socialist states of Central and Eastern Europe, generally, the Soviet Union and the countries of the Warsaw Pact
EC	European Community (collectively the EEC, ECSC and the EAEC in 1967). Theoretically, the EC remained as the first of the three-pillar structure in <i>Maastricht</i> . However, it was generally referred to as the EU from 1 November 1993 onwards.
ECC	European Copyright Code (Wittem Project)
ECJ	European Court of Justice (renamed the CJEU on 1 December 2009)
ECSC	European Coal and Steel Community Treaty
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EPC	European Patent Convention
EPO	European Patent Office
EU	European Union (officially as from the Treaty of Lisbon in 2009)
EUCR	European Union Copyright Regulation (proposed by this thesis)
EUIPO	European Union Intellectual Property Office (formerly OHIM)
EUMS	EU Member State(s)
EUTMR	European Union Trade Mark Regulation
EU27	reference to the EU post-Brexit
EWCA	England and Wales Court of Appeal
FTA	Free Trade Agreement

GDP	Gross Domestic Product
GVA	Gross Value Added
GATT	General Agreement on Tariffs and Trade
GI	Geographical Indication
HoC	House of Commons
HL	House of Lords
ICJ	International Court of Justice
ICTs	International Copyright Treaties
ILO	International Labor Organization
INFOSOC	the harmonisation of certain aspects of copyright and related rights in the Information Society Directive 2001/29/EC
IN REM	property rights imposing a general liability on others
IPRs	Intellectual Property Rights
LMA	Literary, Musical and Artistic copyright-protected works
LDMA	Literary, Dramatic, Musical and Artistic copyright-protected works
LISBON	Treaty of Lisbon 2009
MS	Member States (EU)
MAASTRICHT	Maastricht Treaty of 1992
MOOCS	Massive Open Online Courses
NATO	North Atlantic Treaty Organization; also called the North Atlantic Alliance
OHIM	Office for Harmonization in the Internal Market (now the EUIPO)
OoC	Out-of-Commerce Works
ROME I	Rome Convention; the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961
SATCABS	Satellite and Cable audio-visual works



SCOTS LAW	a hybrid of common law and civil law; as IPRs are legislated for the whole of the UK, and Scotland is bound by former UKHL, current UKSC and former CJEU case law in these matters, the thesis will identify copyright law as ‘UK Copyright Law’. See “Disclaimers” below.
SME	Small to Medium Enterprise
S-VoD	Subscription Video on Demand
TCE	Traditional Cultural Expression
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union (also referred to as Lisbon, the Treaty of Lisbon and the ToL)
ToL	Treaty of Lisbon (current EU Treaty, used interchangeably with TFEU)
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights 1994
T-VoD	Transactional Video on Demand
UCC	Universal Copyright Convention 1952
UK	United Kingdom
UKHL	UK House of Lords
UKSC	UK Supreme Court
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UPC	Unified Patent Court
UPP	Unified Patent Package
US	Unites States of America
USSR	Union of Soviet Socialist Republics
VoD	Video on Demand
WCT	WIPO Copyright Treaty 1996
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty 1996
WTO	World Trade Organisation

# Disclaimers

## **Legal systems of England and Wales, Scotland and Northern Ireland**

The UK is a sovereign state encompassing four countries. As the United Kingdom of Great Britain and Northern Ireland is a political union of previously independent countries, it encompasses three distinct legal systems: England and Wales, Scotland and Northern Ireland. Unlike England and Wales and Northern Ireland, Scotland is not a true common law system. It is an eclectic mix of both common and Roman (civil) law (by a narrow definition). However, Scotland does not have exclusive jurisdiction in matters of statutory intellectual property legal protection and infringement. The current Copyright, Designs and Patents Act 1988 (as amended) extends its geographic reach to the whole of the United Kingdom. Notwithstanding this, Scotland is only bound by intellectual property jurisprudence emanating from the former UK House of Lords and the current UK Supreme Court and, currently, former CJEU jurisprudence (until repealed). As will be seen throughout this thesis though, leading, well-reasoned English Court of Appeal and High Court copyright judgments would massively carry persuasive weight in a Scottish court deciding materially similar legal issues. For ease of reference, this thesis refers to current statutory- and case- law as ‘UK Copyright Law’. For accuracy, it is important to note that there is no absolute ‘UK copyright law’ and Scottish case law from lower courts may differ somewhat from its English and Northern Irish counterparts.

## **Internet Links**

All websites cited were viewed and accessible as of the 30 June 2022.

## Acknowledgements

When I returned to education after an 18-year hiatus, I had no idea where the journey would take me. I arrived at UCLan Lancashire Law School (as was) on Tuesday 16<sup>th</sup> September 2008 excited, but nervous, as I embarked on what was to be a 4-year part time UG law degree. This followed an impromptu phone call of enquiry, in July 2008.

That phone call changed my life.

Some 14 years later, I have just completed my Doctoral Thesis in Copyright Law having gained my undergraduate law degree, the Masters' *Bachelor of Civil Law* at Oxford University and qualifying as a barrister at City Law School, London as a Middle Temple Duke and Duchess of Cambridge scholar whilst also teaching law at UCLan.

Completing my PhD is a momentous achievement for me as, having left school with few GCSEs, one mediocre A-Level, zero confidence and going to work on local factory production lines, I never imagined I would ever return to education. I am the first in my family to go to university and I owe a huge debt of gratitude and thanks to them, and others, for helping to make this day happen.

### *My supervisory team*

I would like to thank my Director of Studies, Susan Fletcher, for all the help, advice and support she has given me over the years

I would also like to thank my second supervisor, Professor Mohammed El-Said, for all his help, advice and support during these last 6 years.

### *My family and friends*

Firstly, I would like to say 'thank you' to my wonderful husband of almost 30 years, Russell Mitchell. He has always stood by my dreams and believed in me. His attitude is never 'can we make this happen?' It is always 'HOW can we make this happen?' He has never complained about the hours, days, weeks and years I have had to spend sat at the dining room table typing on my laptop to complete my degrees. Nor has he really complained about the heap of books and paperwork that seem to have been littered on the table forever (well, maybe just a little!). Most importantly, his belief in my abilities has never once wavered.

Equally, I would like to thank my marvellous parents, Jennifer and Keith Hartley, who moved heaven and earth to help me along this journey. From helping out by feeding my pussycats when I was away in Oxford and London for days on end studying, to just being there to lift my spirits when I stopped believing in myself and wanted to give up. They have been an incredible support for me during the last 12 years and I hope I have done them both proud. My mother is my best friend (equal to Ann) and my confidante. From the bottom of my heart: thank you.

My next thanks go to my dearest best friend, Ann Clarke, of 25 years. We met in 1998 and have remained the best of friends though our shared love of spirituality, tarot cards, yoga, meditation and anything else we can find to do! Ann has spent hours listening about how hard it is to study for so many years whilst working full time. Like my husband and my parents, though, Ann never lost faith in me.

Finally, I would also like to say ‘thank you’ to my fabulous Aunty Barbara (“Aunty B”) for helping me realise my Oxford dream. Through Aunty B’s unwavering kindness and support, I was able to take up my offer of a place at Oxford University in 2012 where I continued my law studies.

To all of you: this day would not be happening if not for you.

Thank you 😊

*Justine Mitchell 2022*

*To my wonderful husband who never stops believing in me*

## Table of Contents

<b>Copyright Notice</b> .....	3
<b>Abstract</b> .....	4
<b>Glossary of Terms</b> .....	5
<b>Disclaimers</b> .....	9
<b>Acknowledgements</b> .....	10
<b>CHAPTER ONE</b> .....	19
<b>INTRODUCTION</b> .....	19
1. INTRODUCTION .....	20
1.1 An overview of copyright law essentials.....	24
1.2 Copyright law rationale .....	28
1.2.1 Common law Locke’s Labour Theory .....	28
1.2.2 Civil Law Author’s Rights philosophies .....	30
1.2.3 Economic Utilitarianism .....	31
1.3 The Early Vision of the EU and its legislative evolution.....	35
1.3.1 Pre-European Economic Community .....	35
1.3.2 The EEC Treaties: moving towards a harmonised copyright system .....	37
1.3.3 The raison d’être of EU Directives and Regulations passed under the Treaties .....	39
1.3.4 International Copyright Agreements.....	43
1.4 Reasons for proposing a harmonising EU Copyright Regulation .....	47
1.4.1 Trade element in the context of non-harmonisation .....	48
1.5 Areas of copyright law left unharmonised by EU law .....	52
1.6 Challenges to this research .....	55
1.6.1 Current EU legislative trajectory .....	55
1.6.2 Common law inclusion in a civil law EU Copyright Regulation .....	56
1.6.2.1 Common law EUMS.....	57
1.6.2.2 Copyright originality standards aligned.....	57
1.6.2.3 EU trading initiatives .....	58
1.6.2.4 Protection of EU Intellectual Property.....	59
1.6.3 Law Enforcement.....	60
1.7 Research questions .....	61
1.8 Research Methodologies .....	63
1.9 Thesis Structure .....	64
1.10 CONCLUSION.....	65
<b>CHAPTER TWO</b> .....	66
<b>The ‘Europeanisation’ of Intellectual Property Law:</b> .....	66
2. INTRODUCTION .....	67
2.1 EU Harmonisation: a brief outline .....	68
2.2 EU Trade Marks and the EU Unitary Patent Package .....	70

2.2.1 EUTM and Patents Harmonisation: a brief history for comparative analysis .....	70
2.3 European Design Law.....	72
2.3.1 Community and Member State Design Law .....	72
2.4 Trade Secrets Directive .....	76
2.5 Harmonising Copyright Law through early EEC Jurisprudence .....	80
2.5.1 Early ECJ jurisprudence exposing copyright single market fragmentation .....	80
2.5.2 21 <sup>st</sup> Century case law positing further EU copyright harmonisation.....	85
2.6 Comparative analysis of unitary EU Trade Mark laws, the Unitary Patent Package, Design law, Trade Secrets, International law and Copyright Directives.....	88
2.7 CONCLUSION .....	98
<b>CHAPTER THREE .....</b>	<b>99</b>
<b>Critical analysis of Wittem’s draft European Copyright Code .....</b>	<b>99</b>
3. INTRODUCTION .....	100
3.1 Who else has proposed EU copyright harmonisation and what steps have been taken by such proposals to consider full copyright harmonisation? .....	101
3.2 Originality in the Wittem draft European Copyright Code.....	102
3.2.1 Judicial application of EU law.....	103
3.2.2 Infopaq: a controversial “judge-made” decision?.....	106
3.2.3 The impact of CJEU jurisprudence on the common law .....	109
3.3 Notions of Works in the Wittem draft European Copyright Code.....	111
3.4 Authorship/Ownership in the Wittem draft European Copyright Code.....	113
3.4.1 Authorship.....	113
3.4.1.1 Authorship of works made in the course of employment.....	114
3.4.1.2 Authorship of commissioned Works .....	115
3.4.1.3 Authorship of computer-generated works .....	116
3.5 Fixation and Moral Rights in the Wittem draft European Copyright Code .....	118
3.5.1 Fixation .....	118
3.5.2 Moral Rights .....	120
3.6 Economic rights in the Wittem draft European Copyright Code .....	125
3.7 Limitations in the Wittem draft European Copyright Code.....	127
3.8 What conclusions have been drawn from the Wittem draft European Copyright Code? .....	135
3.9 CONCLUSION .....	137
<b>CHAPTER FOUR .....</b>	<b>139</b>
<b>Analysis of the “selected issues” from the Wittem Code .....</b>	<b>139</b>
4. INTRODUCTION .....	140
4.1 Originality in a work.....	142
4.1.1 Disparity in “originality standards” amongst EUMS .....	142
4.1.2 Potential routes to harmonisation.....	146
4.1.3 Suggestions for reform to harmonise EU copyright “Originality” standards for all EU Member States.....	148
4.1.4 Did InfoSoc extend the originality requirement to all works within the EU?.....	149

4.1.5 Suggested reform for harmonisation of the EU copyright “originality” standard for all works ....	153
4.2 Notions of Works.....	154
4.2.1 Categories of Works.....	154
4.2.2 Effect of closed categories of works on the EU single market .....	155
4.2.3 Potential solutions for resolving disparity caused by closed categories affecting the EU single market.....	158
4.2.4 Suggested reform to harmonise “works” for EU copyright subsistence .....	161
4.3 Authorship .....	162
4.3.1 Do we really need a human to create an intellectual work of the mind?.....	162
4.3.2 What happens when a machine can think for itself?.....	164
4.3.3 Is there scope to extend copyright law to computer-generated creations under EU law? .....	166
4.3.4 Suggested reform for harmonisation of copyright protection of computer-generated creations .	171
4.3.5 Authorship in collaborative and commissioned works .....	171
4.3.5.1 Collaborative works: joint authorship .....	171
4.3.5.2 Suggested reform for collaborative authorship of copyright-protected works in the EU .....	174
4.3.5.3 Rights in commission-based works.....	174
4.3.5.4 Suggested reforms for harmonisation of commissioned works.....	176
4.3.6 Works made in the course of employment .....	176
4.3.6.1 Suggested reforms for harmonisation of works made in the course of employment.....	177
4.4 Disparities in Fixation requirements in a Copyright Work .....	177
4.4.1 When is “fixation” required and where? .....	178
4.4.2 Effect of fragmented “fixation” laws on the functioning of the EU single market of copyright law .....	181
4.4.3 An argument for fixation harmonisation under <i>Levola Hengelo v Smilde Foods</i> and the effect on the functioning of the single market .....	182
4.4.4 Suggested reform to harmonise fixation standards for EU copyright subsistence.....	185
4.5 Could the Wittem draft ECC proposals for harmonising moral rights apply to a unitary EU Copyright Regulation?.....	185
4.5.1 Author’s Moral Right of Divulgateion in the Wittem draft ECC .....	187
4.5.2 The “right to consent” proposal in the Wittem draft ECC .....	194
4.5.3 Suggested reform to harmonise EU Moral Rights .....	198
4.6 Permitted Exceptions: an argument for mandatory exceptions in the 2001/29/EC “Information Society Directive”, Art. 5 .....	198
4.6.1 Permitted Exceptions .....	199
4.6.1.1 Permitted Exceptions: Article 5(2)(b) “Private Copying” .....	201
4.6.1.2 Permitted Exceptions: Article 5(2)(c) “Archiving” .....	202
4.6.1.3 Permitted Exceptions: Article 5(3)(a) “Teaching” and Article 5(3)(n) “Research and Private Study” .....	203
4.6.1.4 Permitted Exceptions: changes in law impacting current InfoSoc Exceptions .....	205
4.6.2 Suggestions from the Wittem ECC for “permitted exceptions” reform: to use or not to use?.....	206
4.7 CONCLUSION .....	208
<b>CHAPTER FIVE .....</b>	<b>211</b>



<b>Analysis of “selected issues” in the digital single market not included in the Wittem Draft European Copyright Code</b> .....	211
5. INTRODUCTION .....	212
5.1 Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (“Collective Management Rights Directive”).....	214
5.1.1 Collective Rights Management Directive: lack of transparency when giving ‘objectively justified reasons’ to refuse CMO management .....	217
5.1.2 Why was the Collective Rights Management Directive limited to online music works? .....	223
5.1.3 Suggested reform to harmonise mandatory publication of “objectively justified reasons” in the Collective Management Rights Directive.....	226
5.2 Directive (EU)2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (“Digital Single Market Directive”).....	227
5.2.1 Mandatory Exceptions for Research, Cultural Heritage and Education: a critical analysis .....	229
5.2.1.1 Education Exception in the Digital Single Market Directive.....	229
5.2.1.2 Other Exceptions in the Digital Single Market Directive.....	234
5.2.2 Suggested reform to incorporate the mandatory “education exception” into performers’ rights in the Rental and Lending Rights Directive to align with the DSMD .....	236
5.2.3 Article 15: press publication neighbouring right .....	236
5.2.4 Article 17: content sharing platforms .....	238
5.2.4.1 Content-monitoring obligations .....	239
5.2.4.2 Chilling Effect .....	242
5.2.4.3 Risk of inadvertent discrimination contrary to TFEU, Article 167 .....	244
5.2.4.4 Lobbying Power .....	245
5.2.4.5 Concluding thoughts on DSMD, Article 17 measures to counteract UGC copyright infringement .....	246
5.2.5 Suggested reform to assist content-provider compliance with Article 17 in the “Digital Single Market Directive” (EU) 2019/790 .....	247
5.3 Community Exhaustion: analogue v digital .....	248
5.3.1 E-copies and digital software downloads .....	248
5.4 Audiovisual works: licensing complications within the digital single market .....	252
5.4.1 Commission response to licensing online AVWKS: Impact Assessment on the Modernisation of EU Copyright Rules (2016) .....	253
5.4.2 Making the impossible...possible .....	255
5.4.2.1 Non-voluntary licensing .....	255
5.4.2.2 Agreements between Collective Management Organisations and Organisations of Producers .....	257
5.4.2.3 Concluding thoughts on audiovisual work harmonisation.....	259
5.4.3 Suggested reform to facilitate creation of harmonised legal rules for audiovisual works in the EU .....	259
5.5 CONCLUSION .....	260
<b>CHAPTER SIX</b> .....	263
<b>A critical analysis of the EU-UK Trade Deal: should the proposed unitary EUCR annex to the EU-UK TCA?</b> .....	263

6. INTRODUCTION .....	264
6.1 What trading options were available post-Brexit?.....	265
6.1.1 Trade Deal Options for the EU-UK.....	265
6.2 Critical analysis of the Negotiated Agreement: the Trade and Cooperation Agreement.....	268
6.2.1 A comparative analysis of the EU-UK TCA, Articles 219-235 compared to current EU Directives and Regulations: could the proposed EUCR annex to the TCA? .....	269
6.3 Should the proposed EUCR annex to the EU-UK TCA? .....	280
6.4 Suggested reform for utilising the EUCR within the ambit of the EU-UK Trade and Cooperation Agreement 2021 .....	286
6.5 CONCLUSION .....	286
<b>CHAPTER SEVEN</b> .....	288
<b>Recommendations for the proposed unitary EU Copyright Regulation</b> .....	288
7. Recommendations for the creation of a unitary EU Copyright Regulation.....	289
7.1 Why the Commission should act to harmonise the selected areas of copyright law across the European Union to consolidate into a unitary Regulation .....	290
7.2 Recommendation for creating a unitary EU Copyright Regulation.....	291
7.2.1 Directives and regulations for consolidation into the proposed EUCR without amendment .....	291
7.2.2 Directives for consolidation into the proposed EUCR with amendments .....	293
7.2.3 New legislation to be drafted and incorporated into the proposed EUCR .....	293
7.2.4 Copyright legal issues not selected for inclusion in the first draft of the proposed EUCR .....	294
7.3 Recommendations for harmonising “Originality” and “Notion of Works” .....	294
7.3.1 Originality .....	294
7.3.2 Notion of Works .....	294
7.3.3 Recommendation 1: Originality and Notions of a Work .....	295
7.4 Recommendations for harmonising Authorship .....	296
7.4.1 Recommendation 2: Authorship.....	297
7.5 Recommendation for harmonising “Fixation” .....	298
7.5.1 Recommendation 3: Fixation .....	299
7.6 Recommendation for harmonising Moral Rights .....	299
7.6.1 No Authorial Right to Waiver with Fair Remuneration .....	299
7.6.2 Recommendation 4: Moral Rights: authorial right to waiver or receive fair remuneration .....	301
7.7 Recommendation for harmonising “permitted exceptions” in the Information Society Directive 2001 .....	302
7.7.1 Recommendation 5: New Mandatory Permitted Exceptions in Directive 2001/29, Art. 5(1).....	302
7.7.2 Recommendation 6: New Mandatory Permitted Exception in Directive 2006/115, Art. 10 .....	303
7.8 Recommendation for facilitating UGC platform compliance with the Digital Single Market Directive 2019 for online music and audiovisual works.....	304
7.8.1. Provision in the EU Copyright Regulation to mandate an EU Central Processing Hub for Digital Rights Management .....	304
7.8.1.1 Logistics .....	305
7.8.1.2 DRAMH Listings .....	306

7.8.1.3 Messaging the Artist.....	307
7.8.1.4 Outstanding issues with this OPTION .....	307
7.8.1.5 Potential collaborators for the DRAMH Project.....	308
7.8.2 Recommendation 7: Provision in the proposed EUCR to mandate an EU-wide Central Processing Hub to facilitate compliance with DSMD, Article 17 for online music and audiovisual works .....	309
7.9 Recommendation for harmonising an “Education Exception” in (EU) 2019/790 .....	310
7.9.1. Individual issues for AVWKs and Educational Exceptions .....	310
7.9.1.1. Education .....	310
7.9.1.2. European educational, training and research strategies .....	312
7.9.1.3. (EU) 2019/790, Art 17 .....	313
7.9.2 Proposal for harmonisation of an Education Exception .....	314
7.9.2.1 Removal of the voluntary provision in (EU) 2019/790, Art 5(2) .....	314
7.9.3 Recommendation 8: Educational Exceptions and Cross-Border Licensing.....	315
7.10 Recommendation for amending the Collective Management Rights Directive to introduce mandatory publication of “objectively justified reasons” for refusal of representation.....	315
7.10.1 Recommendation 9: include “objectively justified reasons” in the Annual Transparency Report .....	315
7.11 Recommendation for annexation to the EU-UK Trade and Cooperation Agreement 2021.....	316
7.11.1 Recommendations 10 and 11: the proposed EUCR should be annexed to the TCA .....	317
7.12 CONCLUSION.....	319
<b>CHAPTER EIGHT</b> .....	321
<b>CONCLUSION TO THE THESIS</b> .....	321
8. OVERALL CONCLUSION TO THE THESIS .....	322
8.1 What this thesis set out to achieve .....	322
8.2 Chapter summaries and key points exposed by the author’s research .....	323
8.3 The overarching conclusion of the recommendations made for reform .....	328
APPENDIX .....	331
<b>(DRAFT)</b> .....	331
<b>Regulation (EU) 20xx/xxx of the European Parliament and of the Council of [date] on the harmonisation of copyright and related rights in the European Union .....</b>	<b>334</b>
<b>BIBLIOGRAPHY</b> .....	<b>353</b>

# CHAPTER ONE

## INTRODUCTION

## 1. INTRODUCTION

Since 1957, a collection of European countries has lived, worked and traded together in a Regional Economic Trade Organisation collectively known as the European Union (“EU”). During the last 60 years, the EU expanded to 28 member states (“MS” or “EUMS”), but retracted back to 27 when the UK-electorate chose to withdraw in 2016. During that time, EU lawmakers sought to harmonise aspects of intellectual property rights (“IPR”) with varying effects.<sup>1</sup> The focus of this thesis is copyright law. The author’s research seeks to expose deficiencies in the current EU copyright law regime, largely stemming from two factors. The first was that, as will be shown in Chapter 2, EU legal institutions focused predominantly on harmonising IPR laws for industrial property from as far back as 1957, excluding copyright law, at the expense of creators, investors, end-users and other such stakeholders<sup>2</sup>. Secondly, that for harmonisation, a piecemeal, opposed to a unitary, approach prevailed. It was not until the mid-1980s that copyright harmonisation entered the minds of EU legislators.<sup>3</sup> Since then, numerous directives/regulations have been passed endeavouring to harmonise the most pressing issues of copyright.<sup>4</sup> Notwithstanding this, the research will show that the impact of such regime means that EU lawmakers did not address the issue of harmonising copyright protection soon enough<sup>5</sup> and failed to implement a consolidating copyright regulation at a time when it would have been much easier to do so. The European Commission (“the Commission”) itself admitted, in its published 2009 Reflection Document, that the ‘fragmentation of the single market is ... inherent in the current state of Community law where there are still 27 national

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<sup>1</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1; Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1; copyright directives and regulations (see Chapter [1.3] and Chapter 2)

<sup>2</sup> Commission, ‘Memorandum on the creation of an EEC trade mark’ (1976) Supplement 8/76 SEC (76) 2462; Dennis Thompson, ‘The Draft Convention for a European Patent’ (1973) *The International and Comparative Law Quarterly* 22(1) 51

<sup>3</sup> Commission, ‘Completing The Internal Market’ (White Paper) COM (85) 310 def

<sup>4</sup> See Chapter [1.3.3]

<sup>5</sup> It will be shown in Chapter 2 that the then ECJ were endeavouring to harmonise aspects of EU copyright law as early as 1971 – 15 years prior to EU lawmakers

copyright systems, instead of a single European Copyright Law'.<sup>6</sup> Hence, it can be argued that EU harmonisation, aside from the current regime, has been in the minds of lawmakers.

An attempt at partial harmonisation of key EU copyright law principles, consolidated into a European Copyright Code, was published in 2010 by the Wittem Group.<sup>7</sup> It was outlined by the Group that this 'might serve as a model or reference tool for future harmonization or unification of copyright at the European level'.<sup>8</sup> It is not expressly stated in the proposed Code if the intention of the Wittem Group was to create a single unitary right or to create a Code which would harmonise EUMS' national laws. Notwithstanding this, the Preamble states that the Code is

Taking note of the norms of the main international treaties in the field of copyright that have been signed and ratified by the EU and its Member States, in particular the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty, *and of the harmonized standards set by the EC directives in the field of copyright and related rights.*<sup>9</sup>

It has been argued by Professor Bernt Hugenholtz, one of the Code's drafters, that 'its goal [was] to establish unified European legal standards'.<sup>10</sup> However, there is no mention of this intending to be a single, unitary EU right in the Code itself. Moreover, Professor Hugenholtz states, of the Code, that 'European copyright law must operate within the confines of the international commitments of the EU and its Member States'.<sup>11</sup> Crucially, Professor

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<sup>6</sup> Commission, 'Reflection Document of DG INFSO and DG MARKT on Creative Content in a European Digital Single Market: Challenges for the Future,' 22 October 2009, 12 sourced from Eleonora Rosati, 'The Wittem Group and the European Copyright Code' (2010) *JIPLP* 5(12) 862

<sup>7</sup> Wittem Draft European Copyright Code (2010), <[www.jipitec.eu/issues/jipitec-1-2-2010/2622/wittem-group-european-copyright-code.pdf](http://www.jipitec.eu/issues/jipitec-1-2-2010/2622/wittem-group-european-copyright-code.pdf)>. This Code will be critically analysed in Chapter 3 to expose its deficiencies, to outline how it could have been improved but, ultimately, why it may serve as a useful tool for further drafting of an EU Copyright Regulation

<sup>8</sup> *European Copyright Code*, Introduction <https://www.jipitec.eu/issues/jipitec-1-2-2010/2622/wittem-group-european-copyright-code.pdf>

<sup>9</sup> *ibid*, Preamble (author's emphasis)

<sup>10</sup> P. Bernt Hugenholtz, 'The Wittem Group's European Copyright Code' published in Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) 341

<sup>11</sup> *ibid*, 342

Hugenholtz also commented that '[w]hile the Wittem Code is often interpreted as a rallying call for copyright unification in the EU, the Wittem Group has refrained from taking a position on this contentious issue'. On that basis, it could be argued that the Code was intended, at the time of drafting, to harmonise EUMS' national laws, akin to the copyright directives, rather than to create a single unitary copyright across the EU that would replace national laws. As will be shown in subsequent chapters, the 'harmonising of national laws' approach is to be emulated in this author's proposed EU Copyright Regulation, rather than a single EU-wide copyright, largely due to the number of differing rights and rightholders that encompass copyright law.

The draft Code is the only European independent endeavour to create a consolidated harmonised copyright code, to date. However, it was met with lukewarm reception. Academics such as Dr Eleonora Rosati argued that the Group potentially de-valued the project by not taking a positive stance on advocating a unified copyright legal framework, despite this being the Group's *raison d'être*.<sup>12</sup> Moreover, Rosati argued that the Code lacked substance by only covering five main elements of copyright law: authorship, ownership, moral rights, economic rights and limitations.<sup>13</sup> Professor Jane Ginsburg further argued that the 'text provides neither for remedies, nor for voluntary formalities' nor did it 'address neighboring rights.'<sup>14</sup> In response, Professor Hugenholtz, argued that 'it was never the aim of Wittem to draft a comprehensive code'.<sup>15</sup> The principal reason forthcoming was that the sole aim was to 'sketch the contours of a possible future European copyright law by codifying its main provisions in the form of a model law.'<sup>16</sup> Perhaps not unsurprisingly, the Code was not adopted by the EU

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<sup>12</sup> Rosati, 864 (n 6)

<sup>13</sup> *ibid*

<sup>14</sup> Jane C Ginsburg, 'European Copyright Code –Back to First Principles (with some additional detail)' (2011) *J. Copyr. Soc. U.S.A.* 58 265, 268

<sup>15</sup> Hugenholtz n 10, 341

<sup>16</sup> *ibid*

Commission for proposal of a unitary Copyright Regulation. In view of such constraints in the Code, it can be argued at this early stage that further attempts to draft a code, or other such legal instrument, should be more comprehensive covering more than just the main five elements of copyright subsistence.

It could be argued, therefore, that a gap remains in the field of EU copyright law that could be filled by drafting a harmonised single document Copyright Regulation covering most substantive provisions relating to copyright and related rights,<sup>17</sup> rather than just the main substantive elements of copyright. Hence, this thesis explores the possibility of drafting such Regulation and would involve consolidating/amending and recasting the current copyright directives/regulations whilst drafting new harmonising laws in specific unharmonised areas.<sup>18</sup>

Hence, the overarching thesis is twofold in that:-

1. national copyright laws should be harmonised across the EU and codified into a unitary regulation; and
2. the proposed unitary regulation could and should serve as a working model to annex to the current EU-UK TCA.

In terms of “unitary” definition, it is important to outline, at this stage, that this means “unitary” in the context that all EU copyright-specific harmonising legislative measures should reside in a single document. Unlike the EU Trade Mark Regulation and the Community Design Regulation,<sup>19</sup> rather than creating a single EU-wide unitary right that co-exists with MS’ national legislation, the proposed EUCR seeks to harmonise national copyright laws within the EU so that they are enforceable in the CJEU in line with current copyright directives. The

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<sup>17</sup> Related rights is another term for referring to neighbouring rights

<sup>18</sup> See Chapter [1.6]

<sup>19</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1; Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1; copyright directives and regulations (see Chapter [1.3] and Chapter 2



reasoning for this is because the concept of “harmonisation”, opposed to “uniformity”, has been the status quo for EU copyright trading relations since 1988. This thesis will show that, due to the multi-leveilling rights system encompassed within copyright, this has proven to be the correct approach thus far. Moreover, there is no requirement for a registration system for copyright unlike EU-wide registered trade marks and Community designs as is required in the EUTMR<sup>20</sup> and the CDR.<sup>21</sup> In summary, this thesis is not seeking to create a single, unitary copyright to co-exist alongside national laws akin to the EUTMR and the CDR. Instead, the thesis advocates a single document regulation that harmonises national copyright laws in a similar, but much improved manner, to the current copyright directives and regulations.

As contextual background reading for this proposition, this introductory chapter provides a brief overview of copyright, its justification, EEC formation, International, EU and UK legal systems underpinning copyright protection, an outline of this proposal’s reasoning in the context of trade including key areas of unharmonised copyright law for consideration, the research questions to be answered and the thesis structure.

## 1.1 An overview of copyright law essentials

Copyright protection was codified over 300 years ago in the world’s first Copyright Act: the English *Statute of Anne*.<sup>22</sup> Born from the Enlightenment period, its statutory conception created

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<sup>20</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Recital 9)

<sup>21</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1; copyright directives and regulations (see Chapter [1.3] and Chapter 2 (Recital 18))

<sup>22</sup> Statute of Anne 1710 An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned

new publishers' rights granting exclusive rights to publish new books for 14 years,<sup>23</sup> renewable for a further 14 years.<sup>24</sup> Fast forward 300+ years, and UK copyright law now protects numerous types of works, and rights in those works. In contrast, Author's Rights ("AR"), extant from the Romantic intellectual movement, was born from 18<sup>th</sup> Century France, and spread across Europe during the 19<sup>th</sup> Century.<sup>25</sup> Moreover, since the fall of the Soviet Union, 'former socialist countries in Central and Eastern Europe and the ex-Soviet Union [also] follow the [continental] author's rights system today'.<sup>26</sup> The concept of AR is rooted in the philosophy of natural justice. AR protects an intellectual creation of the human mind and the human spirit in the work. Unlike copyright, in pure authorship terms,<sup>27</sup> it is the author that lies at the very centre of this doctrine, not utilitarian, commercial or economic interests. The focus is on protecting the 'author's own intellectual creation'.<sup>28</sup> Notwithstanding this, it can be argued that continued harmonisation through EU directives has modernised AR by bringing economic considerations into its sphere. Numerous mentions in directives of protecting the 'investment of considerable human, technical and financial resources [in the work]' support this advancement.<sup>29</sup>

Internationally, copyright law protects intellectual creations in the field of art, literature and science<sup>30</sup> from unauthorised copying by granting the author and/or owners of such works

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<sup>23</sup> Statute of Anne 1710, Part I < <https://case.edu/affil/sce/authorship/statueofanne.pdf>>. See: *Mitchel v Reynolds* (1711) 1 Peere Williams 181; 24 ER 347 'A grant of the sole use of a new ihvented[sic] art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 Jac. 1, cap. 3, sect. 6, 2 to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people [As to copyright, see St. 8 Anne, c. 19]' (Parker CJ) 348. Previously, publishers had a licence to copy works, but did not own the copyright in the work. Similarly, authors had no such rights or recognition in their work.

<sup>24</sup> If the author was still alive. Statute of Anne 1710, §11. See also: H Tomas Gomez-Arostegui, 'The Untold Story of the First Copyright Suit under the Statute of Anne in 1710' (2010) 25 Berkeley Tech LJ 1247

<sup>25</sup> Justine Pila and Paul Torremans, *European Intellectual Property Law* (OUP 2016) 14

<sup>26</sup> Silke Von Lewinski, *International Copyright Law and Policy* (OUP Oxford, 2008) [3.03] 34

<sup>27</sup> Lee Marshall, *Bootlegging: Romanticism and Copyright in the Music Industry* (SAGE Publications Inc. (US) 2005) 2

<sup>28</sup> The European standard for copyright subsistence in a work of the mind

<sup>29</sup> Maria Canellopoulou-Bottis, 'Utilitarianism v. Deontology: A Philosophy for Copyright' (December 10, 2018). Available at SSRN: <https://ssrn.com/abstract=3298655> or <http://dx.doi.org/10.2139/ssrn.3298655>

<sup>30</sup> The Berne Convention for the Protection of Literary and Artistic Works 1886 (hereafter "Berne" or "Berne Convention"), Art 2

exclusive rights to copy, publish, lend, perform/show, communicate and adapt their work.<sup>31</sup> These rights are economic<sup>32</sup> as they permit the author to exploit their creation exclusively<sup>33</sup> for maximum financial gain. However, copyright law also encompasses moral rights, developed in 19<sup>th</sup> Century France, that protect the author's right to control what happens to their work, to varying extents, after publication and even *post-mortem*.<sup>34</sup> Notwithstanding this, copyright law generally permits limitations to copyright protection,<sup>35</sup> as well as certain non-commercial acts for specific uses of copyright-protected material that would otherwise constitute a breach of copyright. These acts are generally referred to as permitted acts, exclusions or exceptions to copyright infringement and include making temporary copies of the protected work, research/private study, copying text and data for analysis, criticism, review, quotation and news reporting, caricature, parody or pastiche, incidental inclusion of the copyright-protected work, enabling copies/use of the copyright work for accessibility purposes for disabled persons and also using, performing, showing, recording or lending the copyright-protected work for educational use.<sup>36</sup>

To prevent unauthorised use of the work, copyright law provides remedies for breaches of those rights and mechanisms to waive, assign and licence some of those rights.<sup>37</sup> This is because copyright and its related rights are classed as a form of property, bestowing proprietary rights on the author/owner/performer of the work. Proprietary rights are rights *in rem* and are asserted against the world at large, not just against those with whom one has contracted.<sup>38</sup> As this is a

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<sup>31</sup> Berne Convention, Arts 8, 9, 11, 11*bis*, 11*ter*, 12, 14, 14*bis*, 14*ter* and 15

<sup>32</sup> *ibid*, Art 6*bis*

<sup>33</sup> *ibid*, (n 26)

<sup>34</sup> *ibid*, Art 6*bis*

<sup>35</sup> *ibid*, Art 13

<sup>36</sup> *ibid*, Arts 9, 10 and 10*bis*. NB not all of the permitted acts listed are included in international law. Some exceptions have been introduced by EU law and transposed into Member States' national laws.

<sup>37</sup> As will be shown, these are some of the elements that were omitted from the Wittem European Copyright Code ("ECC") that ought to be included in a new draft regulation due to the impact of these rights and limitations on stakeholders, rightholders and end-users

<sup>38</sup> Michael Bridge, *Personal Property Law* (3<sup>rd</sup> edn OUP 2002) 12

‘form of entitlement...enforceable by legal action’,<sup>39</sup> such rights are also classed as *choses in action* (intangible rights).<sup>40</sup> This affords the proprietor a right to sue for copyright infringement. It is irrelevant that the property is intangible, for example, expressions of ideas and text presentation in books, music arrangements, and picture colours/compositions. Nor does it matter if the proprietor still possesses the physical property. It is distinguished from chattels wherein property rights cease to exist when the item has perished or has been sold.<sup>41</sup> All that matters is that the content of the intellectual creation is of the right kind for copyright to exist.

The main harmonious aspect amongst all IPRs is that they are territorial in nature. This means that ‘global intellectual property rights are a bundle of nationally enforceable rights’.<sup>42</sup> Notwithstanding this, IPRs are protected as follows: internationally through a series of conventions, treaties and agreements such as the Berne Convention, TRIPS<sup>43</sup> and so forth; regionally through legal instruments such as EU regulations and directives; and also nationally via domestic law. International law has only minimum standards of protection, albeit covering key elements of copyright law, as will be seen in the Berne Convention.<sup>44</sup> In contrast, the EU has harmonised various aspects of copyright law to higher standards, in some instances, than *Berne*,<sup>45</sup> via directives that EUMS have transposed into domestic law. These sit alongside their unharmonised national copyright laws. The UK was once an EUMS and was in a transitional period whilst leaving the EU during the writing/submission of this thesis. Like all EUMS though, certain legal requirements for copyright were transposed from EU directives into UK national copyright law.

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<sup>39</sup> *ibid*, 144

<sup>40</sup> *Torkington v Magee* [1902] 2 KB 427, 430 (Channell J)

<sup>41</sup> Chattels are personal property, not proprietary Mark Davys, *Land Law* (11<sup>th</sup> edn Red Globe Press 2019) 30

<sup>42</sup> C-192/04 *Lagardère Active Broadcast v SPRE* [2005] ECR I-7199 [46]

<sup>43</sup> Agreement on Trade Related Aspects of Intellectual Property

<sup>44</sup> Berne Convention, Art 19

<sup>45</sup> For example, copyright duration of works in Berne is life of the author plus 50 years; in the EU it is the life of the author plus a further 70 years, harmonised by the Term Directive 2006/116/EC (though there are exceptions depending on the type of work)

A particular example of this is the essential component of both common law copyright and civil law AR: that works must be original for copyright to subsist. For the UK, this has meant, traditionally, that the work ‘originates from the author’<sup>46</sup> and encompasses the requisite elements of sufficient ‘skill, labour and judgment’.<sup>47</sup> No level of creativity exists. In the EU, “original” means that it amounts to the ‘author’s own intellectual creation’ encompassing free and creative choices which may also reflect the author’s personality.<sup>48</sup> As will be shown, these differences have narrowed, largely due to the UK’s transposition of the EU standard to national law through directives and judicial interpretation.<sup>49</sup> However, it will also be shown that where such harmonisation has occurred, it has also uncovered further disparity between national copyright laws. This research will consider if the impact of such disparity is sufficient to debar harmonisation in a unitary EU Copyright Regulation (“EUCR”).

## 1.2 Copyright law rationale

### 1.2.1 Common law Locke’s Labour Theory

As will be seen, copyright provides extensive legal protection, not just in duration, but in the number of rights now embedded within the copyright-protected work. It has been suggested that justification for such protection currently stems from ‘two philosophical approaches to justifying property and one more pragmatic justification...to...support intellectual

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<sup>46</sup> *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601 (Peterson J)

<sup>47</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) 282 (Lord Evershed)

<sup>48</sup> *C-5/08 Infopaq International v Danske Dagblades Forening* [2009] ECR I-6569

<sup>49</sup> Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 (“Software Directive (1991)”); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 (“Database Directive”); 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 [2006] OJ L372/12 (“Term Directive (2006)”); *Newspaper Licensing Agency Ltd and Others v Meltwater Holding Bv and Others* [2010] EWHC 3099 (Ch)

property...’<sup>50</sup> The first early justification is John Locke’s Labour Theory.<sup>51</sup> Locke argued that copyright was the reward for an individual appropriating something from the original commons of the public. The simplified reason lies with the concepts of “survive and thrive” and “self-preservation”. Individuals must use and appropriate parts of the public domain/commons without universal agreement from everyone because such consent is not possible. Humans would never have survived if they could not use Earth’s raw materials. To move from “appropriation” to “proprietary rights”, Locke argued that individuals needed certainty to survive and thrive. What has been appropriated and created must still be there to use again, exclusively, by the appropriator. As Locke’s core philosophy is rooted in proprietorship over oneself, his theory champions property rights in the individual’s labour: ‘the labour of his body, and the *work* of his hands, we may say are properly his’.<sup>52</sup> The individual uses effort to create something new (from existing materials) which is enjoyed, or improved, by others. Once the proprietary right is established in the creation, its owner can do with it what they will. Without exclusive tenure of proprietorship, there is little inducement to create.<sup>53</sup> The caveat was that humans should only take from the commons what was necessary to ensure sufficient material was left for all.

Locke’s Labour Theory is a common law copyright justification and, arguably, still has roots in modern-day copyright justification, albeit, largely in relation to economic utilitarianism (discussed below). Given how widespread global trade has become since the Industrial Revolution, how would creators/society, “survive and thrive” without the ability to use and trade global resources in such a way which protects their works from misappropriation yet

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<sup>50</sup> Christopher May and Susan Sell, *Intellectual Property Rights A Critical History* (Lynne Rienner Publishers Inc. London 2006) 20

<sup>51</sup> Reminiscent from the Ancient Greeks (Carla Hesse, ‘The rise of intellectual property 700 BC-AD: An idea in the balance’ (2002) *Daedalus* 131(2) 26)

<sup>52</sup> Eric Mack and John Meadowcroft, *John Locke* (Bloomsbury Academic & Professional 2009) 56-58

<sup>53</sup> *ibid* 56-62

enables the masses to use them? This is reflected in most legal instruments which convey copyright protection, remedies and enforcement mechanisms to a wide range of subject-matter. Conversely, without limitations to wholesale copyright protection preventing absolute monopoly, there could be a deficit of works as there would be nothing left, legally, for anyone else to use. In modern-day copyright protection, controls exist to prevent such deficit by limiting copyright subsistence, for example, the types of works that can be protected and prohibiting copyright of ideas,<sup>54</sup> limiting infringements by permitting exceptions to copyright infringement for certain uses of the work (generally non-commercial<sup>55</sup>) and limiting copyright infringement actionability, in common law countries generally, to only when the infringement covers a substantial amount of the author's original work.<sup>56</sup>

### 1.2.2 Civil Law Author's Rights philosophies

The second justification relates to the continental civil law AR concept of protecting the soul and spirit of the author inherent in the work. Edward Young (1759) expanded Locke's reasoning, which can be seen in modern-day AR laws, by arguing that in addition to physical/mental labour, the contents of a novel bore the stamp of the author's original personality.<sup>57</sup> Gotthold Lessing (1772)<sup>58</sup> advanced the property rights theory again, albeit, based on 'the author's unique personality' in the work. Fichte (1791)<sup>59</sup> distinguished between 'material' and 'immaterial' property and posited that real property 'lay not in the ideas per se,

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<sup>54</sup> See for example UK Copyright, Designs and Patents Act 1988, § 1

<sup>55</sup> Directive 2001/29/EC 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] OJ L167/10

<sup>56</sup> Copyright, Designs and Patents Act 1988, §16(3); *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC* [2000] 1 WLR 2416 (HL); *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10

<sup>57</sup> Hesse (n 51). This element can be seen in recent CJEU case law decisions such as *C-145/10 Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533

<sup>58</sup> Posited as the 'greatest writer of the German Enlightenment' (Hesse, n 51)

<sup>59</sup> In his essay entitled, *Proof of the Illegality of Reprinting: A Rationale and a Parable*, sourced from Carla Hesse (n 52)

but rather in the unique “form” in which an author chose to express these ideas’.<sup>60</sup> The expression of the idea in a particular form became the property right vested in the person who expressed it.

As with Locke’s theory, there are still elements of these philosophies prevalent in modern-day civil/common law copyright protection which should be retained within EU copyright revisions. It is settled law that copyright protects the expressions of ideas, not actual ideas.<sup>61</sup> As will be shown, the essential element for copyright protection (originality) must bear the author’s stamp where EU copyright law has been harmonised.<sup>62</sup> Moreover, moral rights, which protect the very essence of the author’s spirit and which were borne with the advent of AR in France, are now protected to some extent in every Berne Convention contracting party (“CP”).<sup>63</sup> As with Locke’s Theory, though, traditional AR philosophies now encompass elements of economic utilitarianism.

### 1.2.3 Economic Utilitarianism

Putatively, the most relevant justification lies in the consequentialist utilitarian economic reward theory. This lies in tandem with the modernist view of copyright justification: the need for humans to allocate resources between each other for a functioning society.<sup>64</sup> As trade relations expanded beyond geographic borders, proprietary rights became indispensable to facilitate global trade expansion.<sup>65</sup> Economic development has coexisted with the concept of intangible property and proprietary rights in creations. It has been argued that ‘this efficiency

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<sup>60</sup> *ibid*

<sup>61</sup> Berne Convention, Art 2(1); *Baigent & Anor v The Random House Group Ltd* [2007] EWCA Civ 247, 255 [5]; [2008] EMLR 7

<sup>62</sup> C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533

<sup>63</sup> Berne Convention, Art 6*bis*

<sup>64</sup> May and Sell, 20 (n 50)

<sup>65</sup> Adam Smith and George J Stigler, *Selections from the Wealth of Nations* (John Wiley and Sons Inc 2014)



requirement...drives the historical development of property rights and now underpins the commodification of knowledge'.<sup>66</sup>

To create a market for the exchange of important knowledge, there must be a reward to induce someone to act on their spark of creativity. The economic utilitarian theory is that humans will not create works if they cannot capitalise on them. Without a financial reward, there is no inducement to create.<sup>67</sup> Aside from the manual labour expended by the author in creating the work, there is an initial cost consequence to consider.<sup>68</sup> The creator's time, initial monetary investment of raw materials, potential business costs (employees, premises, machinery, loan repayments/interest) all engender a negative financial impact on the creator from the outset, prior to any guarantees of sale/profit. Uncertainty of profitability risks a disincentive to create.<sup>69</sup> Furthermore, there is an acute threat that such creators would simply distribute their works privately to maximise profits and avoid the risk of copying.<sup>70</sup> From the EU's perspective and its creative industries, the societal impact of this is negative because of the risk of fewer works in circulation. This impact becomes more prevalent as the EU continues to open its trading links with Third Countries through FTAs.

Paradoxically, the risk of under-protecting copyright works is that, initially, there could be an influx of creative works to the market as it would be easier, potentially, to copy expressions created by others.<sup>71</sup> Arguably, nowhere could be more prevalent for this than the EU with 27 MS living and working together with unbridled access to each other's creations flowing

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<sup>66</sup> May and Sell, 21 (n 50)

<sup>67</sup> E Hettinger, 'Justifying Intellectual Property' (1989) *Philos Public Aff* 18 31, 48

<sup>68</sup> William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) *J Leg Stud* 18(2) 325, 327

<sup>69</sup> *ibid*, 329

<sup>70</sup> *ibid*, 332

<sup>71</sup> *ibid*

through the borderless single market. Combined with the well-established use of the internet, this would be easier than ever to do in a free-flowing trade union. However, the enthusiasm and incentive to produce new creations, without financial capitalisation, could diminish over time. There is little point in creating something that can just be copied *ad infinitum* to the extent of depletion of the commons. The impact of this is that the creative industries of those 27 MS could effectively retract because the benefits to new individual creators would be placed ahead of societal good. In theory, an absolutely free public domain of information would be placed ahead of its very creators that made it possible. This risks the “tragedy of the commons” because

[e]veryone [then] has access to everything; the incentive is for all the commoners to over work the land. No one individual has any incentive to invest in improving the land’s quality because they know that the benefit of any investment would be appropriated by the other commoners.<sup>72</sup>

This “tragedy” could disincentivise future creators.

Hence, economic utilitarianism is rooted in reward and incentive for the public good in that creators will usually only generate en masse where there is an economic reward. The greater the reward, the more incentive to create. In tandem, the greater the number of creative works that can be utilised by the masses to better educate themselves, the more benefits there are to society. Educated people are more likely to be gainfully employed;<sup>73</sup> the more people employed in a country, the higher that country’s GDP is likely to be.<sup>74</sup> In Copinger and Skone James practitioner text, academics argue that

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<sup>72</sup> Ilanah Fhima, ‘The Public Domain’ [2019] IPQ 1 1, 2

<sup>73</sup> OECD (2012), ‘How does education affect employment rates?’, Education at a Glance (2012: Highlights, OECD Publishing, Paris) available online at [https://www.oecd-ilibrary.org/docserver/eag\\_highlights-2012-11-en.pdf?expires=1649831999&id=id&accname=guest&checksum=8C2D755233209EF8593C67D881F7032F](https://www.oecd-ilibrary.org/docserver/eag_highlights-2012-11-en.pdf?expires=1649831999&id=id&accname=guest&checksum=8C2D755233209EF8593C67D881F7032F)

<sup>74</sup> Typically referred to as “Okun’s Law” which posits that ‘growth slowdowns coincide with rising unemployment’ Edward S Knotek II, ‘How useful is Okun’s Law?’ (2007) Economic Review 92(4) 73

in the UK, the justifications for copyright law have increasingly centred on the economic performance of important sectors—the creative industries have been especially singled out under this justificatory rubric as [the] UK is a major exporter of “cultural products”.<sup>75</sup>

It was argued by Landes and Posner in 2003, however, that most copyrights have very little economic value after 28 years<sup>76</sup> and that, as an example, the (US) Sonny Bono Copyright Term Extension Act 1988, extending copyright protection in sound recordings from 50 to 70 years, would have little economic effect overall.<sup>77</sup> However, it could be argued now that this possibly did not consider the expansion of the digital era facilitating access to many more works than was possibly envisaged at that time. In 2012, Hachette UK acquired the copyrights to Enid Blyton’s works, which expire in 2038, having previously been sold in 1996 for £13 million.<sup>78</sup> Similarly, Springsteen is one of many artists who “cashed out” by selling his entire back catalogue of music works for \$500 million in 2021 to Sony, which included the master recordings and publishing rights.<sup>79</sup> Moreover, The Monti Report highlighted in 2010 that ‘stimulating the fast development of the digital single market by 2020...corresponds to a gain of almost € 500 billion.’<sup>80</sup> Hence, the economic utilitarianism argument is now prevalent in most copyright/AR legal systems.

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<sup>75</sup> Nicholas Caddick QC et al, *Copinger & Skone James on Copyright* (18<sup>th</sup> edn, Sweet & Maxwell 2019) [2-43]

<sup>76</sup> William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (The Belknap Press of Harvard University Press 2003) 238

<sup>77</sup> Richard A Posner, ‘Intellectual Property: The Law and Economics Approach’ (2005) JEP 19(2) 57, 60

<sup>78</sup> David I Bainbridge, *Intellectual Property* (6<sup>th</sup> edn Pearson Longman 2007) 21

<sup>79</sup> Mark Savage, ‘Bruce Springsteen sells his entire music catalogue for \$500m’ BBC NEWS (London 16 December 2021) < [www.bbc.co.uk/news/entertainment-arts-59680797](http://www.bbc.co.uk/news/entertainment-arts-59680797) >

<sup>80</sup> 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’ (2010) Ref. Ares(2016)841541, 44

## 1.3 The Early Vision of the EU and its legislative evolution

*A day will come when you — France...Italy, England, Germany...— all you nations of the continent will merge, without losing your distinct qualities and your glorious individuality, in a close and higher unity to form a European brotherhood ...*<sup>81</sup>

Sir Victor Hugo's address to the French Parliament (1849) may have seemed utopian against the backdrop of the European wars<sup>82</sup> and forthcoming WW1-2. In the dawning of the 21<sup>st</sup> Century, however, Hugo's United Europe<sup>83</sup> had all but arrived...but gone again.

### 1.3.1 Pre-European Economic Community

The aftermath of the death and destruction from WW2 was a wake-up call to nation states of the shocking, unconscionable effects of xenophobic, insular militarism and political agendas.<sup>84</sup>

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<sup>81</sup> The words of Victor Hugo in 1849 extracted from: Viviane Reding, 'Why we need a United States of Europe now', European Commission - SPEECH/12/796 08/11/2012 <[http://europa.eu/rapid/press-release\\_SPEECH-12-796\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-796_en.htm)>. Hugo was a French poet, novelist, and dramatist of the Romantic movement and a huge proponent of civil law Author's Rights. He was the honorary President and founder of the *Association Littéraire et Artistique Internationale* (ALAI) which eventually led to the world's first international copyright treaty: the Berne Convention for the Protection of Literary and Artistic Works 1886

<sup>82</sup> For a potted history of conflicts in Europe during the 19<sup>th</sup> Century see Neil Thomas, *Napoleonic Wargaming* (The History Press 2009); Neil Thomas, *Wargaming Nineteenth Century Europe 1815 – 1878* (Pen and Sword Military 2012)

<sup>83</sup> Also known as "One Europe" as promulgated by Friedrich Nietzsche. See D Heater, *The Idea of European Unity* (LUP 1992)

<sup>84</sup> History threatened to repeat itself for a third time in the 20<sup>th</sup> Century due to the 1990s Balkan Wars (division of the former 6-territorial Yugoslavia), after the collapse of communism in the former USSR in 1989. Although political unrest remains to this day in the Balkans (e.g. Serbia's refusal to accept Kosovo's declaration as an independent state) the conflicts officially ended with the signing of a UN-NATO Peace Agreement 1999 (Joyce P. Kaufman, 'NATO and the Former Yugoslavia: Crisis, Conflict and the Atlantic Alliance' (1999) *J Confl Stud* 19(2)). This was largely due to NATO intervention through its continual air strikes; a move which was highly criticised by former Belgian Prime Minister/current leader of the liberal faction on the European Parliament, Guy Verhofstadt. This was mainly because of his disapproval of US involvement in European affairs (through its NATO membership). Intervention was deemed necessary, though, by the President Bush Administration. See: Guy Verhofstadt, *Europe's Last Chance* (Basic Books US 2017) 50-1. There are murmurs of Kosovo's endeavours to reach a further peace agreement with Serbia, although the potential for 'border corrections' remains somewhat taboo. This is largely due to a fear of reprisals of genocidal violence which the world witnessed during the 1990s. It is suggested their willingness to seek peace results from their desire to join the EU (see: EU Observer <<https://euobserver.com/enlargement/142709>>). Currently, this is an impossibility due to their long-standing territorial dispute. See: Andrew Gray and Ryan Heath, 'Serbia, Kosovo presidents broach border changes for historical deal' (POLITICO, 25 August 2018) <[www.politico.eu/article/aleksandar-vucic-hashim-thaci-serbia-kosovo-balkans-eu-enlargement-alpbach-forum/](http://www.politico.eu/article/aleksandar-vucic-hashim-thaci-serbia-kosovo-balkans-eu-enlargement-alpbach-forum/)>. Due to the Russia-Ukraine War, which began on the 24 February 2022, both Ukraine and Moldova have both been awarded EU Candidate status to make preparations to join the EU.

Left with the task of re-building a broken Europe, this trepidation escalated with the ensuing threat of post-war Soviet expansion into Europe.<sup>85</sup> These two major political threats were the driving force for European nations to create a more peaceful, stable and integrated environment for its people,<sup>86</sup> rather than regress to pre-war ideologies.<sup>87</sup> In response to WW2 atrocities, four notable international/regional organisations were founded: the United Nations (1945), the North Atlantic Treaty Organization (1949), the Council of Europe (1950) and the European Economic Community (1957).<sup>88</sup>

The UN promulgated global co-operation on humanitarian issues (war avoidance/peace-keeping), upholding human rights and international law through its International Court of Justice (“ICJ”)<sup>89</sup> tackling world poverty, and environmental considerations such as climate change and sustainability. It passed the world’s first Universal Declaration of Human Rights 1948 incorporating property rights.<sup>90</sup> For international IPRs, WIPO is a self-funded UN agency created ‘to lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all’.<sup>91</sup> Similarly, the WTO cooperates with the UN<sup>92</sup> and ‘is a forum for governments to negotiate trade agreements...[and]

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<sup>85</sup> The Cold War marked a period between the end of the Second World War and the collapse of the Berlin Wall in 1989. It largely centred on USSR-US relations but also involved the UK (as US allies). It has been described as being ‘grounded in the Soviet Union's will to empire and its use of force’ (Jeane J Kirkpatrick, ‘Beyond the Cold War’ (1989) 69 Foreign Aff 1, 4). This must be distinguished from the current Cold War, promulgated by the British Press, suggesting that Russia has been involved with a cold war against the UK, again, since 2007.

<sup>86</sup> Nigel Foster, *Foster on EU Law* (2<sup>nd</sup> edn OUP 2009) 6-7

<sup>87</sup> Such as the Bismarckian alliances. Otto von Bismarck was the principle conservative Prussian Statesperson for German and European affairs from the 1860s until 1890, when the Province of Prussia was at its most powerful. He was predominantly anti-socialist and undertook aggressive political and diplomatic strategies. See particularly: the ‘Bismarckian balance’. For further insight into this ideology, see: Thomas Lindemann and Erik Ringmar, *International Politics of Recognition* (Routledge 2015)

<sup>88</sup> The UN, NATO, ECHR and EEC respectively

<sup>89</sup> Established June 1945 by the UN under the Statute of the International Court of Justice

<sup>90</sup> UDHR, Art 17

<sup>91</sup> World Intellectual Property Organisation <[www.wipo.int/about-wipo/en/](http://www.wipo.int/about-wipo/en/)>

<sup>92</sup> Describes ‘organizations whose cooperation agreement with the United Nations has many points in common with that of Specialized Agencies, but does not refer to Article 57 and 63 of the United Nations Charter, relevant to Specialized Agencies’ <[www.unsystem.org/members/related-organizations](http://www.unsystem.org/members/related-organizations)>

settle trade disputes.<sup>93</sup> It administers some of the most broad-spectrum of international IP treaties, such as TRIPS,<sup>94</sup> though WIPO administers more copyright-specific international conventions such as the WIPO Copyright Treaty 1996 (“WCT”) and the WIPO Performances and Phonograms Treaty 1996 (WPPT”). NATO influences defence and security-related issues to prevent conflict.<sup>95</sup> The Council of Europe founded the European Convention on Human Rights,<sup>96</sup> to which all EUMS are signatories, and which specifically encompasses property protection.<sup>97</sup>

Regarding EEC formation, past tumultuous events of pre-war Europe suggested that, in the post-war New World Order, countries that were open and trading with each other, were less likely to fight each other. ‘Barely a decade after the most catastrophic war in European history,’<sup>98</sup> New Europe rose from the ashes. Ideologically, the way to this was through the rule of law<sup>99</sup> in a Union of European states trading, working and living together.<sup>100</sup> For IP law, New Europe set in motion a chain of legal reforms facilitating incremental integration and harmonisation with each new treaty.

### 1.3.2 The EEC Treaties: moving towards a harmonised copyright system

The founding EEC Treaty of Rome 1957 (“Rome”) created a common market of all goods, services, people and capital, initially, between six nations.<sup>101</sup> It formed a Court of Justice<sup>102</sup> to

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<sup>93</sup> World Trade Organisation <[www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm)>

<sup>94</sup> Agreement on Trade-Related Aspects of Intellectual Property

<sup>95</sup> NATO is an organisation that implements the defence agreement (the North Atlantic Treaty 1949) signed on the 4<sup>th</sup> April 1949) between North America and European countries.

<sup>96</sup> ECHR

<sup>97</sup> European Convention on Human Rights 1950, Protocol 1, Art 1

<sup>98</sup> Guy Verhofstadt, *Europe’s Last Chance* (Basic Books US 2017) 6

<sup>99</sup> Ian Ward, *A Critical Introduction to European Law* (3<sup>rd</sup> edn, CUP 2009) 11

<sup>100</sup> For an outline of why the EU ought to have been a federation, rather than a union of territorial nation states, see: Verhofstadt (n 98). Although somewhat biased from the perspective of a passionate Europhile, it does offer a very interesting overview of current and historical events leading up to Brexit.

<sup>101</sup> Germany, France, Italy, Belgium, Luxemburg and the Netherlands

<sup>102</sup> Originally known as the ECJ; now called the CJEU (Court of Justice of the European Union)

interpret law underpinning legal disputes within EEC competence,<sup>103</sup> binding on MS. ICJ opinions are not binding.<sup>104</sup> This is a major contributory factor for positing a unitary EU Copyright Regulation (“EUCR”) as a decision from the CJEU must be applied by all EUMS. Rightholders who must rely on international treaties<sup>105</sup> to enforce their rights in the EU, in areas of non-harmonised copyright law, cannot do so through the CJEU. Apart from TRIPS,<sup>106</sup> the parties must take the dispute to the non-binding ICJ. Alternatively, the rightholder must place itself at the mercy of the laws of the country where the infringement took place.<sup>107</sup> This is still prevalent over 60 years later and immediately creates disparity amongst EUMS where non-harmonised copyright principles are in dispute. No mention was made of IP law directly in the *Rome Treaty* and it took another 40 years to include IP protection, explicitly, when the Treaty of Amsterdam was passed in 1997 (“Amsterdam”).

Forty years after *Rome* and nine years after a Commission Green Paper raising ‘immediate’ copyright concerns,<sup>108</sup> the first specific reference to harmonisation/approximation of IP law was included in *Amsterdam*:

[5] The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to *international negotiations and agreements on services and intellectual property* insofar as they are not covered by these paragraphs.<sup>109</sup>

Under the current Treaty of Lisbon (“Lisbon”), Art. 118 mandates specifically for creation of IPRs ‘to provide uniform protection of intellectual property rights throughout the Union’. It is notable that after a lull in passing directives under *Amsterdam*, ten further legislative

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<sup>103</sup> Treaty of Rome 1957, Art 7 Also known as “the Founding Treaty”.

<sup>104</sup> Based at The Hague. Statute of the International Court of Justice, Art 65

<sup>105</sup> Critically analysed at [1.3.4]

<sup>106</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

<sup>107</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, Art 8

<sup>108</sup> Commission of the European Communities, ‘Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action’ COM (88) 172 final

<sup>109</sup> Amending the Treaty on the European Union (“Maastricht Treaty”) 1992, Art 113

instruments (directive/regulation) were passed under *Lisbon*. Notwithstanding this, as Monti identified in his 2010 report, '[t]wo trends have been visible for a number of years: an "integration fatigue", eroding the appetite for a single market; and, more recently, a "market fatigue", with a reduced confidence in the role of the market'.<sup>110</sup>

### 1.3.3 The *raison d'être* of EU Directives and Regulations passed under the Treaties

Notable areas of copyright law have been harmonised to varying extents via directives/regulations, such as: copyright duration,<sup>111</sup> protection for databases,<sup>112</sup> software,<sup>113</sup> satellite/cable broadcasts,<sup>114</sup> resale rights,<sup>115</sup> internet works,<sup>116</sup> rental and lending and related rights,<sup>117</sup> orphan works,<sup>118</sup> some terms of enforcement,<sup>119</sup> licensing/royalties for music works managed by collecting societies,<sup>120</sup> 'pay per view' and 'charge for access' television/radio broadcasts and internet services,<sup>121</sup> accessibility and portability protection<sup>122</sup> and digital rights

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<sup>110</sup> 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' (2010) Ref. Ares(2016)841541, 12

<sup>111</sup> 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 [2006] OJ L372/12 ("Term Directive (2006)")

<sup>112</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 ("Database Directive")

<sup>113</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16 ("Software Directive (2009)")

<sup>114</sup> 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 L248/15 ("SatCab Directive")

<sup>115</sup> 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 L272/32 (Artists Resale Rights Directive")

<sup>116</sup> Directive 2001/29/EC 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] OJ L167/10 ("InfoSoc")

<sup>117</sup> 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 [2006] OJ L376/28 ("Rental and Lending and Related Rights Directive")

<sup>118</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text [2012] OJ L299/5 ("Orphan Works Directive")

<sup>119</sup> Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004) [2004] OJ L195/16 ("Enforcement Directive")

<sup>120</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72 ("Collective Rights Management Directive")

<sup>121</sup> Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [1998] OJ L320/54 ("Conditional Access Directive")

<sup>122</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168/1 ("Portability Regulation")



management.<sup>123</sup> Notwithstanding the copyright directives/regulations that have been passed since 1988, the status quo is that EU copyright law is not fully harmonised. Key elements that have not been harmonised by directives/regulations include substantive issues relating to originality standards, authorship, types of works, fixation, general licensing other than the minimum standards set down in the Collective Rights Management Directive<sup>124</sup> for online music works, publishers' rights, "Community" exhaustion except in the Software Directive (2009),<sup>125</sup> defences, and procedural issues concerning secondary copyright infringements, counterfeiting, e-licensing, general licensing, evidence and remedies. It will be shown that some of these key areas have been harmonised by CJEU interpretation of directives, but others have not. None have been codified in an EU legislative instrument.

The difference, therefore, is that copyright disputes concerning harmonised areas can be referred directly to the CJEU<sup>126</sup> for a decision binding on all EUMS.<sup>127</sup> EU legislative instruments are unique. They create harmonised rights<sup>128</sup> for all members who must transpose these laws directly into their own national laws. A court sits at its centre issuing binding opinions which all members must apply in their national courts.<sup>129</sup> Members can use their local courts to enforce EU rules. For unharmonised areas where parties must rely wholly on membership of international treaties, there is far more legal uncertainty in how copyright laws may be applied and where parties are not always able to sue in their nation state.

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<sup>123</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92 ("Digital Single Market Directive")

<sup>124</sup> Collective Rights Management Directive ("CRMD")

<sup>125</sup> Art 4(2)

<sup>126</sup> TFEU, Art 257

<sup>127</sup> Notable examples of such referrals that will be considered in detail later are C-302/10 *Infopaq International A/S v Danske Dagblades Forening* [2012] ECR 0; C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure Ltd* [2011] ECDR 11; C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899; C-173/11 *Football Dataco v Sportradar* [2012] ECLI 642; C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533

<sup>128</sup> Whilst still allowing for nuances within each MS copyright for certain aspects such as optional permitted exceptions

<sup>129</sup> C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 [8]

Lack of unity, overall, remains problematic. Given the EU's interconnected nature, this is unacceptable for a trading bloc, referred to as 'Fortress Europe',<sup>130</sup> that promotes free-flowing trade amongst its members whilst trading globally as one entity. MS cannot negotiate copyright trade deals with Third Countries without trading as "One Europe".<sup>131</sup> Non-harmonised copyright laws potentially complicate trade with Third Countries as trade deals must work in tandem with the unharmonised laws of EU27. EU trading laws should be as harmonious as possible between MS to ensure free-flowing trade and enforcement.

Notably, it has been argued that copyright harmonisation via directives and regulations

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.<sup>132</sup>

Notwithstanding this, it can also be argued that, from the very beginning, economic incentives and rewards have been part and parcel of passing copyright directives, not just facilitating change necessary for the functioning of the single market. The *Software Directive* (1991), for example, safeguarded the creator's economic reward by stating that

the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently.<sup>133</sup>

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<sup>130</sup> Oana Lungescu, 'The New Europe' <[www.bbc.co.uk/worldservice/theneweurope/wk22.htm](http://www.bbc.co.uk/worldservice/theneweurope/wk22.htm)>

<sup>131</sup> TFEU, Art 207. See also Dr Swati Dhingra, 'Trade deals with third countries' *The UK in a changing Europe* (19 September 2017) <<http://ukandeu.ac.uk/explainers/trade-deals-with-third-countries/>>

<sup>132</sup> Eleonora Rosati, 'Judge-Made EU Copyright Harmonisation: the Case of Originality' (2012) EUI 1, 51

<sup>133</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 ("Software Directive [1991]")

This was also repeated in the Database Directive in 1996.<sup>134</sup> The Rental and Lending Directive outlined the increasing threat of piracy in 1992<sup>135</sup> whilst the SatCab Directive endeavoured to safeguard rightholders' remuneration as far back as 1993.<sup>136</sup> Hence, although *InfoSoc* is very clear in that 'differences not adversely affecting the functioning of the internal market need not be removed or prevented',<sup>137</sup> it can be argued that there is, and always has been, a clear drive promoting economic expansion within the single market. Hence, it could be argued that 'adversely affecting the functioning of the market' has a broad interpretation as it extends to the impact on the rightholders and the citizens (end-users).

Thus, it can be argued that there has been a clear aim to not only safeguard rights and reduce those differences adversely affecting the functioning of free-flowing goods/services throughout the Union, but that this also extended to positing the economic reward theory. This is very clearly illustrated in the 2006 Term Directive:

The 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*.<sup>138</sup>

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<sup>134</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20, Recital 7

<sup>135</sup> 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 L346/61, Recitals ("Rental and Lending Rights Directive (1992)")

<sup>136</sup> 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 L248/15, Recital 5

<sup>137</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 7

<sup>138</sup> 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 [2006] OJ L372/12 (2006), Recital 6 [author's emphasis]

On that basis, this thesis must consider these wider policy objectives when positing new harmonised copyright laws for inclusion in the EUCR.

### 1.3.4 International Copyright Agreements

Several international copyright treaties facilitate trade<sup>139</sup> which may support the proposed EUCR. The Berne Convention is international in reach, but it has been argued that ‘it was essentially a European agreement’.<sup>140</sup> This is the most relevant of international agreements for this thesis concerning EU copyright harmonisation. *Berne* membership is required by all EUMS.<sup>141</sup> It substitutes, in terms of legislation, for copyright infringements occurring between MS beyond EU competence i.e. where the subject matter is not covered by a directive/regulation. All CPs afford the same rights to each other which their respective and future laws grant to their nationals.<sup>142</sup> This is an essential component for 27 MS trading as One Europe.<sup>143</sup> The downside for relying solely on this convention, in unharmonised copyright areas, is that it only harmonises to minimum standards which are generally below those already harmonised in the EU. Also, CPs could afford more favourable, or more stringent, rights to other nations providing those minimum standards are met. It is not necessarily “one for all”. Moreover, there is no dispute settlement mechanism should disagreements arise in terms of copyright disharmony between EUMS. To sue under *Berne*, claimants in one MS must sue other MS defendants via the ICJ. In the absence of unitary EU copyright harmonisation, this is

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<sup>139</sup> The Berne Convention for the Protection of Literary and Artistic Works 1886; the Universal Copyright Convention 1952; the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 (Rome I); the Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (“TRIPS”); the WIPO Copyright Treaty 1996; the WIPO Performances and Phonograms Treaty 1996; the Anti-Counterfeiting Trade Agreement 2011 (not in force) and the Beijing Treaty on Audiovisual Performances 2012

<sup>140</sup> Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag* (CUP) 3

<sup>141</sup> TFEU, Art 351

<sup>142</sup> Berne Convention for the Protection of Literary and Artistic Works 1886, Art 5 – the principle of “National Treatment”.

<sup>143</sup> TFEU, Art 207. See also Dr Swati Dhingra, ‘Trade deals with third countries’ *The UK in a changing Europe* (19 September 2017) <<http://ukandeu.ac.uk/explainers/trade-deals-with-third-countries/>>

at least an option though it would not provide EU-wide enforcement. The more likely route is for claimants to sue in the defendants' own countries pursuant to the defendants' unharmonised national laws. Given that there has not yet been one single copyright dispute heard by the ICJ, since its inauguration, the latter is the most likely route<sup>144</sup> but this would not provide any form of EU-wide copyright harmonisation.

For unharmonised areas of copyright law, potential EU claimants could also use TRIPS,<sup>145</sup> as this treaty is the only international IP treaty to contain a dispute settlement mechanism for its CPs.<sup>146</sup> Moreover, and unlike *Berne*, it prevents favouritism within specific bilateral agreements due to the most "favoured nation clause" preventing the granting of favourable treatment to individual CPs.<sup>147</sup> This is an essential component for EUMS trading as one entity. However, parties cannot sue directly under TRIPS. Legal entities/individuals wishing to bring an action for copyright infringement cannot do so, directly:<sup>148</sup>

WTO agreements are not in principle among the rules in the light of which the [CJEU] is to review the legality of measures adopted by the Community institutions.<sup>149</sup>

Furthermore, the same issue arises in that any form of resolution remain between the parties. It does not extend EU-wide. Moreover, TRIPS is also deficient in that it only applies to copyright disputes in the "analogue", not "digital" world. It does not address the impact of new technologies relating to information and communication in the Digital Era. Moreover, it did it

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<sup>144</sup> International Court of Justice, 'Judgments, Advisory Opinions and Orders' <[www.icj-cij.org/en/decisions](http://www.icj-cij.org/en/decisions)> (as of 30 June 2022)

<sup>145</sup> Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS")

<sup>146</sup> See: the Alternative Dispute Resolution mechanism contained in *TRIPS*, Part III. See also: Daniel Gervais, *The TRIPS Agreement – Drafting History and Analysis* (3<sup>rd</sup> edn Thomson Reuters (Legal) Ltd 2008) Ch. 2.352, 440. NB It was not until the 1967 Stockholm revision that *Berne* incorporated the provision to take copyright infringement disputes to the International Court of Justice (Stockholm Act 1967, Art 33).

<sup>147</sup> TRIPS, Art 4

<sup>148</sup> Angelos Dimopoulos and Petroula Vantsiouri, 'Of TRIPs and traps: the interpretative jurisdiction of the Court of Justice of the EU over patent law' [2014] EL Rev 39 210, 213.

<sup>149</sup> C-149/96 *Portuguese Republic v Council of the European Union* [1999] ECR I-8395 [47]

recognise the growth of shifting cultural and market trends<sup>150</sup> as it still does not account for the upward trend in social networking tools and, concomitantly, the rise in user-generated content (“UGC”).<sup>151</sup> It failed to consider the accelerating rate at which users can access, use, alter and disseminate new and current creative works within the digital environment, regardless of concerns already outlined by EU lawmakers in 1988.<sup>152</sup> Also, it disregarded the global capacity for everyone to become publishers of creative content with great ease and speed. Instead, the EU has harmonised works, to some extent, in the digital environment<sup>153</sup> and has also passed a Digital Rights Management Directive<sup>154</sup> to counteract some of the issues related to copyright infringements within UGC uploads. As before, even if TRIPS was utilised for resolution of copyright disputes in areas of analogue copyright law that remain unharmonised for EUMS’, it would not have EU-wide effect. EUMS would still have disharmony in those areas of law.

To sue for copyright infringement of audiovisual works (“AVWK”) in terms of EU-wide focus, the Beijing Treaty on Audiovisual Performances (“Beijing”) is of no use. It largely relates to regulating performers’ rights in AVWK in the sphere of international law..<sup>155</sup> Although relevant for EUMS’ performers’ rights disputes in AVWKs, given that this is an area that remains unharmonised in the EU, parties cannot sue directly under the treaty. Again, the most likely route is for claimants to sue directly in the country of infringement. For EUMS, it is an

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<sup>150</sup> Ruth L Okedeji, ‘Copyright in TRIPS and beyond: the WIPO Internet Treaties’, published in Carlos M Correa, *Research Handbook on the Protection of Intellectual Property under WTO Rules* (Edward Elgar Publishing Ltd Cheltenham 2010) 343-344

<sup>151</sup> Otherwise known as Web 2.0. *ibid*, Okedeji, 344. User-generated content is where the user of the web page interacts with it to alter its dynamics in some way. By way of example, a Facebook user who uploads a profile picture, or posts an update on their daily status, is generating content on their Facebook webpage, opposed to simply viewing what is there, without interacting with the static webpage in any way.

<sup>152</sup> Commission of the European Communities, ‘Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action’ COM (88) 172 final (“Green Paper (1988)”)

<sup>153</sup> Directive 2001/29/EC 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] OJ L167/10

<sup>154</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92 (“DSMD”)

<sup>155</sup> *ibid*, Articles 4-11

area that ought to be harmonised and encompassed within an EUCR as the status quo leaves them with no EU-wide recompense.

With regards to IPR enforcement, the multilateral *Anti-Counterfeiting Trade Agreement* (“ACTA”), published in 2011, aimed to establish a framework to prevent counterfeiting and internet copyright piracy outside the scope of the WTO/TRIPS. It never entered into force largely due to issues with negotiation secrecy and potential threats to civil liberties. It was ultimately rejected by the European Parliament.<sup>156</sup> Hence, although this agreement will not be considered by this thesis, in terms of the research question, it is important to highlight its controversies to show in subsequent analysis why measures purporting criminal sanctions will not be included in the draft EUCR appended to this thesis.

Hence, there are numerous important areas of copyright law unharmonised for EUMS. Moreover, when trading as ‘One Europe’ with Third Countries, the EU is limiting itself to the terms that it can negotiate upon, for EU-FTA’s, on behalf of its EUMS. Until recently, the UK was an EUMS and had to give effect to its laws. The transition period for negotiations remained until the 31 December 2020. Until then, UK jurisprudence gave effect to EU law. This did not extend post-transition. At the time of writing, negotiations between the UK-EU27 continued; no trade deal existed. However, a trade deal is now in place between the EU-UK and, as such, the UK is now one of those Third Countries. Notwithstanding this, it will be shown that the UK is different to all other Third Countries, namely due to its former status as an EUMS. Given that there is now a trade deal in place, and in terms of proposing an EUCR that may annex to the EU-UK TCA, the reasoning for positing an EUCR must be considered.

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<sup>156</sup> European Parliament, ‘Everything you need to know about ACTA’  
<https://www.europarl.europa.eu/sides/getDoc.do?type=IMPRESS&reference=20120220FCS38611&format=X ML&language=EN>

## 1.4 Reasons for proposing a harmonising EU Copyright Regulation

The key reasoning for positively advocating a single document harmonising EUCR can be narrowed to the impact on the MS' rightholders, end-users and the context of trade in a multi-member-state regional organisation, given that modern-day copyright protection is largely economic-centric, as outlined at [1.2.4]. Moreover, in view of the UK's recent departure from the EU, but with the advent of the new EU-UK Trade and Co-operation Agreement ("TCA"),<sup>157</sup> a peripheral focus of this concept would be to consider if the proposed regulation could, and should, annex to the new EU-UK TCA, to supplement copyright trade relations. This is because the UK stands apart from all other Third Countries with EU trading agreements<sup>158</sup> due to its status as a former, long-term member of the EU. Moreover, the UK's copyright laws will be shown throughout this thesis to be aligned to a large extent with those of the EU in terms of copyright subsistence and defences. Thus far, the "Trade and Cooperation Agreement" is the only FTA of its kind between the EU and a Third Country. Its values imbue the concepts of close cooperation and peaceful relation wherein the

Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation.<sup>159</sup>

In particular, the words 'broad relationship', 'good neighbourliness' and 'close and peaceful relations' in Article 1 TCA do not exist in any other concluded FTA in this form. There are similarities, in terms of "neighbourly" in the Armenian,<sup>160</sup> some Central American<sup>161</sup> and some

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<sup>157</sup> Commission, 'The EU-UK Trade and Cooperation Agreement' (effective from May 2021) available online at [https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement\\_en](https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en)

<sup>158</sup> European Commission, 'Negotiations and Agreements' [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en)

<sup>159</sup> The Trade and Cooperation Agreement 2021, Art 1

<sup>160</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22018A0126\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22018A0126(01)&from=EN)

<sup>161</sup> Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua see: European Commission, 'Negotiations and Agreements' [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en)



Balkan<sup>162</sup> FTAs, but nothing comparable to that between the EU and the UK. It could be argued that this is indicative of both the strength of the EU-UK relationship, above the other EU-FTA-parties, and the unique status between the two nations with the UK being a former long-standing EUMS. This concept will be fully explored in Chapter 6.

Notwithstanding the above, a key focus for proposing the EUCR is in the context of EU trade between its MS. For the purpose of this thesis, “trade” encompasses allocation of resources, GDP, exports, employment, litigation, education in terms of GDP outcomes and the effect on these elements, of unharmonised copyright law.

#### 1.4.1 Trade element in the context of non-harmonisation

It has been argued that ‘[t]hree aggregates, or indicators, are often used to determine the role of copyright industries’: the contribution of the creative industries to the country’s GDP, employment and exports.<sup>163</sup> Hence, the focus upon economic investment in creative works is essential to copyright law.<sup>164</sup> Across the EU,<sup>165</sup> it was reported in 2019 that the contribution of the copyright industries to their GDP amounted to 6.9%, approximately 7.50% of the GVA.<sup>166</sup> In the UK, the Creative Industries form part of the UK DCMS<sup>167</sup> regarding GDP and GVA

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<sup>162</sup> Montenegro, North Macedonia and Serbia which are all EU candidate countries see: European Commission, ‘Candidate Countries and Potential Candidates’ <https://ec.europa.eu/environment/enlarg/candidates.htm#:~:text=Albania%2C%20Moldova%2C%20the%20Republic%20of,possible%20request%20for%20transition%20periods.>

<sup>163</sup> WIPO, ‘The Economic Contribution of Copyright Industries in France’ (2016) [https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_fr.pdf](https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_fr.pdf)

<sup>164</sup> Professor Fiona Macmillan, ‘Copyright, the Creative Industries and the Public Domain’ in Candace Jones et al, *The Oxford Handbook of Creative Industries* (OUP 2015) 440

<sup>165</sup> NB the UK was a MS during the time that this study was reported. EUIPO, ‘IPR-intensive industries and economic performance in the European Union (2019) [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/IPR-intensive\\_industries\\_and\\_economicin\\_EU/WEB\\_IPR\\_intensive\\_Report\\_2019.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/IPR-intensive_industries_and_economicin_EU/WEB_IPR_intensive_Report_2019.pdf)

<sup>166</sup> This relates to the latest figures, in 2012, published in 2016. WIPO, ‘The Economic Contribution of Copyright Industries in France’ (2016) [https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_fr.pdf](https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_fr.pdf)

<sup>167</sup> The DCMS includes the following industries: Civil Society, Creative Industries, Cultural Sector, Digital Sector, Gambling, Sport, Telecoms and Tourism.

percentages.<sup>168</sup> ‘In 2019, DCMS estimated that the creative industries contributed £115.9 billion to the UK, accounting for 5.9% of the UK economy’.<sup>169</sup> Moreover, ‘the GVA of creative industries had increased by 5.6% between 2018 and 2019 and by 43.6% between 2010 and 2019 in real terms’.<sup>170</sup> Moreover, ‘[UK] employment in the creative industries r[ose] by 8.6 per cent between 2011 and 2012, against growth of 0.7 per cent for the UK as a whole’.<sup>171</sup> According to the latest published figures,<sup>172</sup> the number of jobs in the UK creative sector is over 2 million and ‘expand[ed] faster than the rest of the economy in 2017’.<sup>173</sup>

Furthermore, CIC<sup>174</sup> reported that ‘[i]n 2018 the creative industries grew jobs by 1.6 per cent, compared to the UK-wide employment increase of 0.8 per cent’.<sup>175</sup> By February 2020, this had risen to almost £112bn; over £300m per day.<sup>176</sup> ‘New statistics reveal the Creative Industries sector is growing more than five times faster than the national economy’.<sup>177</sup> Official Government data reports a rise in creative industry contribution of 7.4% compared to the national average of just 1.4%.<sup>178</sup> ‘The sector was supported by large contributions from tech services and the film and television industries, which contributed £45.4 billion and £20.8

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<sup>168</sup> GDP measures the economy of a particular country within the global trading sphere whilst ‘Gross value added (GVA) measures the contribution to an economy of an individual producer, industry, sector or region. It is used in the calculation of gross domestic product (GDP)’, ‘Definition of gross value added GVA’ *Financial Times*. Available online at <http://lexicon.ft.com/Term?term=gross%20value%20added%20GVA>

<sup>169</sup> Eren Waitzman, ‘Impact of government policy on the creative sector’ *HoL Library* (28 October 2021) <https://lordslibrary.parliament.uk/impact-of-government-policy-on-the-creative-sector/#:~:text=Economic%20output,5.9%25%20of%20the%20UK%20economy>.

<sup>170</sup> *ibid*

<sup>171</sup> ‘Definition of gross value added GVA’ *Financial Times*. Available online at <http://lexicon.ft.com/Term?term=gross%20value%20added%20GVA>

<sup>172</sup> GOV.UK, ‘DCMS Sectors Economic Estimates 2017: Employment’ (July 2018) <[www.gov.uk/government/statistics/dcms-sectors-economic-estimates-2017-employment](http://www.gov.uk/government/statistics/dcms-sectors-economic-estimates-2017-employment)>

<sup>173</sup> Creative Industries Council, ‘UK HAS 2M CREATIVE INDUSTRIES JOBS’ (July 2018) <[www.thecreativeindustries.co.uk/uk-creative-overview/facts-and-figures/employment-figures](http://www.thecreativeindustries.co.uk/uk-creative-overview/facts-and-figures/employment-figures)>

<sup>174</sup> Creative Industries Council

<sup>175</sup> Creative Industries Council (n 177)

<sup>176</sup> DCMS and MP Nigel Adams, ‘UK’s Creative Industries contributes almost £13 million to the UK economy every hour’ *Gov.uk Press Release* (6 February 2020) <[www.gov.uk/government/news/uks-creative-industries-contributes-almost-13-million-to-the-uk-economy-every-hour](http://www.gov.uk/government/news/uks-creative-industries-contributes-almost-13-million-to-the-uk-economy-every-hour)>

<sup>177</sup> *ibid*

<sup>178</sup> *ibid*

billion to the economy respectively’. Across the EU collectively, the summary of the contribution of the creative industries to employment was 7.1%, the same as in the UK.<sup>179</sup>

In terms of exports, creative industries exports amounted to 5% (£14.7bn) of all UK exports between 2014-16.<sup>180</sup> Although it has been reported that exports in general between the UK and the EU fell sharply in December 2020 and January 2021, from a previous high of 54% in 2006 of all exports down to a low of 42%,<sup>181</sup> current 2021 figures are purported to have continued to rise since.<sup>182</sup> During a similar time frame in the EU, however, creative industries exports is approximately three times larger than the UK. It amounted to €294,856 million which equates to approximately 15% of all EU exports during that time.<sup>183</sup>

In summary, the UK employs around the same percentage of creative industry employees, as those in the EU, but exports significantly less, in terms of the creative industries, compared to the EU. This is a consideration, when positing an EUCR that may annex to the EU-UK TCA, as to who benefits the most, and from what, that is likely to rest on current governmental policies. In terms of UK policy, a ‘Brexit Freedoms’ Bill will be brought forward to end to the special status of EU law and ensure that it can be more easily amended or removed.<sup>184</sup> Moreover, Prime Minister Johnson’s published policy, ‘The Benefits of Brexit’, outlines that

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<sup>179</sup> EUIPO, ‘IPR-intensive industries and economic performance in the European Union (2019) [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/IPR-intensive\\_industries\\_and\\_economicin\\_EU/WEB\\_IPR\\_intensive\\_Report\\_2019.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/IPR-intensive_industries_and_economicin_EU/WEB_IPR_intensive_Report_2019.pdf)

<sup>180</sup> UK IPO, ‘Use of Intellectual Property rights across UK industries’ (2020) <https://www.gov.uk/government/publications/use-of-intellectual-property-rights-across-uk-industries/use-of-intellectual-property-rights-across-uk-industries>

<sup>181</sup> House of Commons, ‘Statistics on UK-EU trade’ (Dec 2021) CBP 7851 <https://researchbriefings.files.parliament.uk/documents/CBP-7851/CBP-7851.pdf>

<sup>182</sup> *ibid*

<sup>183</sup> EUIPO, ‘IPR-intensive industries and economic performance in the European Union (2019) [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/IPR-intensive\\_industries\\_and\\_economicin\\_EU/WEB\\_IPR\\_intensive\\_Report\\_2019.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/IPR-intensive_industries_and_economicin_EU/WEB_IPR_intensive_Report_2019.pdf)

<sup>184</sup> Prime Minister’s Office Press Release, ‘Prime Minister pledges Brexit Freedoms Bill to cut EU red tape’ (31 January 2022, London) <https://www.gov.uk/government/news/prime-minister-pledges-brexit-freedoms-bill-to-cut-eu-red-tape>

‘we intend to go further than the changes we have already made and to amend, replace, or repeal all the retained EU law that is not right for the UK’.<sup>185</sup> In this regard, the governmental approach outlined in the published policy is synonymous with the UK taking back control of its laws to ensure that retained EU law and regulatory changes align with UK interests.<sup>186</sup> In terms of retained EU law amendments (opposed to repeals), the published policy outlines that this

will provide an opportunity to consider creating a bespoke rule that would address cases where retained EU law came into conflict with domestic law, that had the benefit of specific authorisation by Parliament.<sup>187</sup>

This statement suggests that there may be scope for further negotiations, beyond those that resulted in the EU-UK TCA in December 2020. However, it has been argued that the new Australia-UK-US security partnership ‘confirmed for some Britain’s post-Brexit tilt to the Anglo-Saxon world as well as the Indo-Pacific’.<sup>188</sup> From an EU-UK trading aspect, the UK may seek to pull further away from Euro-centric copyright legal principles, preferring instead, to re-establish its Anglo-Saxon copyright roots elsewhere. Notwithstanding this move towards the UK’s common law cousins, though, the EU remains the single largest trading bloc, to which the UK exports, currently standing at over 42% of all UK exports and potentially rising.<sup>189</sup> Moreover, it has been argued that in the wake of the Russia-Ukraine war, a secure European base is essential for realising the Johnson Administration’s ‘global ambitions’.<sup>190</sup> Hence, such figures, reported from a GDP, employment and export perspective, demonstrate the economic

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<sup>185</sup> HM Government, ‘The Benefits of Brexit: How the UK is taking advantage of leaving the EU’ (January 2022) 6 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1054643/benefits-of-brexit.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054643/benefits-of-brexit.pdf)

<sup>186</sup> *ibid*, 25

<sup>187</sup> *ibid*, 32

<sup>188</sup> Robin Niblett, ‘Brexit Britain at 1: Here’s what we’ve learned’ (*Politico* 3 January 2022) <https://www.politico.eu/article/brexit-britain-european-union-eu-learned/>

<sup>189</sup> House of Commons, ‘Statistics on UK-EU trade’ (Dec 2021) CBP 7851 <https://researchbriefings.files.parliament.uk/documents/CBP-7851/CBP-7851.pdf>

<sup>190</sup> Niblett, (n 188)

and social contributory value of the Creative Industries of the UK to itself and, to perhaps a lesser extent, the EU. Moreover, the current geopolitical climate may serve as a reminder that retaining a close connection with their former EU brethren is one of the most streamlined ways to protect copyright rightholders and end-users when trading in the EU, safeguard job creation in the creative industries and contribute to the future economy. Hence, it will be shown, in view of this, that if an EUCR is possible, it may serve to supplement the current EU-UK FTA though this will be dependent on the “EU-retained-law” status during the *Brexit Freedoms Bill* Houses of Parliament readings/debates.

Regardless of EU-UK trading connections, however, it could be argued that from the reported trade figures alone, the creative industries in general provide a lucrative contribution to the EU economy. Given that areas of copyright remain unharmonised within those creative industries creating disparity between EUMS’ laws, it could be argued that this may impact on trade in terms of wealth generation, employment, exports/imports and the number of works free-flowing through the Union. Hence, a unitary EUCR reducing such disparity may facilitate cohesion to increase wealth generation/employment/works within the EU and ought to be pursued.

## 1.5 Areas of copyright law left unharmonised by EU law

In view of the current piecemeal approach to EU copyright harmonisation, it is essential to identify the key areas of copyright law that remain unharmonised when positing a unitary EUCR. Copyright is a vast field of information. Hence, analytical discussion is not exhaustive. In a doctoral thesis of limited length and resources, opposed to a government-mandated impact assessment, it is essential to narrow the scope of research analysis to focus primarily on unharmonised key elements of copyright law. More specifically, the focus should be on the

unharmonised areas that have the most detrimental impact on the single market, including its rightholders and end-users. On this basis, it can be argued that the following key areas of copyright law remain unharmonised by current EU directives/regulations:-

1. originality
2. when originality is required for a particular work
3. notions of works
4. authorship (including employers/employees, commissioned, collaborative and computer-generated works)
5. fixation in a work
6. moral rights in a work
7. economic rights in a work
8. e-licensing of AVWKs
9. doctrine of community exhaustion
10. e-licensing of intangible works other than those which fall within the Software Directive<sup>191</sup>
11. digital rights management of works in respect of non-mandatory exceptions in InfoSoc and the DSMD
12. licensing of tangible works
13. defences/limitations/permitted exceptions to copyright infringement
14. remedies for copyright infringement
15. publisher's rights except in terms of the neighbouring right in the DSMD
16. evidence
17. counterfeiting
18. secondary infringements invoking criminal sanctions.

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<sup>191</sup> Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Art 4(2)

This thesis will focus predominantly on elements (1) – (12) because these areas generally relate to copyright subsistence. In other words, differences between these areas can affect recognition and, protection, of creative works at the outset. Disparity between EUMS in the above-outlined areas could detrimentally impact the functioning of the single market, particularly economically. Element (13) “defences”, otherwise known as limitations or permitted exceptions to copyright infringement, is discussed in Chapters 3-5 in the context of further harmonisation and the effect of optional defences amongst a union of 27 MS. Hence, the research will critically analyse these elements to make recommendations for codifying existing EU law, and, recommendations for introducing new harmonising laws where no such law exists. Recommendations will be critically analysed in Chapter 7 and will then be presented in a fully drafted EUCR in the Appendix. Element (14) “remedies” are essentially the same in each EUMS (injunctions, award of monetary damages, destruction and delivery up) albeit it with national law nuances. These do not necessarily require further harmonisation as, given their sufficient similarity, they are less likely to affect the single market, than differing elements of copyright subsistence. The generic copyright remedies outlined above will be included in the Draft EU Copyright Regulation for completeness but, for the reasons outlined above, they will not undergo critical analysis in the thesis. With the exception of employees’ and employers’ rights analysed in Chapters 3 and 4, element (15), publishers’ rights, will not be addressed in this thesis as this forms part of a much wider area of copyright law: copyright contracts. This element alone includes multiple elements such as licensing of copyrights which may encompass rights pertaining to employers, employees, agents and publishers as well as the rights of performers who may all reside in differing EUMS. Hence, harmonisation of copyright contracts could be critically analysed and assessed by standalone research in its own right such as a government-mandated report or even a PhD thesis. It is, thus, too vast to give the requisite

attention to detail in a doctoral thesis already covering eleven main elements of copyright subsistence plus other areas such as defences.

Similarly, elements (16) to (18) will not be addressed by this research because these elements may encompass criminal sanctions which are beyond EU competence, particularly (17) and (18). As shown by the problems surrounding ACTA EU ratification, it is possible that a regional agreement seeking to impose binding laws on its members unilaterally which encompass criminal sanctions, may not be well received and, ultimately, may be rejected by the EU Parliament. Hence, the focus is on the areas, as highlighted above, between (1)-(13). These areas will be assessed, in terms of their negative impact on the single market, and the risk that such disparity is likely to cause internal market refragmentation.

## 1.6 Challenges to this research

### 1.6.1 Current EU legislative trajectory

The potential challenges to this research proposal are fourfold. The first lies in convincing EU lawmakers that a unitary Copyright Regulation is necessary and should be adopted expediently. The current trajectory is piecemeal: pass a directive/regulation to deal with a specific copyright issue that causes refragmentation in the internal market. Given that the only other serious proposal suggesting a unitary EU Copyright Code (Wittem Copyright Code) has largely gone ignored by EU lawmakers, there may be no willingness in their minds to go beyond the current regime. It can be argued that this may be due to ‘controversial legal issues, an unstable political and economic context and the pressure to deal with other priorities’.<sup>192</sup> However, as will be

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<sup>192</sup> Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) 1



shown, this proposal goes further than Wittem as it has the benefit of a further 10 years' worth of harmonising directives to include in the proposed EUCR. Moreover, this thesis addresses a greater number of outstanding copyright harmonisation issues, in addition to the five main elements, as seen at Chapter [1.5]. Hence, what is being presented here in this research analysis is a more comprehensive unitary EUCR that could be adopted as a first draft, by EU lawmakers. Moreover, as the Commission has already outlined the problems with 27 different copyright systems in the EU,<sup>193</sup> this acknowledgement may render this proposal more amenable.

### 1.6.2 Common law inclusion in a civil law EU Copyright Regulation

The second challenge is convincing UK and EU lawmakers that a unitary EU copyright regime could enhance current EU-UK trading relations so that harmonised copyright relations could ensure maximum economic gain across the UK/EU for rightsholders, and corresponding maximum access and utilisation of works for end-users.<sup>194</sup>

Currently, trading relations are conducted under the EU-UK TCA, in force since 1 May 2021. EU law no longer applies in the UK, unless it has been retained.<sup>195</sup> Hence, EU27<sup>196</sup> has no obligation to annex the proposed EUCR as trading terms are contained in the TCA. However, this approach may be unnecessarily restrictive potentially narrowing the scope for trading creative works between the EU-UK. This is because, as will be shown, the EU-UK TCA contains a general outline of areas covered by the agreement, such as the economic rights of authors, performers, term of protection, bare reference to permitted exceptions and so forth.

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<sup>193</sup> Reflection Document of DG INFSO and DG MARKT on Creative Content in a European Digital Single Market: Challenges for the Future, 22 October 2009, 12 sourced from Eleonora Rosati, 'The Wittem Group and the European Copyright Code' (2010) *JiPLP* 5(12) 862

<sup>194</sup> Critically analysed in Chapter 6

<sup>195</sup> European Union (Withdrawal Agreement) Act 2020, §1A(5)-(6) (hereafter "the Agreement")

<sup>196</sup> The name given to the remaining MS since the UK withdrew

However, none of the substantive provisions, as outlined between (1)-(13) are contained in the agreement, either at all, or in any great detail. Hence, when hearing disputes, national courts would have to consider national laws which could vary considerably between the states. This could potentially prevent rightholders from exploiting their works for maximum economic gain throughout the EU as well as impeding access to UK works by end-users in the EU. The author posits that this could be a mistake and detrimental to the EU single market. Four reasons for these assertions are suggested below.

#### 1.6.2.1 Common law EUMS

The Republic of Ireland is a common law country and remains an EUMS. Therefore, the EU still has one fully common law MS. Key IP cases show a clear history of Irish higher courts following and applying English HC/HL/SC decisions.<sup>197</sup> Cyprus also encompasses elements of common law as reflected through its categories of works,<sup>198</sup> as does Malta.<sup>199</sup> Moreover, EU-UK trading continues through the TCA.

#### 1.6.2.2 Copyright originality standards aligned

As will be shown, recent copyright judgments<sup>200</sup> indicate that the UK's copyright 'originality' standard<sup>201</sup> has changed from a low-level common law standard to the EU 'author's own intellectual creation' standard through EU directives and jurisprudence applied in the UK.<sup>202</sup>

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<sup>197</sup> *Montex Holdings Ltd v Controller of Patents, Designs and Trademarks* [2001] IESC 36; [2002] 1 ILRM 208; *EMI Records (Ireland) Ltd & Ors v Eircom Ltd & Anor* [2005] IEHC 233; [2005] 4 IR; *Merck & Co Inc v GD Searle & Co* [2001] 2 IRLM 363; [2001] IEHC 41; *Local Ireland Ltd v Local Ireland-Online Ltd* [2000] IEHC 67; [2001] ETMR 42; *Gormley v EMI Records (Ireland) Ltd* [1998] IESC 44; [2000] 1 IR 84 amongst many others

<sup>198</sup> (Cypriot) Law on Copyright and Related Rights of 1976 (as amended), §3

<sup>199</sup> (Maltese) Copyright Act 2000, §3

<sup>200</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10; *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC); [2020] WLR(D) 88

<sup>201</sup> *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601; *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL)

<sup>202</sup> *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 IPEC; [2020] WLR(D) 88, *Sheeran v Chokri* [2022] EWHC 827 (Ch) [59]

This factor alone sets the UK (and Ireland) apart from other Third Countries which makes it somewhat easier for a unitary Copyright Regulation to annex to the TCA. It will be shown that harmonious rules could be achieved for this purpose, largely from civil law principles, but imbued with elements of common law copyright.<sup>203</sup> This thesis does not advocate that the UK's approach to unharmonised aspects of copyright law should be factored into a future EUCR. However, where rightholders, end-users and dissemination of works in the EU single market can be strengthened by inclusion of common law principles, there is no reason why such common law principles should be ignored. An example of this will be shown, particularly in Chapter 4, in the context of authorship and computer-generated works.

#### 1.6.2.3 EU trading initiatives

Current statistics reveal that despite UK business investment decreasing in 2019 by 0.3% overall,<sup>204</sup> the value of IP UK business investment is increasing. In 2019, the total sum of UK business investment in IP was £81bn.<sup>205</sup> The last quarter of 2019 (Oct-Dec) revealed a sum total of investment of £20.2bn whilst the first quarter of 2020 (Jan-Mar) showed an increase to £21bn.<sup>206</sup> This reflected a 4.1% increase on the previous quarter.<sup>207</sup> Data between 1997 and 2020 reveals that UK business investment has increased in IP sectors, year on year, with only momentary minor blips (between 0.1-0.6%) during this time.<sup>208</sup> In the EU, statistics reveal that

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<sup>203</sup> Such as elements pertaining to “authorship” which do not converge with civil law authorship stands e.g. computer generated works and the need, by civil law standards, for a “human” author

<sup>204</sup> ONS. ‘Business investment in the UK: January to March 2020 revised results’ *Statistical Bulletin* (30 June 2020) 2

<[www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/businessinvestment/januarytomarch2020revisedresults](http://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/businessinvestment/januarytomarch2020revisedresults)>.

<sup>205</sup> *ibid* G4 Table

<[www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/businessinvestment/januarytomarch2020revisedresults](http://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/businessinvestment/januarytomarch2020revisedresults)>. The Tables cited are ‘seasonally adjusted’. This means ‘seasonally adjusted changes are usually preferred since they eliminate the effect of changes that normally occur at the same time and in about the same magnitude every year’ US Bureau of Labor Statistics, ‘Consumer Price Index’ <[www.bls.gov/cpi/seasonal-adjustment/using-seasonally-adjusted-data.htm](http://www.bls.gov/cpi/seasonal-adjustment/using-seasonally-adjusted-data.htm)>

<sup>206</sup> *ibid*, G1 Table

<sup>207</sup> *ibid*, G2 Table

<sup>208</sup> *ibid*, G4 Table

‘IP-intensive industries generate around 45% of EU GDP (EUR 6.6 trillion)’<sup>209</sup> and around 90% of EU global trading.<sup>210</sup> In 2018, the UK’s e-marketplace, worth \$99bn, outstripped that of both France and Germany at \$43bn and \$73bn respectively.<sup>211</sup> In particular, charges for IP use is greater from UK-EU export than those from the EU: 8% UK to EU; 5% EU to UK.<sup>212</sup> Moreover, a concrete priority for the EU, in future trading, is to ‘[a]lign global IP standards through various EU bilateral trade agreements’.<sup>213</sup> It will be shown that the EU should not be so quick to risk alienating UK business investment in this sector, by creative industries concerned that they may not be able to exploit their creations to the full extent in the EU. Hence, this potential deficit may be lessened if EU and UK lawmakers can utilise a trading agreement which strengthens and aligns their copyright laws for their creative industries.

#### 1.6.2.4 Protection of EU Intellectual Property

According to the European Commission, ‘[p]rotection and enforcement of intellectual property are crucial for the EU's ability to stimulate innovation and to compete in the global economy’.<sup>214</sup> Moreover, according to the Commission, ‘the IPR chapters [in bilateral agreements] should offer similar levels of protection to that of the EU. Yet the ‘*EU does take into account the level of development of the country concerned.*’<sup>215</sup> Hence, it will be shown that as the EUCR will be a first attempt to comprehensively harmonise EU copyright law unitarily, as aforementioned at [1.6.2.2], it could extend deference to common law copyright principles, particularly if such principles offer stronger protection for copyright works, end users and

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<sup>209</sup> Business Europe, ‘Intellectual property - Priorities for the next institutional cycle’ *Intellectual Property Report* (Sep 2019) 6 <[www.busesseurope.eu/sites/buseur/files/media/reports\\_and\\_studies/september\\_2019\\_-\\_intellectual\\_property\\_priorities.pdf](http://www.busesseurope.eu/sites/buseur/files/media/reports_and_studies/september_2019_-_intellectual_property_priorities.pdf)>

<sup>210</sup> *ibid*

<sup>211</sup> *ibid*, 15

<sup>212</sup> European Commission, ‘Questions & Answers: EU-UK Trade and Cooperation Agreement’ [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2532](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532)

<sup>213</sup> *ibid*, 29

<sup>214</sup> Commission, ‘Intellectual Property’ <<https://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/>>

<sup>215</sup> *ibid* (author’s emphasis)

facilitate dissemination of works throughout the EU. This is because (1) there have been previous close trading relations during the UK's EU membership for over 40 years which are continuing under an EU-UK Agreement; (2) enforcement is likely to be more successful for all parties where laws are aligned with each other to a large extent particularly in the current circumstances where the UK now does not accept CJEU jurisdiction on case law decisions;<sup>216</sup> and (3) Ireland and Cyprus encompass common law. If a regulation can be drafted that seeks some harmony with UK legal principles, which also strengthens the law for its MS, it will also achieve harmony for its existing EUMS. Moreover, this can only be of benefit to the EU in its long-term vision of global trading and aligning global IP standards, given the extent of common law countries worldwide.

For these collective reasons, this thesis posits that EU copyright harmonisation could strive to observe deference to UK copyright law, where it seeks to strengthen EUMS' copyright laws for future trading.

### 1.6.3 Law Enforcement

The third challenge relates to law enforcement and is, arguably, the most difficult to reconcile. It requires deflecting current tensions on IPR enforcement between the CJEU's ability to issue binding judicial decisions for all EUMS and the UK's necessity to take back control of its own laws.<sup>217</sup> Yet, it is crucial to reach reconciliation, in this sphere, for the success of a unitary

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<sup>216</sup> HM Government, 'The Benefits of Brexit: How the UK is taking advantage of leaving the EU' (January 2022) 5  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1054643/benefits-of-brexit.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054643/benefits-of-brexit.pdf)

<sup>217</sup> HM Government, 'EU Exit: Taking back control of our borders, money and laws while protecting our economy, security and Union' 5  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759792/28\\_November\\_EU\\_Exit -](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759792/28_November_EU_Exit_-_)

Copyright Regulation that encompasses common law copyright principles, where appropriate, which could annex to the current EU-UK Agreement. In the very likely event that such deference to CJEU binding decisions is not forthcoming, an alternative strategy is to posit the benefits of EU-UK cohesion, in terms of copyright legal principles, but for the UK to retain its Supreme Court as the final arbiter for UK disputes. In terms of workability, though, this proposal would mean that every time a dispute arose between an EUMS and the UK, a jurisdiction race could arise whereby the first to issue a claim, or pre-emptive defence, could potentially seize jurisdiction for the case. Moreover, if an EUMS was successful in suing in their own MS, there would be no route of appeal via the CJEU for a binding decision upon the UK. Arguably, there may be nothing preventing an EUMS from referring questions to the CJEU whose opinions on particular legal issues would then be binding across the EU. However, CJEU opinions would not bind the UK so there is little advantage in EUMS making such referrals. It is likely that parties will defer to the default position to sue in the country where the breach occurred. Hence, the problem with this route is that, in terms of enforcement, it leaves the CJEU in limbo and, thus, offers little incentive for EU lawmakers to extend deference to the UK. This is a challenge that will be explored in Chapter 6 and recommendations made to lessen the impacts of this challenge in Chapter 7.

## 1.7 Research questions

This thesis posits the advantages of adopting a unitary EUCR that imbues elements of common law to complement EU law and it sets out what this harmonised copyright regulation could look like in the Appendix. To be able to posit a regulation of this magnitude, certain research

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[Taking back control of our borders money and laws while protecting our economy security and Uni on 1 .pdf](#)

questions must be addressed to critically analyse the current similarities and differences between EU and UK copyright law. Moreover, it must consider how such differences could be overcome for a copyright regulation to annex to the EU-UK TCA.

As a reminder, the thesis is twofold:-

1. copyright law should be harmonised in the EU and codified into a unitary regulation
2. a draft EU Copyright Regulation incorporating harmonised copyright law may annex to the current EU-UK TCA to facilitate copyright trading relations

To critically analyse the thesis, the following research questions will be addressed:-

1. Why did EU lawmakers focus only on harmonising industrial property in the early years of the EEC?
2. How was industrial property harmonisation achieved?
3. What effect has “industrial property” harmonisation had on current EU copyright harmonisation?
4. Who else has proposed full EU copyright harmonisation?
5. What steps have been taken by such persons to propose full copyright harmonisation?
6. What conclusions have been drawn?
7. Do these outstanding areas of harmonisation impact the EU single market of copyright law detrimentally?
8. Are there unharmonised areas of EU copyright law that detrimentally affect the single market that cannot be resolved by this thesis?
9. What is the impact of these findings on the overall proposal for a unitary copyright regulation?
10. Should the proposed EUCR annex to the EU-UK Trade and Cooperation Agreement 2021?

11. What recommendations could be posited to harmonise key areas of copyright, left unharmonised by EU directives/regulations, that should be contained in the draft Regulation?

## 1.8 Research Methodologies

Two methods for conducting research are utilised to evaluate this thesis: socio-legal and comparative analysis. The socio-legal methodological research examines how current copyright law affects EU-UK stakeholders and how the proposed EUCR may alter this. Using only a doctrinal black letter methodology would severely restrict analysis and evaluation. Furthermore, this approach follows the current EU Commission trajectory. EU Commission proposals such as the draft 2014 Stakeholder Dialogue consultation for further EU copyright harmonisation and the 2016 digital rights management impact assessment deferred to a socio-legal approach.<sup>218</sup>

Moreover, an analytical research strategy is used to draft the skeleton of the proposed Copyright Regulation (“EUCR”). This is executed by the author analysing the contents of the current copyright directives/regulations, extracting relevant parts, consolidating the directives/regulations that harmonise the same subject matter and drafting the remaining contents into a single document under relevant headings to produce a draft unitary EUCR. The author has also used relevant parts of Wittem’s drafted European Copyright Code. This is indicated on the author’s draft EUCR.

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<sup>218</sup> Commission, *Draft Impact Assessment on the EU Copyright acquis (provisional title)*. Available online at: <http://statewatch.org/news/2014/apr/eu-com-IA-value-tree.pdf> (Unpublished); Commission, ‘Impact assessment on the modernisation of EU Copyright Rules’ SWD(2016) 301 final



## 1.9 Thesis Structure

**Chapter 1** sets the context for the thesis from a historical, and current, legal and trade-related perspective.

**Chapter 2** addresses research questions (1)-(3) by critically analysing why EU law makers did not prioritise copyright harmonisation alongside industrial property harmonisation and the effect on stakeholders that this action had.

**Chapter 3** addresses research questions (4)-(6) and considers what others have currently considered, thus far, in terms of EU copyright harmonisation, largely encompassing a critical analysis of Witten's Copyright Code.

**Chapter 4** addresses research questions (7)-(9), in terms of substantive copyright elements, by critically analysing the research questions, and further questions exposed by the critical analysis in Chapter 3, for the purpose of finding solutions to fulfil EU copyright harmonisation.

**Chapter 5** addresses research question (7)-(9) and critically analyses why key outstanding areas of copyright law have remained unharmonised in the context of unharmonised works on the internet and in digital format.

**Chapter 6** addresses research question (10) by comparatively critically analysing the current EU-UK TCA to posit that the proposed EUCR should be annexed to the TCA to better support rightholders, end-users and litigants.

**Chapter 7** addresses research question (11) by making recommendations for adopting a unitary EU copyright regulation that could annex to the EU-UK TCA.

**Chapter 8** outlines the author's concluding thoughts and summarises key analysis in the thesis.

**Appendices** The Appendix includes a part-skeleton EU Copyright Regulation, drafted by this author.

## 1.10 CONCLUSION

This chapter has introduced copyright [1.1], its reasoning for protection [1.2] and the concept of a unitary EUCR in view of current EU law [1.3]. It has outlined an overview of the author's reasoning for this proposal, essentially from trade perspectives [1.4], and has introduced the key areas of EU copyright law that remain unharmonised and which shall be the focus of this thesis [1.5]. The author has also outlined challenges that may impede successful implementation of the thesis recommendations [1.6] and the methodologies used to conduct this research [1.8]. The thesis will address the research questions [1.7] in order to explore why a unitary EU Copyright Regulation should be drafted with expediency.

# CHAPTER TWO

## **The ‘Europeanisation’ of Intellectual Property Law: a comparison between trade marks, patents, design law, trade secrets and copyright in the EU**

*Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball.<sup>219</sup>*

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<sup>219</sup> Z Chafee, ‘Reflections on the Law of Copyright’ (1945) 45 Colum L Rev 503

## 2. INTRODUCTION

Intellectual property law harmonisation has already been unitarily codified in EU regulations/directives for registered trade marks, unregistered and registered design law, trade secrets and, to some extent, patent law. No such EU regulation exists for copyright. However, it will be shown that copyright harmonisation began as early as 1971 through a series of judicial rulings, culminating in the passing of the first of 20 directives in 1987. Chapter 2 critically analyses what EU “harmonisation” looks like, as well as critically comparing trade mark, patent, design and trade secrets laws with current EU copyright laws. The purpose is to begin exposing deficiencies in the EU single market of IP protection. Crucially, this chapter critically analyses the impact of not passing a unitary Copyright Regulation in response to the ‘immediate concerns’ of fragmented national copyright laws, within the EU, identified in the Commission’s 1988 Green Paper.<sup>220</sup> Individual copyright directives, early ECJ case law and modern-day CJEU jurisprudence is evaluated to assess lacunae in copyright harmonisation from 1971 onwards. The chapter concludes with the researcher making a positive case for full unitary copyright protection to harmonise EUMS’ national laws in the form of an EUCR. In doing so, this chapter seeks to answer the first three research questions:-

1. Why did EU lawmakers focus only on harmonising industrial property in the early years of the EEC?
2. How was industrial property harmonisation achieved?
3. What effect has “industrial property” harmonisation had on current EU copyright harmonisation?

In this chapter, trade mark (“TM”), patent, design, trade secret (“TS”) and copyright laws are analysed, evaluated and compared with each other, in the context of the EU principles set out

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<sup>220</sup> Commission of the European Communities, ‘Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action’ COM (88) 172 final (“Green Paper (1988)”)

above. The purpose is to show, not only that EU copyright harmonisation is feasible, but that it should have been executed much sooner and in the form of a unitary regulation.

## 2.1 EU Harmonisation: a brief outline

It has been posited that ‘[h]armonization is the process by which the varying laws of different sovereign entities are changed to more closely reflect a common set of legal principles.’<sup>221</sup> It has been argued that harmonisation is not akin to international law-making because there are no uniformly agreed rules. The change in international legal rules, standards and processes are to foster equivalence and avoid conflicts.<sup>222</sup> It has also been suggested that harmonisation is a process to reduce, but not eliminate entirely, differences between legal systems.<sup>223</sup> Standardisation is distinguished as a method for creating uniform processes<sup>224</sup> seeking to eradicate, not reduce, differences leaving no scope for deference.

For EU lawmakers considering harmonisation, the Treaty of the European Union (“TEU”) promulgates ‘subsidiarity’, ‘proportionality’ and ‘competence’. Subsidiarity means that where Treaty aims can be achieved through national laws, these should prevail. Where a specific law passed under the Treaty is required to effect its aims, proportionality requires that the law-making process should not go beyond what is necessary to achieve these aims.<sup>225</sup> Laws may be proposed by the EU Commission and passed in conjunction with the Council of the European Union,<sup>226</sup> the European Parliament and other such stakeholders, but only where they act within

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<sup>221</sup> Timothy W Blakely, ‘Beyond the International Harmonization of Trademark Law: The Community Trade Mark as a Model of Unitary Transnational Trademark Protection’ (2000) UPennP (149)1 309, 312

<sup>222</sup> *ibid*

<sup>223</sup> *ibid*

<sup>224</sup> Albrecht Richen and Ansgar Steinhorst, ‘Standardization or Harmonization? You need Both’, (2005) BPTrends

<sup>225</sup> TEU, Art 5

<sup>226</sup> TFEU, Art 26(3)

the competences set down by the Treaty for the Functioning of the European Union (“TFEU”).<sup>227</sup>

In the EU, “harmonisation” can be posited as a three-pronged approach: approximation, harmonisation and judicial interpretation. EU approximation is the process of facilitating the functioning of the internal market.<sup>228</sup> Harmonisation promotes the creation of, and closer co-operation within, the internal market.<sup>229</sup> Judicial interpretation gives effect to treaty, regulation and directive aims, in conjunction with subsidiarity and proportionality principles when interpreting EU law.<sup>230</sup> Generally, when EU and national lawmakers are attempting to co-exist and create common rules, approximation is the process to achieve this through directives, such as the Database Directive.<sup>231</sup> When conforming national laws to one standard, albeit it with margins of appreciation, the process to achieve this is by a harmonising regulation/directive, such as *InfoSoc*.<sup>232</sup> However, lawmakers must be mindful that ‘true uniformity of law is unlikely given the varying political and legislative processes that each jurisdiction necessarily undertakes in its attempts to reach the target goals of harmonization’.<sup>233</sup> This is especially so for a Union encompassing two different legal systems and 27 national laws. Hence, EU law must encompass varying degrees of deference, even when attempting harmony.

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<sup>227</sup> TFEU, Arts 2-6

<sup>228</sup> Uroš Čemalović, ‘Framework for the Approximation of National Legal Systems With the European Union’s *acquis*: from a Vague Definition to Jurisprudential implementation’ [2015] CYELP 11 241, 243. An example of this is the Database Directive as this ‘is not a ‘unitary Community’ right’: Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20; *Football Dataco Ltd and Others v Sportradar GmbH and Others* [2012] ECLI:EU:C:2012:642 [31]

<sup>229</sup> See, for example, EU Trade Marks Regulation (EU) 2017/1001, Recital 5

<sup>230</sup> C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, [2006] ECLI:EU:C:2008:54 cited in Blakely, 313 (n 221)

<sup>231</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20

<sup>232</sup> Directive 2001/29/EC 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] OJ L167/10

## 2.2 EU Trade Marks and the EU Unitary Patent Package

### 2.2.1 EUTM and Patents Harmonisation: a brief history for comparative analysis

In terms of why EU lawmakers focused only on harmonising industrial property in the early years of the EEC, it can be argued that plans to harmonise EUTM laws and patents arose in 1959 to address trade deficit in the single market.<sup>234</sup> In terms of trade marks, a Draft, proposing to harmonise EECMS' TM laws<sup>235</sup> was prepared only seven years after the Rome Treaty was signed, and was published in May 1973.<sup>236</sup> It was deemed necessary because, at that point, trade marks were only protected in the country in which they were registered. As the EEC had seven different systems of registrations, it created an impediment for TM goods/services distribution in the common market. Hence, the first TMD approximating MS' national TM laws was passed in 1988<sup>237</sup> followed by the Community Trade Mark Regulation ("CTMR") in 2009 for MS to make a single application for a unitary TM enforceable across the EU.<sup>238</sup>

Likewise, for patents, the rationale for harmonisation was to reduce trade restraints caused by national patent systems which impeded the single market hypothesis underwritten in the Rome Treaty.<sup>239</sup> The idea of an EEC unitary patent turned to the wider European community wherein a First Preliminary Draft Convention for a European System for the Grant of Patents was

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<sup>234</sup> European Commission, 'Memorandum on the creation of an EEC trade mark' (1976) Supplement 8/76 SEC (76) 2462 [3] and Thomas R Nicolai, 'The European Patent Convention: A Theoretical and Practical Look at International Legislation' (1971) *The International Lawyer* 5(1) 135, 136

<sup>235</sup> Then: Belgium, France, Germany, Italy, Luxembourg and the Netherlands

<sup>236</sup> Three more countries had joined the EEC by this time: Denmark, Ireland and the UK.

<sup>237</sup> First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1

<sup>238</sup> Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1 [no longer in force from 30.09.2017] ("CTMR"). Subsequent revisions followed in 2015 and 2017: amending Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) [2015] OJ L341/21 [no longer in force from 30.09.2017] ("EUTMR (2015)") replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 ("Trade Marks Implementing Regulations (2017)") ("EUTMR (2017)")

<sup>239</sup> Thomas R Nicolai, 'The European Patent Convention: A Theoretical and Practical Look at International Legislation' (1971) *The International Lawyer* 5(1) 135, 136

published in 1970.<sup>240</sup> It made provisions for an international patent law, to be administered by a European Patent Office issuing European patents. It did not provide the unitary rights once envisaged by the EEC, though. Instead, the patent grant ‘would be the equivalent of a bundle of national patents governed by the respective national laws of each of the Contracting States to the Convention’.<sup>241</sup> Hence, patent protection is now administered nationally, internationally and Europe-wide. Moreover, although there is no EU-wide protection for patentability criteria, revocation or enforcement, the Unitary Patent Package (“UPP”), seeks to create a unitary right for its signatories. It is designed to supplement, not replace, national and pan-European patent grants. It does not create ‘a true EU patent or an EPC patent’.<sup>242</sup> Rather, it enables a group of CS, for example, EUMS, to agree to adhere to a set of unitary rules.<sup>243</sup> Applicants to the EPO will be able to obtain a single patent, in all EUMS. As with the EUTMR, the patent will have unitary effect in the EU in participating MS.<sup>244</sup>

The effect on copyright, of focusing on industrial property harmonisation opposed to literary and artistic works inclusion, is that there is far less protection for copyright in the EU, than there is for trade marks. At first blush, however, it may be considered that EU copyright directives/regulations have achieved more harmony than patents in the EU over the last 30+ years. This is certainly true, to some extent, given the fact that an EU-wide patent is not yet in operation and only one harmonising directive has been passed to deal with ethics-based considerations relating to patent applications for specific inventions.<sup>245</sup> The key point, though,

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<sup>240</sup> Intergovernmental Conference, ‘Reports on the First Preliminary Draft Convention for a European System for the Grant of Patents’ (1970) [4]

<sup>241</sup> *ibid*

<sup>242</sup> Gaurav Jit Singh, ‘Unified European Front: the road towards a European Unitary Patent’ (2014) Working Paper № 21, 7. Available online courtesy of The National University of Singapore <<http://aei.pitt.edu/63494/1/WP21-European-Unitary-Patent.pdf>>, 9

<sup>243</sup> *ibid*

<sup>244</sup> Spain and Croatia, currently, will not participate. Italy joined in 2015. See: European Commission, ‘Unitary Patent’ <[https://ec.europa.eu/growth/industry/intellectual-property/patents/unitary-patent\\_en](https://ec.europa.eu/growth/industry/intellectual-property/patents/unitary-patent_en)>

<sup>245</sup> Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L213/13 (“Biotech Directive”)



is that like TMs, plans had been made for unitary patent protection in the EEC's infancy. This was largely because it was implied by the Rome Treaty that a common market of trade would encompass industrial property.<sup>246</sup> This focus completely discounted the fact that literary and artistic property were also encompassed in that trade market, precisely because of that industrial property notwithstanding international agreements protecting such works. Poor Cinders was completely forgotten about! Moreover, from the time that the patents Working Group was commissioned to produce a Draft Treaty to a European Patent Law (1962)<sup>247</sup> to where we are now in terms of creating a UPP (60 years later), nothing was ever posited about the fact that removing trade barriers for industrial property across the whole of Europe would open up the market for many more creative works generated by use of those inventions. Moreover, inventors do have the opportunity of obtaining pan-European patent protection, albeit, without enforcement, and the likelihood remains of unitary patent protection for EUMS who have ratified the UPC Agreement. Copyright holders have no such option to protect their rights in their work unitarily. We may conclude, therefore, that copyright is the least harmonised given that there is still no EU/Europe-wide protection beyond piecemeal directives/regulations.

## 2.3 European Design Law

### 2.3.1 Community and Member State Design Law

Another industrial property right, Design Law, has been protected EU-wide since 2001. Design law is a key comparator for copyright law harmonisation because of their similarities in differing rights embedded within the IP protected “works” and, as will be discussed, because of its transition from piecemeal harmonisation to the Community Design Regulation being

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<sup>246</sup> Dennis Thompson, ‘The Draft Convention for a European Patent’ (1973) *The International and Comparative Law Quarterly* 22(1) 51, 53

<sup>247</sup> Nicolai, 136 (n 239)

passed. It can be argued that design law in the EU has been more complicated to harmonise than TMs. As before, harmonised design law, akin to TMs, was first posited in 1959 and a Working Party was established to explore its viability.<sup>248</sup> Its conclusion, though, was that ‘any attempt at harmonisation [of design laws] would be hopeless’.<sup>249</sup> This is similar to copyright law, in some respect, and goes some way to explaining the logic behind the initial piecemeal approach of copyright directives. Unlike concrete proposals for patent and TM harmonisation suggested by the Groups, differences in MS’ design laws were considered too numerous, both in their nation states, and between each other.<sup>250</sup> The Benelux states enjoyed a regional protection system, but the remaining states were limited to national laws.<sup>251</sup> The only possibility was a standalone Community Design Regulation (“CDR”) that would ‘co-exist with the national legislations’.<sup>252</sup> Priority was given to patent and TM harmonisation which ‘prevented...the Commission from taking an initiative on’ Design Law harmonisation.<sup>253</sup> Thus, a fallow period for EEC design harmonisation occurred. It took almost another 30 years for the EU to seriously re-consider harmonising design law across the EU. Determinative consultation began when the MPI, by

its own initiative elaborated an almost complete draft regulation for a Community design, which in July 1990 was submitted for discussion to a group of experts from European States. These experts, who included experts from the Commission, concluded that the principles set out in the draft could constitute a basis for future work at the Community level.<sup>254</sup>

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<sup>248</sup> (Along with patents and trademarks) Roscini Working Party Report on Industrial Designs, 2143/IV/62 of 17 December 1962

<sup>249</sup> David Stone, ‘Ten years of EU Design Law’ (2013) WIPO Magazine 6; available online <[www.wipo.int/wipo\\_magazine/en/2013/06/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2013/06/article_0006.html)>

<sup>250</sup> Commission, ‘Green Paper on the Legal Protection of Industrial Design’ (1991) III/F/5131191-EN, 8 (“Green Paper on Designs (1991)”)

<sup>251</sup> *ibid*, 2

<sup>252</sup> *ibid*

<sup>253</sup> *ibid*, 8

<sup>254</sup> *ibid*, 11

Eleven of the then, twelve,<sup>255</sup> MS had one design feature in common but there were a further nine elements that were incompatible with each other.<sup>256</sup> Similar to copyright, what may have been protected in one MS, may not have been protected in another. Other IP protections were rejected as certain elements could not be met such as “originality” in copyright, the ‘inventive step’ for patents, the problem with trade-marking shapes and the prohibition to invoke unfair competition in some CS. Unfair competition was not recognised in the UK/Ireland as it is a civil law concept but “passing off” could have been used to the same effect.<sup>257</sup> This is exactly the circumstances in which unharmonised aspects of copyright law finds itself throughout the EU and would have been more so during the time that the MPI was positing design law harmonisation. And yet, no one seemed concerned about unitary copyright harmonisation.

An initial proposal of an approximating Design Directive was posited favourably but not without problems. The territoriality principle threatened to usurp the proposal due to the fact that two rightholders may have had a design right for the same item and would both be able to prevent importation of the other’s design into their MS.<sup>258</sup> Notwithstanding this, to achieve industrial property design harmonisation, and against these criticisms, an EU Directive for the legal protection of designs, was passed in 1998.<sup>259</sup> Essentially, this was because ‘the differences in the legal protection of designs offered by the legislation of the Member States directly affect[ed] the establishment and functioning of the internal market’.<sup>260</sup> The same could be said for copyright law. However, copyright directives had been utilised for over 10 years by this point whilst nothing had been facilitated for design law. The Directive sought to ‘approximate

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<sup>255</sup> Greece did not have a specific design law

<sup>256</sup> Commission, Green Paper on Designs, 17 (n 250). These related to procedural issues concerning deposits, searches, examinations and oppositions, preliminary examinations (or not) and substantive issues for differing standards of originality and novelty, and duration of protection.

<sup>257</sup> *ibid*, 20-25

<sup>258</sup> Commission, Green Paper on Designs, 38 (n 250) utilising EEC, Art. 36

<sup>259</sup> Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs [1998] OJ L 289/28 (“Design Directive”)

<sup>260</sup> *ibid*, Recital 2

the design protection laws of the Member States<sup>261</sup> where the internal market was most directly affected.<sup>262</sup> Additionally, the Community Design Regulation<sup>263</sup> (“CDR”) came into law in 2001 for unitary protection of registered/unregistered designs, akin to the EUTMR, providing minimum harmonised standards. Hence, although it has been argued that design rights protection was part of a larger strategy for harmonising IPRs generally and facilitating the single market,<sup>264</sup> it is notable that this was yet another industrial property right that was harmonised whilst the piecemeal effect still dominated copyright harmonisation.

Notably, and in copyright’s favour, there are differences in design legal protection between MS, as in the TMD. Substantive rules of design law are harmonised, to a large degree, by the Design Directive.<sup>265</sup> However, ‘ownership, registration, procedures and remedies’ are left to individual MS.<sup>266</sup> It may be posited that design law is less harmonised than copyright. The piecemeal effect of copyright may be argued to have harmonised more elements of copyright law, than the Design Directive, through its 22 Directives/Regulations. Notwithstanding this, the Design Directive is supplemented by the option of registering an EU-wide design right. Unlike the Directive, the Regulation covers substantive, registration and procedural rules to facilitate a unitary design right across the EU. It promotes a ‘unified system for obtaining a

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<sup>261</sup> *ibid*, Recital 3

<sup>262</sup> *ibid*, Recital 5

<sup>263</sup> Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1 (“CDR (2002)”)

<sup>264</sup> Commission, Green Paper on Designs (n 292)

<sup>265</sup> Design Directive (n 259) with regards to ‘novelty’ Art 4 if ‘no identical design has been made available to the public before’, ‘individual character’ Art 5 if an informed user thinks it differs from something already published, ‘technical function and interconnection’ prohibitions Art 7 if the appearance is solely due to its technical function, or mechanically connected to another product so that that product can function (this should be protected by a patent as it would be an invention that was new and capable of industrial application (European Patent Convention 1973, Art 52(1)), ‘scope of protection’ Art 9 “scope” meaning that subsequent designs would have to produce a different impression on the informed user to avoid infringing the protected design (i.e. the informed user must not think it looks like the same design), ‘term of protection’ Art 10 giving 5 years’ protection renewable up to a maximum of 25 years, ‘validity’ and ‘limitations’ of the design right Art 11 and Art 13 respectively, ‘exhaustion’ Art 15 of the design right but not the product incorporating the design, and ‘copyright’ Art 17 ancillary copyright protection wherein the “originality” standards are determined by the Member State though, as will be seen in Chapter 4, this, in itself, has now been harmonised by the CJEU decision in *Infopaq International v Danske Dagblades Forening* [2009] ECR I-6569

<sup>266</sup> Commission, Green Paper on Designs (n 259)

Community design to which uniform protection is given with uniform effect throughout the entire territory of the Community’,<sup>267</sup> rather than part-approximation. Trade and competition were deemed to be ‘distorted by the large number of applications, offices, procedures, laws, nationally circumscribed exclusive rights and the combined administrative expense[s]’.<sup>268</sup> The Regulation was conceded as the only way that a unitary design right, under a single procedure and application, could be accomplished.<sup>269</sup> In addition to the harmonised protections as in the Directive, the Regulation also harmonised ‘ownership’<sup>270</sup> encompassing ‘proprietary rights’ (which also included ‘licensing’<sup>271</sup>), ‘applications’ for a community design and ‘registration’,<sup>272</sup> ‘surrender’ and declarations of ‘invalidity’<sup>273</sup> and ‘enforcement’ and ‘disputes’.<sup>274</sup>

Challenges, rendering the unitary prospects of this right ‘hopeless’, have been overcome to a workable extent within the EU to better protect designs and further the single market imperative. Through the CDR, there is now less disparity within the EU in the area of industrial design law. Thus, two out of the three main protections were harmonised in the EU whilst copyright struggled to keep up with its individual piecemeal approach.

## 2.4 Trade Secrets Directive

It can be argued that even trade secrets laws have been harmonised across the EU. Notwithstanding this, it can be argued also that trade secrets are a wider part of industrial

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<sup>267</sup> CDR (2002) (n 263), Recital 1

<sup>268</sup> *ibid*, Recital 3

<sup>269</sup> *ibid*, Recital 5

<sup>270</sup> *ibid*, Section 3

<sup>271</sup> *ibid*, Arts 27-33

<sup>272</sup> *ibid*, Titles IV and V respectively

<sup>273</sup> *ibid*, Title VI

<sup>274</sup> *ibid*, Title IX

property in terms of attracting investment for research and development (“R&D”). Prior to 2016, TS were protected in the EU by MS’ national laws, supplemented by international law. TRIPS protects ‘undisclosed information’ that is ‘not generally known or readily accessible’ which has ‘commercial value because it is secret’ providing ‘reasonable steps’ were taken ‘to keep it secret’ to avoid unauthorised use.<sup>275</sup> The Paris Convention 1883 is silent on TS. Instead, it requires CPs to protect against ‘unfair competition’ and behaviours ‘contrary to honest practice’.<sup>276</sup>

The Trade Secrets Directive<sup>277</sup> (“TSD”) is a new addition to EU law and was transposed into UK law by The Trade Secrets (Enforcement, etc.) Regulations 2018<sup>278</sup> and Irish law by the S.I. № 188/2018 - European Union (Protection of Trade Secrets) Regulations 2018. Prior to the TSD, TS in the UK/Ireland were only protected as such in the course of commercial endeavours,<sup>279</sup> through the common law of confidence.<sup>280</sup> However, the TSD may have widened the scope beyond commerciality because

where certain confidential information satisfies the definition of a "Trade Secret" additional procedural measures or remedies provided for under the UK Regulations may be available in addition to the protection which would otherwise have been available in a breach of confidence action.<sup>281</sup>

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<sup>275</sup> TRIPS, Art 39

<sup>276</sup> Paris Convention for the Protection of Industrial Property 1883, Article 10*bis*

<sup>277</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1 (“Trade Secrets Directive”)

<sup>278</sup> The Trade Secrets (Enforcement, etc.) Regulations 2018 (SI 2018/597) passed under the European Communities Act, § 2(2)

<sup>279</sup> *Faccenda Chicken Ltd v Fowler* [1986] IRLR 69 (CA)

<sup>280</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41

<sup>281</sup> Robert Williams and Will Smith (of Bird & Bird LLP, London), ‘Implementation of the Trade Secret Directive – Some comments from the UK’ *News Centre* (Jan 2020)

[www.twobirds.com/en/news/articles/2020/belgium/implementation-of-the-trade-secret-directive](http://www.twobirds.com/en/news/articles/2020/belgium/implementation-of-the-trade-secret-directive)

Common law elements of what may constitute a TS, in the leading authority *Faccenda Chicken*, have now been supplemented with a defined set of statutory legal principles.<sup>282</sup> The TSD essentially incorporated the TRIPS definition into EU law.<sup>283</sup>

It can be argued that the incentive for the Commission's TSD proposal was driven by a deficit in EU investment funding, for R&D innovations.<sup>284</sup> As part of the Europe 2020 strategy, the Commission was looking to drive more investment towards universities, industry and cross-collaborators. Due to economies of scale relating to time and resources, fragmented national markets would not reach the venture-capitalist financial markets, in the same way that a harmonised single market would delivering comparable protection.<sup>285</sup> Essentially, collaborators in one MS endeavouring to conduct research with those in others would be bound by their own national laws in terms of TS protection (unless the applicable law was pre-agreed in the R&D agreement). Fragmented laws equal fragmented markets. They are much riskier, from an investment viewpoint, in terms of the likelihood of confidential information leakage, corporate espionage, misappropriation and theft of valuable IP.<sup>286</sup>

The TSD attempted to harmonise the EU single market of TS protection to safeguard MS' confidential information unitarily and attract investment. In doing so, the Directive has harmonised the main areas of 'acquisition, use and disclosure',<sup>287</sup> 'measures, procedures and remedies',<sup>288</sup> 'provisional and precautionary measures',<sup>289</sup> 'measures resulting from a decision

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<sup>282</sup> Trade Secrets Directive, Art 2 (n 277)

<sup>283</sup> *ibid*, Art 2(1)

<sup>284</sup> Commission, 'Proposal for a Directive of the European Parliament and of Council' COM(2013) 813 final

<sup>285</sup> *ibid*, 2

<sup>286</sup> *ibid*, 6

<sup>287</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1, Chapter II

<sup>288</sup> *ibid*, Chapter III

<sup>289</sup> *ibid*, Section 2

on the merits of the case'<sup>290</sup> and 'sanctions, reporting and final provisions'.<sup>291</sup> As with the EUTMR and the CDR, harmonisation is not absolute. For the UK/Ireland, confidential information could still be enforced through the common law of confidence<sup>292</sup> and breach of contract. This is because the TSD and the UK Regulation/Irish SI create parallel, not replacement, rights. Statutory and common law work in tandem.<sup>293</sup> However, it has been suggested that the statutory definition is now narrower than that of the English common law.<sup>294</sup> This could still lead to disparity between MS via Ireland/Malta/Cyprus who still use common law torts and generally follow UK precedents.<sup>295</sup> Furthermore, the term 'reasonable steps' may be subject to varying degrees of interpretation until determined by the CJEU.

On a practical level, an increase of TS litigation during the last 18 months has been noted by the Belgian office of *Bird & Bird LLP*. It has been argued that 'trade secret holders have gained confidence through the impetus and solid legal framework provided for by [Belgian law].'<sup>296</sup> Furthermore, the 'reasonable steps' criterion in a recent Belgian case was deemed to include incorporating non-disclosure provisions into employment contracts and confidentiality provisions covering both during, and after, employment. Failure to do so, in this case, was

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<sup>290</sup> *ibid*, Section 3

<sup>291</sup> *ibid*, Chapter IV

<sup>292</sup> It can be argued that this also applies to Scotland. See *Lord Advocate v Scotsman Publications Ltd* (1989) SC (HL) 122

<sup>293</sup> The Trade Secrets (Enforcement, etc.) Regulations 2018 (SI 2018/597), § 3

<sup>294</sup> Robert Williams and Will Smith (of Bird & Bird LLP, London), 'Implementation of the Trade Secrets Directive – Some comments from the UK' *News Centre* (March 2020)

<[www.twobirds.com/en/news/articles/2020/uk/implementation-of-the-trade-secrets-directive-some-comments-from-the-uk](http://www.twobirds.com/en/news/articles/2020/uk/implementation-of-the-trade-secrets-directive-some-comments-from-the-uk)>. Presumably, this would also extend to Irish law.

<sup>295</sup> Robert Clark et al, *Intellectual Property Law in Ireland* (3rd edn Bloomsbury Professional Dublin 2010) 589; Cyprus see Antoniou McCollum & Co LLC 'Cyprus Trademarks: Registration, Revocation and Infringement' (7 October 2019) <[www.lexology.com/library/detail.aspx?g=6fdd3d16-8a60-434a-9318-441ed72ce6a1](http://www.lexology.com/library/detail.aspx?g=6fdd3d16-8a60-434a-9318-441ed72ce6a1)> and Malta where 'judgments handed down by UK courts are often persuasive although not legally binding' see Luigi A Sansone and Salomone Sansone, 'Trade mark litigation in Malta: overview' (1 January 2019) [https://uk.practicallaw.thomsonreuters.com/w-009-6190?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/w-009-6190?transitionType=Default&contextData=(sc.Default))

<sup>296</sup> Domien Op de Beeck and Alizee Jolie (of Bird & Bird LLP, Belgium), 'Implementation of the Trade Secret Directive – Some comments from Belgium' *News Centre* (Jan 2020) <[www.twobirds.com/en/news/articles/2020/belgium/implementation-of-the-trade-secret-directive](http://www.twobirds.com/en/news/articles/2020/belgium/implementation-of-the-trade-secret-directive)>



deemed not to be ‘reasonable’ for the purpose of fulfilling the legal criterion of the Directive.<sup>297</sup> Notwithstanding this, it has been suggested that a TFEU, Art 267 reference, on this criterion is likely.<sup>298</sup> After that, the interpretation will be binding on all EUMS. Hence, a unitary law of TS has been created for all EUMS to help reduce disparity in the internal market of TS. Again, we are still waiting for the same for copyright.

Ergo, it could be argued that the effect, on copyright, of focusing on industrial property law, is that copyright has been left fragmented across the EU. It has a piecemeal legal regime of over 22 legislative instruments rendering it wholly unsuitable for the 21<sup>st</sup> century internal market of copyright protection, encompassing multitudinous aspects of copyright works, fuelled by those very inventions that EU lawmakers sought to protect over 60 years ago. This is wholly unsuitable for a single market that already, with its piecemeal approach, generates over €300 million per year in creative industry exports: approximately 15% of all EU exports.<sup>299</sup> With a harmonised free-flowing single market of 27 EUMS encompassing the digital world of creative works as well, who knows what could be achieved?

## 2.5 Harmonising Copyright Law through early EEC Jurisprudence

### 2.5.1 Early ECJ jurisprudence exposing copyright single market fragmentation

In comparison to TMs, patents, design law and TS, copyright harmonisation/approximation has been fragmented, with protection provided through a series of directives/regulations passed since 1987. It might be argued that copyright harmonisation was not really brought to the minds

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<sup>297</sup> *ibid*

<sup>298</sup> Williams and Smith (n 294)

<sup>299</sup> EUIPO, ‘IPR-intensive industries and economic performance in the European Union (2019) [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/IPR-intensive\\_industries\\_and\\_economicin\\_EU/WEB\\_IPR\\_intensive\\_Report\\_2019.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/IPR-intensive_industries_and_economicin_EU/WEB_IPR_intensive_Report_2019.pdf)

of lawmakers until the Green Paper publication in 1988.<sup>300</sup> However, research shows this to be untrue. It can be argued that the CJEU can take much of the credit for openly facilitating EU copyright law harmonisation, as far back as 1971, indicting this point in time as ‘the real beginning of copyright jurisprudence of the European Court’.<sup>301</sup> Even though there had been no mention of copyright law at all, by EU lawmakers, the ECJ posited that copyright’s neighbouring rights could fall within the ambit of the Treaty of Rome 1957, Art. 36, alongside industrial and commercial property ‘[o]n the assumption that *those provisions may be relevant to a right related to copyright*’.<sup>302</sup> Furthermore, the ECJ suggested that preventing goods entering a MS market, by enforcing a right related to copyright, would effectively fragment the internal market.<sup>303</sup> This loophole ‘*would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market*’.<sup>304</sup> It can be argued that this ought to have been the first trigger, in the minds of EU lawmakers, for EU copyright harmonisation. This is especially poetic given that WGs, around that time, had already been commissioned to facilitate industrial property unitary harmonisation to prevent the very essence of what this case illuminated: single market fragmentation.

Nine years later, in *Coditel I* (1980),<sup>305</sup> the ECJ further held that a rightholder of film copyrights in one MS could prevent cable television diffusion companies in the same MS from broadcasting those television programmes and films in other MS. This was unless the broadcasts had been placed into the Community with the consent of the rightholder.<sup>306</sup>

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<sup>300</sup> Commission of the European Communities, ‘Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action’ COM (88) 172 final

<sup>301</sup> Adolf Dietz, ‘Copyright issues in the E.E.C.: The recent decisions of the European Court of Justice and of the Commission’ (1983) Copyright Soc’y USA 30 J 517

<sup>302</sup> C-78/70 *Deutsche Grammophon Gesellschaft v Metro-S.B.-Großmärkte*, [1971] EUECJ R, 499-500 [11] (author’s emphasis)

<sup>303</sup> *ibid*

<sup>304</sup> *ibid* [12] (author’s emphasis)

<sup>305</sup> C-62/79 *Coditel v Ciné Vog Films* [1980] ECR 881 (“*Coditel I*”)

<sup>306</sup> Under the doctrine of Exhaustion

Moreover, the Court reiterated the ECJ's earlier statement in *Deutsche Grammophon* and found that '...the Court's interpretation of Article 36 in regard to the protection of industrial and commercial property rights must also apply to literary and artistic property rights.'<sup>307</sup> Copyright, as well as its neighbouring rights, were protected under Art. 36. And yet, it took another 13 years of single market fragmentation to pass a directive preventing such fragmentation in the internal market of just broadcasts.<sup>308</sup>

Moreover, the GEMA<sup>309</sup> case further exposed the problem of fragmented copyright markets in the single market of collecting societies in 1981. The case concerned a German Copyright Collecting Society (GEMA) and inflated royalty fees for importations of sound recordings. The ECJ stated that 'the act of requiring a supplementary royalty without doubt constitute[d] an obstacle to the importation of the sound recordings in question'.<sup>310</sup> Despite arguments from GEMA and the Belgian and Italian governments to the contrary, the Court stated that national copyright protection could not be used as a tool to invoke separate royalty fees in different MS.<sup>311</sup> The rightholder could not claim back a higher royalty fee (as damages for copyright infringement) when sound recordings lawfully made available in the Community, were then re-imported more cheaply, back into the country of the rightholder.<sup>312</sup> Once again, though, it took almost 35 years to actually codify regulation in the internal market of collective rights management, after this decision was published, and, as will be seen in Chapter [5.1], only then to minimal standards.<sup>313</sup> Hence, the ECJ stated with authority, as early as 1981, that 'the

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<sup>307</sup> C-62/79 *Coditel v Ciné Vog Films* [1980] ECR 881, 893

<sup>308</sup> 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 L248/15

<sup>309</sup> C-55/80 and 57/80 *Musik-Vertrieb Membran v GEMA* [1981] ECR 147

<sup>310</sup> *ibid*, 154

<sup>311</sup> *ibid*

<sup>312</sup> *ibid* [15]

<sup>313</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72 ("CRMD")

principle of the territoriality of copyright laws always prevail[ing] over the principle of freedom of movement of goods within the Common Market cannot be accepted'.<sup>314</sup> Additionally, the *Imerco* case (1981)<sup>315</sup> further exposed single market fragmentation in the internal market of sub-standard<sup>316</sup> specially commissioned products. *Imerco* prevented the debarring of on-sales of goods, exhausted in the Community, by permitting sales of the sub-standard products in the UK, as well as the better-quality products in Denmark. The court re-stated the ECJ opinion in *Coditel I* and *GEMA* that 'Article 36 d[id] not permit copyright to be used as an obstacle to the marketing of goods which ha[d] been sold with the consent of the author'.<sup>317</sup> In *Coditel II* (1982)<sup>318</sup> the Court confirmed the ECJ's tentative hypothesis in *Deutsche Gramophon*, and the clear rulings in *Coditel I*, *GEMA* and *Imerco* that literary and artistic works fell within the ambit of the Art. 36 EEC prohibition, along with industrial and commercial property. And yet, despite these clear judicial rulings openly exposing single market copyright fragmentation: nothing.

It has been suggested that the Court's observation in *Coditel II* was a thinly veiled hint to the importance of cultural backgrounds appurtenant to copyright, particularly in the film industry.<sup>319</sup> This is logical because differences in the cultural backgrounds of MS' copyright laws meant that it may have been difficult to consider the justifications for industrial property unity, and apply those same justifications to copyright protection for literary and artistic works, when no such cultural considerations existed for industrial property. Professor Dietz summarises this by stating that:

copyright questions to a large extent are related to questions of cultural policy and further to the question of the existence or nonexistence of a flourishing cultural industry. It is in this respect...we have to be very careful in applying solutions

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<sup>314</sup> C-55/80 and 57/80 *Musik-Vertrieb Membran v GEMA* [1981] ECR 147, 162 [12]

<sup>315</sup> C-58/80 *Dansk Supermarked A/S v A/S Imerco* [1981] ECR 181

<sup>316</sup> Commonly referred to as "seconds" in the UK

<sup>317</sup> C-58/80 *Dansk Supermarked A/S v A/S Imerco* [1981] ECR 181, 186-7

<sup>318</sup> C-62/81 *Coditel v SA Cine Vog Films* [1982] ECR 3381 ("Coditel II")

<sup>319</sup> Dietz, 521 (n 301)

stemming from other fields of intellectual property, and particularly patent and trade mark law.<sup>320</sup>

Professor Harris also confirms that:

the rigid application of the provisions of the Treaty to literary and artistic works, as though they were tins of coffee or packets of tablets, would run counter to the social and cultural, as distinct from the commercial and economic, objectives of the EEC Treaty.<sup>321</sup>

Understandable this may be. However, the ECJ explicitly stated that all IP protections fell within the ambit of Art. 36. Hence, it is posited that the ECJ's first preliminary reference to copyright and Art. 36, in *Deutsche Grammophon* in 1971,<sup>322</sup> denotes when the first seeds<sup>323</sup> of copyright harmonisation were sprinkled. It could be argued that the four cases after *Deutsche Grammophon*,<sup>324</sup> between 1980–1982, was another point at which those seeds should have germinated fully in the minds of EEC lawmakers into preparing for a unified Copyright Regulation, around the time that the harmonising TMD was passed in 1988. Given the explosion of creative goods and services in the internal market, fuelled by all those inventions and trade-marked companies that the Commission sought to facilitate registration for within the EU/Europe, it is very difficult to justify the sole piecemeal approach to copyright harmonisation taken by the Commission.

This author posits that despite numerous missed opportunities to at least consider harmonising copyright when unitary industrial property protection was being drafted, this ought to have been the last trigger for serious negotiations for a unitary EUCR. Moreover, it must be argued that the Commission could have made provisions for negotiations for a harmonised EUCR, at

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<sup>320</sup> *ibid*, 518

<sup>321</sup> Bryan Harris, 'Community Law and Intellectual Property: Recent Cases in the Court of Justice' (1982) 19 CMLR 62(1)

<sup>322</sup> C-78/70 *Deutsche Grammophon Gesellschaft v Metro-S.B.-Großmärkte*, [1971] EUECJ

<sup>323</sup> Using the words of Dr Eleonora Rosati, 'Judge-Made EU Copyright Harmonisation: the Case of Originality' (2012) EUI 1, section 1(2) 48

<sup>324</sup> C78/70 *Deutsche Grammophon Gesellschaft v Metro-S.B.-Großmärkte*, [1971] EUECJ

the very latest, just after the 1988 Commission Green Paper<sup>325</sup> was published. After all, it condemned the then current law's unworkability in a single market and, which, had been consistently exposed by the then ECJ for 17 years prior to that Green Paper. The question remaining, of which there has been no satisfactory answer to, as yet, is this: why did the Commission not propose a harmonised Copyright Regulation instead of leaving the CJEU to just interpret numerous directives? We are left to extrapolate that their focus was purely on industrial property, particularly given that recent published figures show that patents and TMs alone contribute to over 50% of the EU's GDP.<sup>326</sup> This must lead us to question where copyright might have been, now, in terms of EU GDP contribution, had it garnered the same legislative focus.

### 2.5.2 21<sup>st</sup> Century case law positing further EU copyright harmonisation

Notwithstanding clear EU legislative failures to produce a unitary copyright law, it can be argued that two aspects of EU law have furthered copyright harmonisation in more recent years: the *InfoSoc Directive*<sup>327</sup> and its interpretation, by the CJEU, through judicial rulings. *InfoSoc* is a harmonising directive intended to harmonise digital and traditional copyright works (i.e. on- or off- line) due to the generously worded Art. 1: 'This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.' Furthermore, it was to be interpreted in line with directives that had already been enacted (Software, Database and Term Directives).<sup>328</sup>

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<sup>325</sup> Commission of the European Communities, 'Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action' COM (88) 172 final

<sup>326</sup> EUIPO, 'Intellectual property rights strongly benefit the European economy, EPO-EUIPO study finds' *Press release* (25 September 2019) [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/IPR-intensive\\_industries\\_and\\_economicin\\_EU/IP\\_Contribution\\_Report\\_092019\\_pr\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/IPR-intensive_industries_and_economicin_EU/IP_Contribution_Report_092019_pr_en.pdf)

<sup>327</sup> Directive 2001/29/EC 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] OJ L167/10

<sup>328</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42, Art. 1(3)); Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L 290/9, Art. 6 (in terms of photographs ("Duration Directive

Hence, in *Infopaq v Danske*,<sup>329</sup> the court stated that “works” interpreted within the meaning of *InfoSoc* are original if they are the ‘author’s own intellectual creation’ (see Chapter [3.2]). This was because the legisprudence already encompassed this definition. The key point, therefore, is that prior to this case, “originality” in “works ” would have been interpreted on a case by case basis if they fell outside the scope of software, databases or photographs. *Infopaq*, however, has harmonised the originality standard given that it applies to all works.

In *FAPL v QC Leisure*,<sup>330</sup> the courts, once again, prevented anti-competitive behaviour<sup>331</sup> and single market fragmentation in the field of satellite broadcasting by stating that national legislation prohibiting foreign decoding devices prevented EU users from accessing satellite and broadcasting services within the EU outside the MS in which the device was licensed.<sup>332</sup> This, in itself, was prohibited without justification.<sup>333</sup> Effectively, such licensing restrictions partitioned the single market impeding the free flow of goods and services.<sup>334</sup> Given that there were no ‘overriding reasons in the public interest’, such action to prevent access to legitimately placed goods in the single market was disproportionate.<sup>335</sup> The means did not justify the end which resulted in single market fragmentation purely for profit maximisation. Moreover, in *Painer v Standard*,<sup>336</sup> the court stated that

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(1993)”; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20, Art. 3(1)

<sup>329</sup> C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569

<sup>330</sup> C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] E.C.D.R. 11

<sup>331</sup> TFEU, Arts 101 and 102

<sup>332</sup> *ibid.*, [86]-[87]

<sup>333</sup> TFEU, Art. 56

<sup>334</sup> (C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] E.C.D.R. 11 [92]

<sup>335</sup> *ibid.*, [93] and [116]

<sup>336</sup> C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533

when adopting measures to implement EU legislation, national authorities must exercise their discretion in compliance with the general principles of EU law, which include the principle of proportionality.<sup>337</sup>

Hence, MS do not have *carte blanche* when interpreting laws not yet set down in CJEU jurisprudence. Finally, a key element to note stated by the court in *Football Dataco v Sportradar*<sup>338</sup> is that not all current directives are designed to create unilateral harmonisation. One such directive is the *Database Directive* whereby its only unilateral requirement is that MS provide copyright protection for databases.<sup>339</sup> This is important, in terms of positing an EUCR, because this shows that even where some form of EU harmonisation already exists, it is not always unilateral. Hence, it is argued that, due to the growth and expansion of the EU, in terms of its citizens, cultures and goods/services since this directive was passed, this may be one area whereby a simple re-casting may not be adequate now to sufficiently protect rightholders within the EU, particularly, and as will be shown in Chapter 5, in the wake of borderless digital work expansion.

In all cases discussed, it can be argued that the court's objectives for harmonisation can be identified as follows: furtherance of the single market<sup>340</sup> prevention of anti-competitive behaviours,<sup>341</sup> upholding remuneration recompense for rightholders as required by the directives<sup>342</sup> and proportionality.<sup>343</sup> Given this raft of case law, which will no doubt increase as new works continue to flood the single market, it must be argued that the time has come for

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<sup>337</sup> *ibid*, [105]

<sup>338</sup> C-173/11 *Football Dataco Ltd and Others v Sportradar GmbH and Others* [2012] EUECJ

<sup>339</sup> *ibid*, [25]

<sup>340</sup> Former EEC, Art. 36

<sup>341</sup> TFEU, Art, 101 and 102

<sup>342</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 38; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20, Recital 48; 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 L248/15, Recitals 5, 25 and 29

<sup>343</sup> TEU, Art. 5



unitary copyright harmonisation. Moreover, it may be argued that the time has also come to revisit some of the EU's long-standing directives to analyse if they are still fit for purpose in this modern digital era.

In view of this, it must be argued that EU lawmakers could, and should, have created a unitary copyright regulation over 30 years ago. In the wake of further directives and continual upwards harmonisation by the CJEU, there is now no justifiable reason for not doing so.

## 2.6 Comparative analysis of unitary EU Trade Mark laws, the Unitary Patent Package, Design law, Trade Secrets, International law and Copyright Directives

In 1976, it was identified that '[t]he work on the creation of a Community trade mark law should therefore be pursued *as a matter of urgency* and should be brought to an early conclusion'.<sup>344</sup> This is synonymous to what was stated 12 years later in the 1988 Commission Green Paper on copyright.<sup>345</sup> Yet, no such unitary copyright directive or regulation was forthcoming. Instead, the piecemeal approach which, to date, has existed for over 30 years culminating in over 20 different pieces of copyright legislation, was adopted. It might be argued that the reason for this is due to the disparity in the number of works potentially protectable by each IPR. TM law protects industrial property within two categories only: goods and services. These are registered under the internationally recognised Nice Classification system.<sup>346</sup> The registers in EU/international countries can be checked online to see if a mark is

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<sup>344</sup> Commission of the European Communities, 'Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action' COM (88) 172 final [33]

<sup>345</sup> *ibid* [1.6.1]

<sup>346</sup> WIPO-administered Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks 1957

already registered against products/services.<sup>347</sup> The caveat is that UTM may have prior rights and are not capable of being checked in advance of an application to the EUIPO just by looking at a register. The prior right may only come to light if the EUTM application is opposed.<sup>348</sup> It may be argued, though, that UTM are more likely to apply to national, not EU-wide, undertakings. Furthermore, a UTM, protected by “passing off” in the UK/Ireland/Cyprus/Malta (or unfair competition elsewhere in the EU), has to be recognisable amongst the relevant public.<sup>349</sup> It could be argued that this is more likely to be the national, not EU-wide, public.

Similar issues occur for industrial design law. Registers can be checked for comparable designs under the Locarno Agreement (1968) though with the same caveat for unregistered designs as those in UTM. These may have a prior right not capable of being checked on the register in advance of an application. Notwithstanding this, similar to the EUTMR, the CDR has safeguards to prevent this. To oppose a CDR application, the unregistered design must have been published within the Community ‘in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialised in the sector concerned, operating within the Community’.<sup>350</sup> Likewise, for patents, the EPO also administers a register for easy checking.<sup>351</sup> Notwithstanding this, as with TM and designs, holders of national prior rights may oppose the European application. However, the consequences of the ‘patentability of the invention in the designated contracting states are

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<sup>347</sup> NB it would not show whether or not the mark was in use, in an unregistered form, and thus capable of usurping a later registration. Also, common marks may return too many results for a search to be conducive.

<sup>348</sup> Regulation (EU) No 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1; Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2017] OJ L3/1, Art 8(4)

<sup>349</sup> *Reckitt & Colman Ltd v Borden Inc* [1990] 1 WLR 491; *Fenty v Arcadia Group Brands Ltd (t/a Topshop)* [2015] EWCA Civ 3; [2015] EMLR 12 (CA (Civ Div))

<sup>350</sup> Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1, Art 11

<sup>351</sup> EPO, ‘European Patent Register’ <[www.epo.org/searching-for-patents/legal/register.html](http://www.epo.org/searching-for-patents/legal/register.html)>. This does not affect claims of prior right though see EPO, ‘European Patent Guide: How to get a European patent’ <[www.epo.org/applying/european/Guide-for-applicants/html/e/ga\\_c3\\_3\\_2.html](http://www.epo.org/applying/european/Guide-for-applicants/html/e/ga_c3_3_2.html)>

assessed by the competent national courts after the European patent has been granted'.<sup>352</sup> Furthermore, although statutory interpretation of 'novelty',<sup>353</sup> 'inventive step',<sup>354</sup> and 'industrial application',<sup>355</sup> are wide-ranging, arguably, they are not as broad as works in the creative industries. In contrast, courtesy of those novel industrial, mechanical and electronic inventions, works emanating from the creative industries may now be innumerable, surpassing industrial works: like Cinderella at the Ball.<sup>356</sup> Notwithstanding this, the Commission commented as early as 1985 that

[The Community Trademark System] has recently been further complicated by the need to adapt existing trademark systems to technological change in a number of areas including computer software, microcircuits and biotechnology.<sup>357</sup>

Just as copyright works have expanded, so too have industrial property works. The Commission was able to adapt to pass unifying laws in that increasingly diverse area though. It could be argued that they ought to have considered harmonising copyright too.

However, copyright law protects literary and artistic works in a minimum of eight categories of work (UK/Ireland) and, at the opposite end of the spectrum, any work (France). No such registers exist for protected works;<sup>358</sup> nor is there any requirement for this.<sup>359</sup> With the inability to check for protected works, and the innumerable amount of works that could be protected, it may be argued that a unitary copyright regulation would have taken far too long to deal with concerns requiring 'urgent action'.<sup>360</sup> This is especially so given that, although there were only

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<sup>352</sup> *ibid*

<sup>353</sup> European Patent Convention 1973, Art 54 ("EPC (1973)")

<sup>354</sup> *ibid*, Art 56

<sup>355</sup> *ibid*, Art 57

<sup>356</sup> Z Chafee, 'Reflections on the Law of Copyright' (1945) 45 Colum L Rev 503

<sup>357</sup> Commission, 'Completing The Internal Market' (White Paper) COM (85) 310 def [147]

<sup>358</sup> The US requires registration for rights holders wishing to pursue legal action. However, no such registration of the work is required for copyright to arise.

<sup>359</sup> Berne Convention for the Protection of Literary and Artistic Works 1886, Art 5(2)

<sup>360</sup> Commission of the European Communities, 'Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action' COM (88) 172 final [3.9.1]

eight years between the Commission's proposal for a unitary TMD, and its adoption into law, negotiations had been ongoing, periodically, for 20 years prior to the Commission's 1980 proposal. The Commission, the Council and the European Parliament had 20 years' worth of drafts, debates and Working Group analyses to use as benchmarks for the Directive. As we have seen, no such attention had been given to copyright law, despite numerous ECJ judgments exposing single market copyright legal deficiency. The 1985 White Paper<sup>361</sup> was the first official publication, by the Commission, recognising that some form of EEC-wide protection for certain aspects of copyright law protected works was necessary. This was reiterated, with much greater clarity, in the 1988 Green Paper.<sup>362</sup>

With this in mind, and with the rate that electronics and the computer chip were accelerating the ability to produce creative works at speed, it was little wonder that the Commission had to act more quickly than perhaps they would have done had they addressed the issue much sooner. It could be argued that this ought to have been in 1959 given that the onset of digitisation had arisen by then. Furthermore, it is posited that, at the very least, a unitary Copyright Regulation ought to have been negotiated at the same time as passing individual directives from 1987 onwards. Lawmakers had realised by then that 'technological advances and new scientific discoveries ha[d] resulted in an ever-increasing number of applications for patent protection'.<sup>363</sup> Furthermore, national patent offices were struggling to cope with the number of patent applications due to the number of searches and the complexity of the inventions involved.<sup>364</sup> Given the onset of digitisation in the 1950s, there is little doubt that technological advances were a contributing factor to the number of inventions coming through the patent

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<sup>361</sup> Commission, 'Completing The Internal Market' (White Paper) COM (85) 310 def [149] ("White Paper (1985)")

<sup>362</sup> Commission of the European Communities, 'Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action' COM (88) 172 final [3.9.1]

<sup>363</sup> Nicolai, 136 (n 239)

<sup>364</sup> *ibid*

offices. It is suggested that the clear increase in patentable inventions throughout the 1950s, which would have facilitated and accelerated creative endeavours, ought to have been the catalyst for negotiating and drafting a unitary copyright regulation or directive, along with the EUTMD, the EPC and the CDR.

It may be argued that another reason for not adopting a unitary Copyright Regulation at that time, in favour of industrial property harmonisation, was because copyright-protected works automatically enjoyed protection in EUMS under various international copyright conventions. No registration was required for such works to be protected in those countries.<sup>365</sup> TM and patents, on the other hand, could not be protected unless they were registered in the country in which protection was sought. Also, at the time of negotiations, as noted by the 1973 Working Party, not all MS were CPs to all the industrial property international conventions. Notwithstanding this, the same could be said for the copyright conventions. Although all EECMS were signatories to the main copyright conventions, this only guaranteed a minimum level of rights. Moreover, it did not prevent more favourable trading terms between CPs until TRIPS was signed into international law in 1995. Furthermore, rightholders could not enforce their rights, or access MS works, through litigation in their domestic courts directly under *Berne*.<sup>366</sup> Nor could claimants fight for their rights directly. The MS had to take the case to the ICJ, on behalf of the claimants, which would have delivered non-binding opinions. As aforementioned, this has never been executed before.<sup>367</sup> None of this was ever suitable for an internal market that has always sought to increase in size and international standing.<sup>368</sup>

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<sup>365</sup> Berne Convention for the Protection of Literary and Artistic Works 1886, Art 5(2)

<sup>366</sup> *ibid*

<sup>367</sup> International Court of Justice, ‘Judgments, Advisory Opinions and Orders’ <[www.icj-cij.org/en/decisions](http://www.icj-cij.org/en/decisions)> (as at 30 June 2022)

<sup>368</sup> Rome Treaty 1957, Preamble ‘to lay the foundations of an ever closer union among the peoples of Europe’; ‘to eliminate the barriers which divide Europe’; ‘to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade’; ‘to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles

As with previous criticisms of the industrial property treaties, a clear advantage for the EU CR lies in enforcement. Hence, the effect industrial property harmonisation has had on current EU copyright is that, unless encompassed within a unitary copyright directive, enforcement for unauthorised use of unharmonised works must begin in the country where the infringement took place, not in the country where copyright arose in the work.<sup>369</sup> For industrial property infringement however, encompassed in the EUTM/TMR/CDR, enforcement can take place in the claimant's MS or that of the defendant.<sup>370</sup> Furthermore, the only international copyright agreement that has any form of dispute resolution encompassed within its provisions, is TRIPS. This Agreement was still being negotiated at the time of the 1988 Green Paper.<sup>371</sup> Even now, rightholders seeking redress for copyright infringement occurring in the signatory cannot bring an action under TRIPS through their national courts. The CP, itself, (i.e. the signatory) must bring the action on behalf of the claimant. This is in the form of an alternative dispute resolution process utilising a two-stage process via the WTO Dispute Settlement Body.<sup>372</sup> Although the WTO gives indicative times of around 15 months for resolution, not all disputes are settled so easily. Some WTO disputes are still ongoing from as far back as 1995.<sup>373</sup> This would have been a completely unworkable solution for a single market encompassing 12 MS back in 1988 (had it been an option), let alone now in a political alliance of over 500 million citizens<sup>374</sup>

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of the Charter of the United Nations'; 'calling upon the other peoples of Europe who share their ideal to join in their efforts';

<sup>369</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, Art 8

<sup>370</sup> Regulation (EU) No 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1; Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2017] OJ L3/1, Arts 124-125; also pursuant to the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1. This is otherwise known as 'forum shopping' see Neil Jenkins (of Bird and Bird LLP, London), 'Forum Shopping Under the CTM Regulation' *News Centre* (February 1996) <[www.twobirds.com/en/news/articles/1996/forum-shopping-under-the-ctm-regulation](http://www.twobirds.com/en/news/articles/1996/forum-shopping-under-the-ctm-regulation)>

<sup>371</sup> Commission of the European Communities, 'Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action' COM (88) 172 final

<sup>372</sup> WTO, 'A unique contribution' <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)>

<sup>373</sup> *ibid*

<sup>374</sup> Europa, 'Living in the EU' (6 August 2020) <[https://europa.eu/european-union/about-eu/figures/living\\_en](https://europa.eu/european-union/about-eu/figures/living_en)>

encompassing 27 MS. Moreover, this is particularly acute given that claimants cannot even seek compensation through this route.<sup>375</sup> Although the “reference” system under TFEU, Art 267 can be a long process taking up to 2 years, at least MS will have a resolution within that timeframe. Furthermore, the decision binds all MS thus giving legal certainty for future trading within the single market. No such certainty can be guaranteed under TRIPS. Hence, it can be argued that prioritising industrial property harmonisation over copyright has impacted on the way that copyright harmonisation has been left to a piecemeal approach as, clearly, EU lawmakers have not had the time or resources to devote to resolving copyright harmonisation issues when they ought to have: over 30 years ago.

Notwithstanding this, a further point in favour of not drafting a unified Copyright Regulation, certainly in 1988, was that the elements of TM protection were essentially the same in all MS: distinctiveness, absolute and relative grounds for refusal, validity, revocation, infringement and so forth. Furthermore, once a TM is registered in the EU, it will be upheld throughout the Union (unless an objection is raised as to its validity) regardless as to what that product or service is. The same cannot be said for copyright. It is acknowledged that once the originality threshold is reached, the work is *prima facie* copyright protected, provided it is capable of forming the subject matter of copyright protection. And therein lies the problem. As will be shown in Chapter [4.2], a work in one MS, may not be recognised as being copyrightable in another. This is not the same as challenging the validity of a TM, design or patent registration on specific grounds. AVWks, for example, in one MS may not be protected, or accessible, in another; yet the hard copy equivalent (CD/DVD), or satellite version, is.<sup>376</sup> You cannot access Netflix subscription services in Romania, for example, if you are a French citizen based in France.

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<sup>375</sup> WTO, ‘The process — Stages in a typical WTO dispute settlement case’  
<[www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s9p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm)>

<sup>376</sup> C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure Ltd* [2011] ECDR 11

Even if you are in Romania on a temporary basis, you will still be accessing Netflix via your French subscription.<sup>377</sup> Currently, the online AVWK market in the EU has been fragmented thus directly contradicting, not only the CJEU in *FAPL v QC Leisure*,<sup>378</sup> but also the same court some 50 years ago in *Deutsche Grammophon*.<sup>379</sup> This was a key point then and is still not fully resolved. This impedes the single market imperative: the very thing that EU lawmakers were determined to eradicate in the 1959 industrial property discussions. Some 60 years later, the market is still being carved up to suit various rightholders at the expense of others. These outstanding issues could make a unitary copyright regulation more difficult to achieve.

Ultimately, it is very difficult to show, with concrete authority, which would have been the better route at the outset. It may be argued that it would have taken much longer for a harmonised copyright regulation to have been passed than individual directives. This was undesirable given the pressing need to address concerns requiring ‘urgent action’<sup>380</sup> of certain copyright legal issues outlined by the 1988 Green Paper. Notwithstanding this, there was nothing preventing lawmakers from negotiating a Copyright Regulation contemporaneously to enacting directives. After all, it was during this time that the monumental WTO TRIPS agreement was negotiated. TRIPS encompassed all areas of IP law, as well as aspects of anti-competitive practices and confidential information, not just copyright law. The Tokyo Round of negotiations occurred between 1974-1979 and the Uruguay Round of negotiations between 1985 and 1993. Collectively, it took 13 years to negotiate TRIPS between 123 single CPs, although, it is recognised that the GATT provisions may have provided a benchmark for TRIPS.

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<sup>377</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168/1 (“Portability Regulation”)

<sup>378</sup> C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure Ltd* [2011] ECDR 11

<sup>379</sup> C-78/70 *Deutsche Grammophon Gesellschaft v Metro-S.B.-Großmärkte*, [1971] EUECJ R-78/70

<sup>380</sup> Commission of the European Communities, ‘Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action’ COM (88) 172 final [3.9.1]



In comparison, the EEC had only 12 MS at that time. It is suggested that it could have taken steps to negotiate a Copyright Regulation during this time, as well as passing directives for the most pressing issues caused by copyright territoriality. Furthermore, the EPC was passed in 1973, after years of negotiations, instigated by the EEC. A Community Patent Convention had also been proposed, and drafted, during the mid-70s. Also, the first harmonising TMD was introduced to the EEC on the 21<sup>st</sup> December 1988. Although it followed 20 years of periodic discussions and drafting, the Directive itself, only took 8 years from its initial proposal on the 25 November 1980 to adoption by the Council on the 21 December 1988. It is posited that a copyright regulation could also have been negotiated, using the early directives as benchmarks for discussion. After all, the latest revision of the TMD only took around nine years: proposed in 2007 and implemented in 2016.

It can be further argued that the Commission proposal for the EPC and the early 1988 TMD, adopted the ‘proportionality’ principle of not going beyond what was necessary to achieve certain objectives, namely ‘those national provisions of law which most directly affect free movement of goods and services’.<sup>381</sup> Similarly, the 1988 Green Paper proposing some form of copyright harmonisation outlined that

Community legislation should be restricted to what is needed to carry out the tasks of the Community. Many issues of copyright law do not need to be the subject of action at Community level...[s]ince all the Member States adhere to the Berne Convention for the Protection of Literary and Artistic Works...Many of the differences that remain have no significant impact on the functioning of the internal market or the Community’s economic competitiveness.<sup>382</sup>

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<sup>381</sup> Commission, ‘New trade-mark system for the Community’ COM (80) 635 final, 8

<sup>382</sup> Commission of the European Communities, ‘Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action’ COM (88) 172 final [1.4.9] 7

Given the number of directives and regulations that were subsequently passed, this was clearly an incorrect assessment. Furthermore, as far back as the SEA 1986, EU lawmakers had closer trade unity and cooperation in mind when the SEA outlined that ‘[t]he responsibility incumbent upon Europe [was] to aim at *speaking ever increasingly with one voice*.<sup>383</sup> Crucially, if sufficient protection was available in the international treaties, why did the Commission et al unitarily harmonise industrial property across the EU in the first place when these also had two international treaties,<sup>384</sup> and which had also been in place since the 19th Century? Clearly, by the very fact that these were insufficient to avoid fragmentation in a single market of IP industrial property protection, so too was Berne.

It must, therefore, be concluded that the Commission ought to have known that international minimum standards were insufficient for a European Union of nations trading unilaterally in a single market ‘with one voice’.<sup>385</sup> After all, this is what instigated EU and European institutions to pass the EUTMD/TMR, the CDR and the EPC. Furthermore, it can be argued, more forcefully, that the EU has now progressed from solely an economic, to a political, union as

...the Treaty of Maastricht...marked a shift in European integration, with the creation of an economic and monetary union and the passage from an essentially economic community to a political union...<sup>386</sup>

Its trading laws, which cause maximum impediment to the single market, should reflect this.

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<sup>383</sup> Single European Act 1986, Preamble (Author’s emphasis)

<sup>384</sup> Paris Convention for the Protection of Industrial Property 1883; Madrid Agreement Concerning the International Registration of Marks (1891)

<sup>385</sup> *ibid*

<sup>386</sup> European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286(INI)) <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0055+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0055+0+DOC+XML+V0//EN)>

## 2.7 CONCLUSION

This chapter has endeavoured to answer the first three research questions outlined in the introduction. It contains analysis of the processes, and the policy objectives, for passing the EPC, the EUTMD/TMR, the CDR and the TSD. The author has also considered early ECJ copyright cases from the 1970s-80s and modern CJEU case law to posit a critical evaluation that EU lawmakers ought to have taken steps to pass an EU Copyright Regulation contemporaneously with the copyright directives. Had it done so, it could have been quicker and easier with 12 MS trading in an economic market, rather than now with 27 MS intertwined in a political alliance along with EEA/EFTA MS. The parting decree of this chapter is best said in the words of the EU Commission themselves:

This [trade secrets] proposal is one further deliverable on the commitment of creating a single market for intellectual property.<sup>387</sup>

Clearly, ‘a single market for intellectual property’ must denote that unitary copyright law is on the horizon.

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<sup>387</sup> EU Commission, ‘Proposal for a Directive of the European Parliament and of Council’ COM(2013) 813 final, 3

# CHAPTER THREE

## Critical analysis of Wittem's draft European Copyright Code

*Who sees further,  
the DWARF or the GIANT?  
Why the dwarf of course,  
when astride the shoulders of the  
giant!*<sup>388</sup>

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<sup>388</sup> Adapted from Shayner Z Leiman, *Dwarfs on the Shoulders of Giants* (Tradition 27 № 3 1993) 92. Available online:

[http://leimanlibrary.com/texts\\_of\\_publications/60.%20Dwarfs%20on%20the%20Shoulders%20of%20Giants.pdf](http://leimanlibrary.com/texts_of_publications/60.%20Dwarfs%20on%20the%20Shoulders%20of%20Giants.pdf).

### 3. INTRODUCTION

Two serious attempts have been made to suggest harmonising EU copyright law: one dialectic in a collection of essays edited by Tatiana-Elena Synodinou,<sup>389</sup> the other physically in the form of a part-drafted European Copyright Code (“ECC”) by the Wittem Group (“Wittem”).<sup>390</sup> Chapter 3 critically analyses Wittem’s 2010 draft Code, in the wake of judicial development, and in the context of relevant parts of Synodinou’s dialectic analysis of European copyright law. The purpose of this evaluation is to expose key areas of non-harmonised copyright law by critically analysing what proposals have already been suggested for EU copyright harmonisation, and to deduce where significant gaps remain. To date, Wittem’s Code is the only attempt at producing a draft unitary EU copyright code for legislative consideration and, along with Synodinou’s anthology, its critical analysis will serve to address the next three research questions (4)-(6):-

4. Who else has proposed EU copyright law harmonisation?
5. What steps have been taken by such proposals to consider full copyright harmonisation?
6. What conclusions have been drawn?

In terms of structure, the author will critically analyse Wittem’s ECC by methodically working through each chapter and sub-chapter of the Code to expose further differences in EUMS’ laws and the gaps remaining in current EU harmonised areas of copyright law. A series of questions

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<sup>389</sup> Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012)

<sup>390</sup> ‘Established in 2002 as a collaboration between copyright scholars across the European Union’, The Wittem Project European Copyright Code April 2010, 5. Available online: [www.copyrightcode.eu/Wittem\\_European\\_copyright\\_code\\_21%20April%202010.pdf](http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20April%202010.pdf) (“Draft Wittem ECC (2010)”)

to extrapolate EU harmonisation issues, still outstanding from Wittem's ECC, will be drafted after critical analysis, to be further analysed in Chapters 4 and 5.

### 3.1 Who else has proposed EU copyright harmonisation and what steps have been taken by such proposals to consider full copyright harmonisation?

In terms of proposed EU copyright harmonisation, it can be argued that Wittem's draft ECC 2010, offers a feasible starting point for a potential EUCR.<sup>391</sup> Wittem drafted a Code which 'might serve as a model or reference tool for future harmonization or unification of copyright at the European level'.<sup>392</sup> It may be argued that the proposed Code is probably the most ambitious independent endeavour to propose copyright law harmonisation within the EU, to date. However, in terms of Originality, Notions of a Work and Fixation, it could be argued that the draft Code failed to combine the common and civil law concepts sufficiently to offer a workable satisfactory solution for all EUMS at the time of its drafting. This may have been one reason why its provisions were not implemented by the EU Commission given that the UK was an EUMS at that point, Ireland still is, and Cyprus and Malta encompass common law elements within their national copyright laws.

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<sup>391</sup> Jane C Ginsburg, 'European Copyright Code - Back to First Principles (with Some Additional Detail)' (January 2011). Auteurs et Medias (Belgium), 2011; Columbia Public Law Research Paper № 11-261, 3. Available online: <<http://ssrn.com/abstract=1747148>>.

<sup>392</sup> Draft Wittem ECC (2010)

## 3.2 Originality in the Wittem draft European Copyright Code

The concept of “originality” in Art. 1.1(1) ECC has a distinct civil law bias, no doubt inspired by *Berne*:

Copyright subsists in a work, that is to say, any expression within the field of literature, art or science in so far as it constitutes its author’s own intellectual creation.<sup>393</sup>

At the point of publishing this Code, “originality” was harmonised at EU level only in the Software, Database, Information Society and Term Directives<sup>394</sup> and specific CJEU case law subject-matter.<sup>395</sup> Incorporating it fully into a harmonising Code in 2010 failed to acknowledge the temporal common law originality standard. Hence, it may be argued that Wittem failed to converge the differing originality systems and notions of work in a way that may have appeased all EUMS without them, as Sir Hugo stated, losing their distinct qualities.<sup>396</sup> At that point, the civil law originality standard was not EU-wide. This may have been problematic for authors wishing to exploit their work in other EUMS because of the *Rome II* criterion requiring that rightholders sue in the country of infringement.<sup>397</sup> Subject matter that may have been classed as “original” from the lower common law standard in the UK/Ireland,<sup>398</sup> may not have met the higher EU civil law standard.<sup>399</sup> To assume that all works were original because they were the

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<sup>393</sup> *ibid*, Art 1.1(1)

<sup>394</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16 (“Software Directive (2009)”; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 (“Database Directive (1996)”; Directive 2001/29/EC 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] OJ L167/10 (“InfoSoc”); 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 [2006] OJ L372/12 (“Term Directive (2006)”)

<sup>395</sup> Predominantly C-5/08 *Infopaq International v Danske Dagblades Forening* [2009] ECR I-6569 in the context of *InfoSoc*

<sup>396</sup> The words of Victor Hugo in 1849 extracted from: Viviane Reding, ‘Why we need a United States of Europe now’, European Commission - SPEECH/12/796 08/11/2012 <[http://europa.eu/rapid/press-release\\_SPEECH-12-796\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-796_en.htm)>. Hugo was a French poet, novelist, and dramatist of the Romantic movement and a huge proponent of civil law Author’s Rights. He was the honorary President and founder of the *Association Littéraire et Artistique Internationale* (ALAI) which eventually led to the world’s first international copyright treaty: the Berne Convention for the Protection of Literary and Artistic Works 1886

<sup>397</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, Art 8

<sup>398</sup> and Cyprus and Malta

<sup>399</sup> An example of this is the case *Hyperion v Sawkins* [2005] EWCA Civ 565; [2005] 1 WLR 3281 where copyright was found in a faithful reproduction of a previously copyright protected piece of Baroque music and

author's own intellectual creation was to sweep away the UK/Irish common law standard entirely, in favour of upwards civil law harmonisation. However, notwithstanding these valid criticisms of the time, since the draft ECC reform was published, major changes have occurred through application of CJEU jurisprudence by EUMS.<sup>400</sup> Upwards harmonisation of "originality", for example, as incorporated into the ECC, has occurred systemically in view of CJEU jurisprudence and the UK's application of it.<sup>401</sup> Moreover, the element of "substantiality" for determining copyright infringement is required for UK/Irish law, yet, no such reference to this was made in Art. 1.1(1) ECC.

### 3.2.1 Judicial application of EU law

The concept of "substantiality" had previously been settled by the UKHL in *Designers Guild*<sup>402</sup> where assessment of copyright infringement to a substantial part of the work, depended 'on the *qualitative* importance of the part that ha[d] been copied, assessed in relation to the copyright work as a whole'.<sup>403</sup> Courts determined if the part reproduced was the most significant, recognisable part of the whole of the work, regardless of the quantity taken.<sup>404</sup> In *Meltwater* (2010), Mrs Justice Proudman assessed if a newspaper headline, reproduced by

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where the reconstruction of the same score was deemed copyright-protected because the author's effort, skill and judgment meant that a previously unplayable score was once more playable. As a faithful reproduction, none of the work amounted to the author's own intellectual creation unless it could be argued that constructing the missing parts was the due to the author's free and creative choices imbued with his stamp

<sup>400</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890; [2012] Bus LR 53

<sup>401</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10; *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd* [2020] EWHC 148

<sup>402</sup> *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC* [2000] 1 WLR 2416 (HL); *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) 282 (Lord Evershed)

<sup>403</sup> *ibid* (*Designers Guild*), (Lord Scott) (author's emphasis). This judgment is from the House of Lords and is binding upon Scotland.

<sup>404</sup> Imagine the theme music to the blockbuster movie: *Jaws*. The main theme song, that accompanies the shark stalking its prey, is actually around 3 minutes long. Its most famous part, though, is the first two notes that begin the theme signifying that the shark is around and about to stalk its prey. <[www.youtube.com/watch?v=BX3bN5YeiQs](http://www.youtube.com/watch?v=BX3bN5YeiQs)>. It has had many an audience sat in terror! See: Robbie MacKay, '45 years on, the 'Jaws' theme manipulates our emotions to inspire terror' *The Conversation* (27 April 2020) <<https://theconversation.com/45-years-on-the-jaws-theme-manipulates-our-emotions-to-inspire-terror-136462>>. The CJEU have also confirmed this in *C-476/17 Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] ECLI 624 [16] and [39] wherein publishing 'approximately 2 seconds of a rhythm sequence from the song 'Metall auf Metall' and us[ing] that sample in a continuous loop in the song 'Nur mir'' was deemed to be copyright infringement.



another, amounted to copyright infringement. However, the *Infopaq* standard was applied using ‘originality in the work’ for copyright subsistence. The legal issue, due to it having previously been decided by the CJEU in *Infopaq*<sup>405</sup> was whether the work taken was ‘original in the sense that it amounted to the author’s own intellectual creation’,<sup>406</sup> irrespective of the qualitative amount taken as in *Designers’ Guild*.

*Infopaq* concerned the data-capture of an 11-word text extract obtained by scanning a newspaper hard-copy and converting it into a digital file for data processing<sup>407</sup> of the captured words.<sup>408</sup> Data capture was partly an online process<sup>409</sup> potentially caught by *InfoSoc*, Art. 2, permitting rightholders to ‘authorise or prohibit direct or indirect, temporary or permanent reproduction in any form’<sup>410</sup> of their copyright-protected work. If protected, the Art. 5(1) *InfoSoc* defence against copyright infringement of this type could have applied and authorial permission to use the work in this way would not be required.<sup>411</sup> The work was held a literary, thus intellectual, creation within Art. 2 and also fell within the definition of a work within *Berne*,<sup>412</sup> from which *InfoSoc* drew inspiration. The EU Commission had already outlined in the *Software*,<sup>413</sup> *Database*<sup>414</sup> and *Term*<sup>415</sup> Directives that works were original if they were the

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<sup>405</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569

<sup>406</sup> *ibid* [37]

<sup>407</sup> *ibid* [2]

<sup>408</sup> Similar to the way search engines like Google, Bing and Yahoo obtain results.

<sup>409</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [17]-[21]

<sup>410</sup> Directive 2001/29/EC 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] OJ L167/10, Art 2(a)

<sup>411</sup> If reproductions were, cumulatively: ‘temporary’, ‘transient or incidental’, ‘integral and essential...[to the] technological process’, only used ‘to enable a transmission...between third parties by an intermediary of a lawful use of the work or protected subject-matter’ and if it had ‘no independent economic significance’.

<sup>412</sup> Literary, artistic and scientific works.

<sup>413</sup> Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 in relation to computer software programs (“Software Directive (1991)”)

<sup>414</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20, Recital 16 with regards to databases

<sup>415</sup> 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 [2006] OJ L372/12, Art 6 regarding photographs. NB this is supplemented with the updated 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 [2011] OJ L265/1

‘author’s own intellectual creation’. As *InfoSoc* was a harmonising directive,<sup>416</sup> works that fell within its sphere were ‘original’ if they were ‘the author’s own intellectual creation.’<sup>417</sup> The CJEU interpreted *InfoSoc* from the EU originality standard as included in the Directive Recitals<sup>418</sup> and the work was deemed “original”. This was because it was the expression of the author’s own intellectual creation, ‘if the author’s creativity was expressed through the ‘choice, sequence and combination of those words’’.<sup>419</sup>

In England, Proudman J in *Meltwater* considered whether headlines/text extracts (“the Extracts”) taken from articles, were copyright-protected.<sup>420</sup> If so, unauthorised reproduction would be copyright infringement.<sup>421</sup> Like *Infopaq*, reproduction occurred from a computer program ‘scraping’ words from the original online article to email the headline and relevant hyperlinks/extracts to the Defendants’ paying subscribers.<sup>422</sup> Alternatively, subscribers could access content on Defendants’ websites. If the Extracts were copyright-protected, the legal issue was if copying, created by the temporary storing of the content on the end-user’s computer, was exempt from requiring authorial permission.<sup>423</sup> Proudman J held that the headline could be original for copyright protection depending on an assessment of the ‘process of creation and the identification of the skill and labour’.<sup>424</sup> When assessing if a headline was a substantial part of the work copied,<sup>425</sup> the *Infopaq* judicial reasoning was applied because

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<sup>416</sup> *InfoSoc*, Recitals 4, 7, 9, 10, 11 and 20 (n 410)

<sup>417</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [37]

<sup>418</sup> *InfoSoc*, Recital 20 (n 410)

<sup>419</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [45]

<sup>420</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10 [56]

<sup>421</sup> Copyright, Designs and Patents Act 1988, §16(1)-(3)

<sup>422</sup> *Meltwater Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10 [26]-[27]

<sup>423</sup> Copyright, Designs and Patents Act 1988, §28A. The CDPA had transposed *InfoSoc*, Art 5 directly into its national law, under section 28A, via Regulation 8(1) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498)

<sup>424</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10 [71]

<sup>425</sup> Copyright, Designs and Patents Act 1988, § 16(3)

EUMS must apply EU law where domestic law conflicts.<sup>426</sup> This set a new English judicial precedent for assessing “substantiality”: ‘originality rather than substantiality [wa]s the test to be applied to the part extracted [as that was] the only test’.<sup>427</sup> In practical terms, “substantiality” was still assessed, but in the context of whether the work amounted to the ‘author’s own original creation’. Originality in the part copied conferred a higher level of protection than the common law ‘skill, labour and judgment’<sup>428</sup> doctrine. It had to ‘demonstrate the stamp of individuality reflective of the creation of the author or authors of the article’.<sup>429</sup> It can be argued that this need not be the personality of the author *per se*; the ‘stamp’ can be exhibited through the choice, sequence and combination of the elements expressed.<sup>430</sup> Thus, ‘headlines [we]re capable of being literary works’ pursuant to *InfoSoc*.<sup>431</sup> They are now protected against infringement if the amount copied is the ‘author’s own intellectual creation’ denoting that author’s ‘stamp of individuality’.<sup>432</sup>

### 3.2.2 Infopaq: a controversial “judge-made” decision?

It can be argued, therefore, that ‘the Court of Justice of the EU, through its creative and extensive interpretation of the Treaties, [has] bec[o]me an important catalyst for the integration process’.<sup>433</sup> Between 2009 and 2012, in addition to *Infopaq*, the CJEU interpreted “originality” to be ‘the author’s own intellectual creation’ in four further influential cases: *BSA v Minsitertvo*, *FAPL*, *Football Dataco* and *Painer*.<sup>434</sup> However, these decisions have attracted criticism from

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<sup>426</sup> C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 [8], as referred to in *Meltwater* [40] (n 424)

<sup>427</sup> *ibid* [69]

<sup>428</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) 282 (Lord Evershed)

<sup>429</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10 [83]

<sup>430</sup> *Case C-5/08 Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [45]

<sup>431</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10 [71]

<sup>432</sup> *ibid* [83]

<sup>433</sup> Hristina Runcheva Tasev, Milena Apostolovska-Stepanoska and Leposava Ognjanoska, ‘Union based on the rule of law: the Court of Justice of the European Union and the (future of) European integration’ (2020) *East. J. Eur. Stud* 11(2) 396

<sup>434</sup> *Case C-5/08 Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569; C-393/09 *Bezpečnostní softwarová asociace v Ministerstvo Kultury* [2011] E.C.D.R. 3 (“BSA”); C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media*

eminent academics, notably, Professor Lionel Bently, who postulated whether the CJEU's interpretation equated to 'harmonisation by stealth'.<sup>435</sup> In his 2012 presentation at the (New York) Fordham IP conference, Professor Bently argued that the CJEU had expanded copyright protection to works, ownership and designs through its judicial decisions.<sup>436</sup> In *BSA*, for example, Bently postulated that this judgement may extend "originality" to all works. Moreover, in *Painer*, the CJEU stated that

nothing in Directive 2001/29 or in any other directive applicable in this field supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works.<sup>437</sup>

Hence, Bently questioned where this left the UK's closed categories because of this "stealth". In the UK case, *Abraham Moon*, the claimant argued that, post-*Painer*, 'the scope of copyright protection should not depend on the possible differences in the degree of creative freedom in the production of various categories of works.'<sup>438</sup> This was rejected by Birss J, though, it may be argued, somewhat tentatively given that it was 'tempting'.<sup>439</sup> Moreover, in *FAPL*, the court held that football matches would not be classed as "works" because they did not amount to the 'author's own intellectual creation'.<sup>440</sup> The inference here, of course, is that they could have been had the originality threshold been met. The question therefore is what category in UK/Irish common law were these works supposed to fit into? If they did not fit into any, then protection would not have been available in the UK/Ireland, thus causing disparity.

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*Protection Services Ltd* (C-429/08) [2011] E.C.D.R. 11 ("FAPL"); C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 ("Painer") and C-173-11 *Football Dataco Ltd and Others v Sportradar GmbH and Others* [2012] EUECJ ("Football Dataco")

<sup>435</sup> Lionel Bently, 'Harmonization By Stealth: Copyright and the ECJ

<[www.competitionlawassociation.org.uk/docs/harmonisation\\_bently\\_slides\\_01\\_05\\_12.ppt](http://www.competitionlawassociation.org.uk/docs/harmonisation_bently_slides_01_05_12.ppt)>

<sup>436</sup> *ibid*

<sup>437</sup> C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 [97]

<sup>438</sup> *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPC 37 [98]

<sup>439</sup> *ibid* [99]

<sup>440</sup> C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] E.C.D.R. 11 [96]-[98]

In terms of ‘harmonisation by stealth’, though, Professor Bently has conceded that ‘the harmonising effects of CJEU jurisprudence touched upon concepts which could not be possibly harmonised with legislation alone’.<sup>441</sup> Moreover, Bently queried where the evidence was ‘that the ECJ has its own agenda rather than acting in accordance with legal rationality (or other influences)’.<sup>442</sup> At the passing of *InfoSoc* (i.e. pre-*Lisbon*), the EU had competence to make legal rules for intellectual property, via Art. 36 (preventing restriction on trade) and Art. 114 (approximation of law for the establishment and functioning of the internal market). The CJEU, as the final arbiters of law, had the competence to interpret the directives in judicial rulings, in line with the treaty objective to establish an internal market.<sup>443</sup> It also had permission granted to it under the former Art. 234,<sup>444</sup> which included interpreting treaty objectives. Hence, it may be argued that, rather than judicial activism, the principle of “Indirect Effect” (*Marleasing*), has also been a key factor in advancing copyright harmonisation across the EU due to MS’ duty to apply EU law which contravenes their own. Notwithstanding this, it may also be argued that Bently’s postulation may have some merit because, as we have seen above, the *Infopaq* decision has far-reaching consequences that extend to all works within the ambit of *InfoSoc* across all EUMS. The wording of *InfoSoc* is sufficiently broad to sweep in all works falling within its ambit both on-and off-line:

This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, *with particular emphasis on the information society*.<sup>445</sup>

This potentially has monumental consequences for upwards judge-made harmonisation through their broad interpretation of *InfoSoc*. Notwithstanding this, it must be argued that as

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<sup>441</sup> Eleonora Rosati, ‘Judge-Made EU Copyright Harmonisation: the Case of Originality’ (2012) EUI 1, 54-5

<sup>442</sup> Bently, (n 435)

<sup>443</sup> TEU, Art 3

<sup>444</sup> Now TFEU, Art 267

<sup>445</sup> Directive 2001/29/EC 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] OJ L167/10, Art 1(1) [author’s emphasis]

*InfoSoc* is a directive drafted by EU lawmakers encompassing the Commission, the Council of the EU and the European Parliament, we must consider that this is what EU lawmakers wanted, or, at the very least, should have envisaged. If it was not, the Commission, as the guardian of the treaties, has had plenty of time to intervene.<sup>446</sup>

### 3.2.3 The impact of CJEU jurisprudence on the common law

Ultimately, the EU harmonised originality standard, applied in *Meltwater*, has been reconfirmed and affirmed by various English case law decisions, notably in *Mitchell*,<sup>447</sup> *Abraham Moon*,<sup>448</sup> *SAS Institute*,<sup>449</sup> *Response Clothing*,<sup>450</sup> *Sheeran*<sup>451</sup> and *Shazam*.<sup>452</sup> Thus, as Bently postulated, this has extended *Infopaq* to potentially encompass numerous works: animated characters (*Mitchell*), fabric designs (*Abraham Moon* and *Response Clothing*), music works (*Sheeran*) and characters (*Shazam*). Hence, regardless of the potential controversial nature of the CJEU decisions, the EU standard of originality is now the standard applied in the UK. The *InfoSoc*, Art. 1 wording, as outlined above, does not appear directly in an amended version of the UK CDPA. However, the standard still applied because the UK was under a duty to transpose this directive into UK law. Hence, when judges were interpreting legal principles in copyright cases, the UK had a duty to apply them. There has been no formal repeal of EU directives, as yet, in the UK. However, it remains to be seen if the current British government

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<sup>446</sup> ‘The Legal Service...is empowered to represent the Commission in the Courts of the Court of Justice of the European Union and the EFTA Court...as well as in any other court such as a national court,’ Legal Service, ‘The Commission’s legal representative’

[https://ec.europa.eu/dgs/legal\\_service/agent\\_en.htm#:~:text=The%20Commission%20may%3A,actions%20brought%20against%20another%20institution.](https://ec.europa.eu/dgs/legal_service/agent_en.htm#:~:text=The%20Commission%20may%3A,actions%20brought%20against%20another%20institution.)

<sup>447</sup> *Mitchell v British Broadcasting Corporation (BBC)* [2011] EWPC 42 [28]-[29] (Birss J)

<sup>448</sup> *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPC 37 [56] (Birss J)

<sup>449</sup> *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482 [38] (Birss J). Again, this will not extend to Scotland by this case alone as it was heard in the English Court of Appeal.

<sup>450</sup> *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (PIEC); [2020] WLR(D) 88 [59] (Hacon J)

<sup>451</sup> *Sheeran & Ors v Chokri & Ors* [2022] EWHC 827 (Ch) [21] (Zacaroli J)

<sup>452</sup> *Shazam v Only Fools The Dining Experience and Others* [2022] EWHC 1379 IPEC [95] and [125] (John Kimbell QC sitting as a Deputy High Court Judge) applying, at [113], EU case C-683/17 *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* [2019] ECLI 721

considers EU copyright legal principles to be defunct “retained EU legislation” that require repeal/change in line with the Brexit Freedoms Bill. It may be argued that this could be unlikely if, by repeal, it serves to reduce copyright protection for rightholders and, possibly, severely limit access to works for end-users. For now, the impact of *Meltwater* et al means that, for the UK, copyright infringement rests on ‘originality’ and continues to do so. Notwithstanding a Scottish Court of Sessions (Inner House) case in 2012 referring to the *Designers Guild* test instead of *Meltwater*,<sup>453</sup> searches on key legal databases have not uncovered any Scottish senior court decision upholding this. Moreover, Arnold J’s judgment in *SAS Institute* was very clear in that ‘to interpret s.16(3) in this way was consistent with the court’s duty to interpret domestic legislation, so far as possible, so as to conform with European Directives.’<sup>454</sup> Thus, although CoA/HC English rulings do not bind Scotland, the CJEU *Infopaq* ruling was binding on the UK. It is highly likely that Scottish senior courts would have applied EU law in these circumstances, thus following *Meltwater* et al. In view of judicial development post-2010, it can be argued that this has now affected two major elements for UK copyright law: the minimal amount of reproduction required to determine copyright infringement given that currently, 11 words is sufficient for copyright infringement, and, the standard for “substantiality” of copyright infringement now being “originality” if the work copied is the ‘author’s own intellectual creation’. Hence, it is suggested that Wittem’s approach to incorporate EU-bias for “originality” was correct and should remain in a draft EUCR. The outstanding issue, however, is the scope of “intellectual creation” required in terms of where this falls on the scale: from the lower end exhibiting free and selective creative choices to the higher end requiring the author’s personality. Wittem suggested adopting a middle road approach between the lower and upper strands. Thus, the following selected issue remains for this area of copyright harmonisation:

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<sup>453</sup> *Forbes v Strathclyde Partnership for Transport* 2012 S.L.T. 993 [7]

<sup>454</sup> *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482 [38] (Arnold J)

## SELECTED ISSUE: originality

1. What is the standard of “the author’s own intellectual creation” for the purpose of finding originality in a work?

### 3.3 Notions of Works in the Wittem draft European Copyright Code

It may be argued that a resolution of “originality” exposes an irresolution in terms of the types of works to which originality applies in the EU. In Ireland (and the UK), the requirement of “originality” is expressly limited to authorial works (literary, dramatic, musical and artistic).<sup>455</sup> No such element is required for media/entrepreneurial works (films, sound recordings, broadcasts and typographies). Similarly, in Cyprus and Malta, “originality” is limited to literary, musical and artistic works.<sup>456</sup> Potentially, there may be disparity in the EU in terms of when originality will apply to a particular work in Ireland and Malta (and the UK if the proposed EUCR annexes to the current EU-UK TCA). This disparity must be considered, and resolved to a workable format, if it exists, when positing a unitary EUCR.

In terms of existing proposals for harmonising EU copyright law of works, Art 1.1(2) of the draft ECC codifies that

copyright subsists in a work, that is to say, any expression within the field of literature, art or science in so far as it constitutes its author’s own intellectual creation.

The clause introduced a non-exhaustive list of works in which copyright may subsist.<sup>457</sup> The scope of this copyright protection is derived from *Berne* as identified by the Code itself.<sup>458</sup> This

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<sup>455</sup> Copyright, Designs and Patents Act 1988, § 1(1); (Irish) Copyright and Related Rights Act 2000 (as amended) §17(2). NB the Irish Act also explicitly allocates “originality” to databases, however, these are generally proposed to be literary works in the CDPA

<sup>456</sup> (Cypriot) Law on Copyright and Related Rights of 1976 (as amended) § 3(2); (Maltese) Copyright Act 2000 (as amended) § 3(2)

<sup>457</sup> Draft Wittem ECC (2010) Fn. 8

<sup>458</sup> *ibid*, 9, Draft Wittem ECC (2010) Fn. 4



is a safe and logical thought path. Since the introduction of TRIPS, it has been mandatory that all EUMS become signatories to the Paris Act 1971<sup>459</sup> of *Berne* and amend their national laws accordingly.<sup>460</sup> Crucially, Wittem's definition of copyright subsistence incorporates a statement of originality: 'in so far as it constitutes its author's own intellectual creation'.<sup>461</sup> Professor Hugenholtz argued that 'the Wittem Code refrains from expressly requiring originality – a quality implicit in the words 'the author's own intellectual creation'.<sup>462</sup> Moreover, Hugenholtz argued that 'the Code does not rule out works based (largely) on expended skill and labour'<sup>463</sup> clearly with the common law standard of the time in mind. Notwithstanding this, it must be argued that the effect of this proposed all-encompassing clause is to necessitate "originality" as an element required for all works. This undoubtedly would include media-type entrepreneurial works such as sound recordings, films, broadcasts and typographies. This is because Wittem's clause does not differentiate between the types of works, only the sphere in which the works must fall (literary, art and science). In contrast, Ireland (and the UK), Cyprus and Malta all have closed categories of works for copyright subsistence of which only four require originality in the UK, five in Ireland, and only three types of work in Malta. Hence, the legal issues outstanding, that Wittem's Code implicitly resolved in this area, can be deduced as follows:

- Closed categories of work potentially impeding the single market by upwardly harmonising them to works in the broad field of art, literature and science; and
- Originality which is not required for certain categories of work in some EUMS but is for other EUMS potentially impeding the single market, in which Wittem's clause sought to eradicate by uplifting harmonisation to necessitate originality for all copyright works.

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<sup>459</sup> Adam Smith and George J Stigler, *Selections from the Wealth of Nations* (John Wiley and Sons Inc 2014), xv

<sup>460</sup> TRIPS, Arts 2 and 9; Council 'Resolution of 14 May 1992 on increased protection for copyright and neighbouring rights' (Resolution) (92/C 138/01). Available online: [www.wipo.int/wipolex/en/text.jsp?file\\_id=126902](http://www.wipo.int/wipolex/en/text.jsp?file_id=126902).

<sup>461</sup> Draft Wittem ECC (2010) Art 1.1

<sup>462</sup> P Bernt Hugenholtz, 'The Wittem Group's European Copyright Code' published in Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) 343

<sup>463</sup> *ibid*, 344

Hence, this leaves the following selected issues for this area of copyright harmonisation:

### **SELECTED ISSUES: notions of works**

1. Should EUMS eradicate their closed categories in favour of Berne's?
2. If there is already a harmonising element by *InfoSoc*, does this mean that “originality” will automatically extend to all categories of works, not just those set down in Ireland (and the UK if it wishes to annex the Copyright Regulation to the TCA), Malta and Cyprus?
3. If not, should originality apply to all works, regardless of categories, if such differences cause fragmentation in the single market?

## 3.4 Authorship/Ownership in the Wittem draft European Copyright Code

### 3.4.1 Authorship

Currently, the essential element of “authorship” remains unharmonised at EU level. It has been argued that there has been no willingness of EU legislators to introduce harmonisation for this element, despite having the competence under Art. 118, TFEU to do so.<sup>464</sup> Wittem's ECC attempted some form of authorship harmonisation via Art. 2.1:

‘The author of a work is the natural person or group of natural persons who created it.’

However, this definition affixed “authorship” to human authors only. It largely followed the meaning of authorship and its reach as set down in the *Term Directive*,<sup>465</sup> and the updated

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<sup>464</sup> Antoon Quaedvlieg, ‘Authorship and Ownership: Authors, Entrepreneurs and Rights’ published in Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) 198

<sup>465</sup> 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 [2006] OJ L372/12 (2006), Art 1 and Recitals 14 and 16

*Software Directive*,<sup>466</sup> thereby only covering the single main aspect of authorship: the human who created the work.

#### 3.4.1.1 Authorship of works made in the course of employment

In terms of works made in the course of employment, Art. 2.5 ECC outlines that:

Unless otherwise agreed, the economic rights in a work created by the author in the execution of his duties or following instructions given by his employer are deemed to be assigned to the employer.

After careful research of all EUMS' Copyright Acts, this author's research revealed the following, in terms of authorship:

- For software exclusively, at least 12 EUMS expressly provided for automatic transfer of the economic rights in the work from the author (employee) to the employer;<sup>467</sup>
- For works generally, the majority expressly provided for the automatic transfer of the economic rights in the work from the author (employee) to the employer;
- At least three MS required the transfer of economic rights from the author (employee) to the employer to be expressly assigned in contract;<sup>468</sup>
- At least three MS imposed time limits between 2-10 years on the transfer of economic rights to the employer after which the rights would revert to the author.<sup>469</sup>

As can be seen from the research, the majority of MS assign (automatically or otherwise) only the economic rights of the author to the employer for works made in the course of employment.

This is largely the approach taken by the Wittem Group in that, under Art. 2.5, the draft Code granted automatic assignation of economic rights to the employer but not authorship, in line with civil law traditions.<sup>470</sup> It is suggested that this is a clause which could be adopted and

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<sup>466</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Art 2(1)

<sup>467</sup> Austria, Bulgaria, Croatia, Denmark, France, Greece, Italy, Latvia, Lithuania, Malta, Spain and Sweden

<sup>468</sup> Croatia, Latvia and Romania

<sup>469</sup> Lithuania, Poland and Slovenia

<sup>470</sup> Hugenholtz, 346 (n 462)

drafted into an EUCR given that it clearly represents the majority of current MS' national laws in this area of copyright law.

#### 3.4.1.2 Authorship of commissioned Works

The ECC ignored the element of collaborative works (joint authors) choosing, instead, to focus on works made on commission in Art. 2.6. No reasoning is given for the exclusion of collaborative works, which, arguably is relatively straightforward. After inspection of the 27 MS' national Copyright Acts, it can be concluded that the majority of MS include "joint authors" in their works to the extent that copyright arises in the work, as a whole, provided it is indivisible. The majority of MS also include a caveat that each author can take action independently in case of infringement. In the age of information and collaborative research, it could be argued that this was a key element that was missed by Wittem. Instead, this very important aspect was left to private contract law instead of public substantive, procedural and regulatory copyright law. Hugenholtz argued that commissioned works was included in the draft ECC, in terms of "ownership", largely because

[i]n several Member States, courts have accepted the argument that the commissioner should be able to use a commissioned work within the limits of the object and purpose of the contract of commission. Article 2.6 codifies this doctrine.<sup>471</sup>

In terms of commissioned works, research of the 27 MS' Copyright Acts reveals that not all expressly include this provision.<sup>472</sup> Some MS do, but some only in terms of "portraits" wherein the economic rights largely remain with the commissioner of the work.<sup>473</sup> The remainder<sup>474</sup> expressly assign the economic rights to the commissioner though a couple of MS<sup>475</sup> require this assignation by contract. Hence, Wittem's clause seems sensible as it clearly attempts to

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<sup>471</sup> *ibid*, 347

<sup>472</sup> Namely: Austria, Estonia, Malta, Poland, Romania Slovakia and Slovenia

<sup>473</sup> Hungary (in terms of publicity rights), Denmark, Finland, and Sweden

<sup>474</sup> Belgium, Bulgaria, Croatia, Czech Republic, Ireland (companies only), Latvia and Lithuania

<sup>475</sup> Belgium and Croatia

harmonise this aspect of copyright law that is somewhat fragmented between MS. Again, it is possible that this clause could also be included in the posited EUCR. However, it is not clear why Wittem chose to include this aspect, yet did not tackle collaborative works in the same way. Hence, it must be considered in Chapter 4 if this exclusion, in terms of common law, was a *casus omissus*, given that the fundamental parts of MS' national laws of joint authorship are largely in harmony.

### 3.4.1.3 Authorship of computer-generated works

Moreover, the rising concept of machine-based creations, as encompassed in the UK CDPA and the Irish Copyright and Related Rights Act was completely ignored in the draft ECC.<sup>476</sup> Currently, in terms of EU *acquis communautaire*, there is no harmonisation of any of these aspects. Vague references in the *Software* and *Database* directives<sup>477</sup> are made, but largely in terms of leaving the issue to national laws. Hence, there are currently 27 national “authorship” copyright laws in which, it could be argued, Wittem failed to address satisfactorily in the draft ECC. Arguably, both the *Software*<sup>478</sup> and the *Database*<sup>479</sup> directives attempted some form of *acquis* in terms of allocation/identification of authorship. However, these are *sui generis* laws that do not apply universally across all copyright works. Moreover, it has been argued that it is still creator-centric and does not cover the element of allocation of ownership beyond economic rights,<sup>480</sup> or moral rights. If such differences cause refragmentation in the single market, they ought to be harmonised under the *InfoSoc* principles.

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<sup>476</sup> Irish Copyright and Related Rights Act 2000, §21(f); UK Copyright, Designs and Patents Act 1988, §9(3)

<sup>477</sup> Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42, Art 2(1); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20, Art 4

<sup>478</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Art 2

<sup>479</sup> Database Directive, Art 4

<sup>480</sup> Quaedvlieg, 217 (n 464)

Currently, UK and Irish law permit machine-based copyright, though both still envisage human authors:

In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.<sup>481</sup>

Differences between the UK, Ireland and its other 26 EUMS is that Ireland/UK statutorily recognise that it is the machine that has created the work, albeit because of human intervention.<sup>482</sup> In civil law EUMS, it would be for the remaining 26 national courts to decide (based on domestic law) if computer-generated work under the control of the human author, is capable of producing copyright-protected work. Without legislative provision to extend beyond human authors, it is highly unlikely domestic courts would do so. Potentially, there is a gap in EU law harmonisation concerning “authorship” in terms of non-human authors, works made in the course of employment, collaboration or by commission where there is either no harmonisation or minimal harmonisation. This largely places the issue back in the hands of the 27 national laws. Arguably, the ECC is a starting point for commissioned works and works made in the course of employment, but little else. Hence, the following questions must be critically analysed if an EUCR is posited:

### **SELECTED ISSUES: authorship**

1. What is the impact, on the internal market, of disparity between EUMS who differentiate between machine-based and human-only authorship?
2. Is there scope in the proposed Copyright Regulation to make a recommendation to include machine-based works without alienating or impeding EUMS’ cultural differences?
3. What is the impact, on the internal market, of differing standards of copyright protection of authorship, in terms of collaborative and commissioned works and works made in the course of employment?

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<sup>481</sup> Copyright, Designs and Patents Act 1988, § 9(3) and similarly in the (Irish) Copyright and Related Rights Act 2000, §21(f). Cyprus and Malta do not make provision for machine-based creations.

<sup>482</sup> This is likely to be on the basis that the human wrote the computer source code, and it was a human mind that invented the device on which the source code is used.

4. If the impact results in refragmentation detrimental to the single market, how should authorship be divested between parties in collaborative and commissioned works and works made in the course of employment?

## 3.5 Fixation and Moral Rights in the Wittem draft European Copyright Code

### 3.5.1 Fixation

The draft ECC did not make any provision for “fixation” except for a cursory reference in Footnote 2

‘Any’ denotes “whatever may be its mode or form of expression or its merit”. There is no requirement of fixation. An adaptation of a work may qualify as a work itself.

It is suggested that Wittem could have considered the element of “Fixation” of a work of the mind given that there are practical implications and policy reasons for the requirement that the subject-matter must be ‘reduced to a material form’ for copyright subsistence.<sup>483</sup> It may be argued that, as most works, by their very nature, are fixed in some format, a formal requirement of this is not necessary. Indeed, most EUMS do not have fixation requirements which is possibly why Wittem did not include this in the ECC. Hugenholtz, himself, is conspicuously silent on this issue, in his essay in Synodinou’s anthology.<sup>484</sup> Furthermore, there is merit in the argument that authors should be free to choose fixation for future evidence preservation, particularly as it is much easier to do this with the invention of digital devices. However, since the CJEU *Levola* judgment in 2018,<sup>485</sup> it may be argued that EU lawmakers may be left with little choice but to mandatorily introduce a fixation requirement if an EU CR is envisioned. In *Levola*, the CJEU stated that, in terms of finding copyright protection for the taste of cheese

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<sup>483</sup> Nicholas Caddick QC et al, *Copinger & Skone James on Copyright* (17<sup>th</sup> edn Sweet & Maxwell 2019) [3-109]

<sup>484</sup> Hugenholtz, 339-54 (n 462)

<sup>485</sup> (C-310/17) *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899; [2018] Bus LR 2442; [2018] 11 WLUK 155 (ECJ (Grand Chamber))

[the expression] could only be determined if ‘the subject-matter [was] expressed in a manner which ma[de] it identifiable with sufficient precision and objectivity, even if not in permanent form’.<sup>486</sup>

It must be argued that mandatory fixation requirements do provide legal certainty for an author’s intellectual creation. However, it could be argued that *Levola* only harmonised the fixation requirement for sensory-perceptive works. Notwithstanding this, *InfoSoc*, the context in which this case was heard, relates to ‘the legal protection of copyright and related rights *in the framework of the internal market*, with particular emphasis on the information society’.<sup>487</sup> Hence, as this is a harmonising directive, it could be argued that this ruling extends to all works in the internal market, as Handig posited.<sup>488</sup> It may be suggested that the provision to “fix” works in a material form could be included in the proposed EUCR. However, countries may elect to omit this formality, as an exception, from their national copyright laws that fall outside the scope of *InfoSoc* thus placing the onus on the individual author to evidence their work. This, alone, may encourage market-driven harmonisation of fixation if creators fear they may lose out on copyright protection for “unfixed” works. The alternative is to enforce fixation for all works and all EUMS, though this could be contentious if it inherently conflicts with the very essence of their author’s rights, such as in France. EU representatives may have to seek stakeholder guidance for this if mandatory fixation *per se* was likely to be introduced into an EUCR. Notwithstanding this, an EUMS’ duty is to apply EU law that conflicts with their own.<sup>489</sup> Hence, the following questions must be critically analysed if an EUCR is posited:

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<sup>486</sup> *ibid* [40]

<sup>487</sup> Directive 2001/29/EC 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] OJ L167/10, Art 1(1) [Author’s emphasis]

<sup>488</sup> Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) 94 citing C Handig, ‘Infopaq International A/S v. Danske Dagblades Forening (C-5/08): is the term ‘work’ of the CDPA 1988 in line with the European Directives?’ (2010) EIPR 32(2) 53

<sup>489</sup> C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 [8]



## SELECTED ISSUES: fixation

1. What is the impact, on the internal market, of differences between EUMS who do not have a “fixation” requirement for works in terms of copyright protection?
2. Is there scope in the proposed Copyright Regulation to make such recommendation for harmonisation?
3. If so, will this be mandatory that requires fixation for all works opposed to certain ones as currently seen in Ireland, Cyprus, Malta (and the UK)?

### 3.5.2 Moral Rights

It can be argued that moral rights protect an inalienable author’s right connecting the author to the work, essentially to protect their claim of authorship and their right to object to derogatory treatment of their work which causes detriment to their honour and/or reputation.<sup>490</sup> This standard is set down internationally in the Berne Convention.<sup>491</sup> All EUMS have, as a minimum, these standards of moral rights protection for their authors. The potential problem is that some EUMS have more protection than others which could impact upon dissemination of works between EUMS. The Commission argued as far back as 1996 that differences between moral rights in EUMS’ national systems were gaining traction, largely due to digitisation and wide-spread internet usage.<sup>492</sup> Works could be manipulated easily, transformed into something wholly different to what the original author envisaged and shared throughout the Union. Hence, it was argued in the Commission Green Paper (1996) that lack of EU unity, in terms of moral rights, ‘may lead to significant barriers to their exploitation, notably in the field of multimedia products and services’.<sup>493</sup> From the Green Paper consultation period, the Commission reported that an ‘overwhelming number’ of parties (notably rightholders and end-users) argued in favour of strong moral rights protection, particularly due to the onslaught of digitisation.<sup>494</sup> However,

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<sup>490</sup> EC Commission, ‘Follow up to the green paper on copyright and related rights in the Information Society’ 20/11/1996 (COM) (96) 568 final, 27 (“Green Paper (1996)”)

<sup>491</sup> Berne Convention, Art 6bis

<sup>492</sup> Commission, Green Paper (1996), 27 n 490

<sup>493</sup> *ibid.*, 28

<sup>494</sup> *ibid.*, 28

the Green Paper (1996) does not indicate what “strong protection” means. Clearly, it must mean more than Berne’s minimum standards and somewhat less than the strongest protection as seen in France. Arguably, this would suggest a middle way between the two standards. Other interested parties preferred only minimal intervention given that such harmonisation ‘might impede efficient exploitation of multimedia creations’.<sup>495</sup> Notwithstanding this, a clear indication that private contract law was not the correct method to deal with moral rights, was elucidated in the Green Paper.<sup>496</sup> This could suggest two paths for dealing with this issue: leave it to the remit of national laws given that all must encompass some form of moral rights as required by Berne,<sup>497</sup> or, harmonise moral rights in the proposed EUCR. The key issue for the latter, of course, would be the standard that harmonisation should be. No strong commitment to harmonise moral rights across the Union was offered by the Commission, following the stakeholder consultation and publication of the 1996 Green Paper. Instead, the focus moved to considering existing disparities of national legal systems that may impede the single market in terms of the information society.<sup>498</sup> No such recommendations, opinions, decisions or legislation have been forthcoming, since the Green Paper was published over 25 years ago, in terms of harmonising moral rights.

Wittem’s draft ECC attempted some form of moral rights harmonisation, drafted in terms of “authorship” under Art. 2.2 as follows:

- (1) The author of the work has the moral rights.
- (2) Moral rights cannot be assigned.

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<sup>495</sup> *ibid*, 28

<sup>496</sup> *ibid*, 28

<sup>497</sup> Berne, Art 6*bis*

<sup>498</sup> *ibid*

Chapter 3 of the draft ECC includes more detail in terms of the rights of divulgation, attribution and integrity.<sup>499</sup> Under Art. 3.2, the right of divulgation, outlined as ‘the right to decide whether, and how the work is disclosed for the first time’ lasts for the author’s lifetime. The right of attribution in Art. 3.3. outlined as ‘the right to be identified as the author...to choose the manner of identification...and to remain unidentified’ lasts for the author’s lifetime but is left open in terms of *post-mortem* duration. The reason given for this is somewhat vague and generalised. There are references to differences in elements of moral rights not requiring the same protection and MS’ privacy laws impacting on certain aspects, such as the right of divulgation. However, there was nothing concrete offered as to why this aspect, in terms of *post-mortem* duration, was left open. The right of integrity in Art. 3.4, outlined as ‘the right to object to any distortion, mutilation or other modification, or other derogatory action in relation to the work, which would be prejudicial to the honour or reputation of the author’, is covered in the same way as “attribution” in terms of duration, leaving it to EUMS to set the term of *post-mortem* duration. Hence, the draft ECC does not posit unitary duration of moral rights, except in relation to the right of divulgation which would only last the lifetime of the author. This particular clause will be concerning for French legislators as moral rights in France last in perpetuity.<sup>500</sup>

In the draft ECC, moral rights, generally, cannot be waived.<sup>501</sup> Key focus in the ECC relates to the issue of “consent” in that Art. 3.5 permits rightholders to consent ‘not to exercise his moral rights’. Information in the footnotes does not expand on the extent but seems to act as a waiver, limited in scope where the author permits certain uses of the work. The main explanatory information relates to “consent”. This is in the sense that it must be informed, ideally in writing

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<sup>499</sup> Art 3.1

<sup>500</sup> (French) Intellectual Property Code, Article L121-1

<sup>501</sup> Draft Wittem ECC (2010), Fn. 30

but may be deduced having regards to the particular circumstances,<sup>502</sup> and unequivocal though no further explanation of this element is given apart from a reference to consent in writing being deduced as unequivocal. The emphasis, in the ECC, seems to be to only cover general issues whilst leaving the key details of elements, such as manner of consent, to private contract law. In terms of moral rights harmonisation, Cyprus, Finland, Ireland (and the UK) and Sweden permit a waiver of moral rights. In Denmark and The Netherlands, they can be waived but only in very limited circumstances although the Statutes are silent on what these circumstances are. Croatia does not permit assignation or waiver of moral rights, but such rights may be entrusted to a third party. France does not permit waiver of moral rights as they attach to the author's personality in the work.<sup>503</sup> Hence, EUMS would need to amend their national laws in line with this draft Code, should this clause be incorporated in the proposed EUCR. This would have the effect of downwardly harmonising moral rights in some EUMS and upwardly harmonising moral rights in others. Finally, in Art. 3.6, the ECC covers the interests of third parties by limiting the scope of moral rights, namely the rights of divulgation, attribution and integrity, to situations only where such exercise would not 'harm the legitimate interests of third parties to an extent which is manifestly disproportionate to the interests of the author'. Examples of third parties include private entities such as publishers and also the general public for improving access to the work.<sup>504</sup> There seems to be a clear indication, here, of protecting the economic interests, albeit, through the scope of moral rights given that "legitimate interests" remains unqualified and wide in scope.

Two potential viewpoints can be considered here in terms of harmonisation of moral rights in a proposed EUCR. The first, posited in Synodinou's anthology, returns to economic

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<sup>502</sup> *ibid*

<sup>503</sup> Jean-François Bretonnière and Thomas Defaux, 'French copyright law: a complex coexistence of moral and patrimonial prerogatives' (2012) *Building and enforcing intellectual property value* 83, 84

<sup>504</sup> Draft Wittem ECC (2010), Fn. 34

utilitarianism in terms of an ‘industry-orientated ‘copyright approach’, wherein copyright is perceived as an instrument of economic policy, promoting growth, creating markets and fostering innovation’.<sup>505</sup> The second is the approach outlined by Professor Hugenholtz wherein copyright harmonisation should disregard elements that do not impact the internal market or foster cultural and social sensibilities, such as moral rights.<sup>506</sup> In terms of the former viewpoint, it can be argued that this carries strong weight, particularly in EU policy and law.<sup>507</sup> The latter however, by Hugenholtz, is also a logical thought path as it clearly emulates the approach set down in *InfoSoc*, whereby if there is little to no impact on the single market, national laws should be left as they are.<sup>508</sup> This is a clear indication of the fundamental subsidiarity principle as set down in the TEU.<sup>509</sup> Hence, the following questions must be critically analysed if an EUCR is posited:

#### **SELECTED ISSUES: moral rights**

1. What is the impact, on the internal market, of disparity between the differing standards of moral rights pertaining to EUMS?
2. Is there scope in the proposed EUCR to make such recommendation for harmonisation?
3. If so, how will the proposed EUCR balance the divide between the current highest and lowest moral rights protections in individual EUMS?
4. Will moral rights be capable of being assigned to a machine-produced work if such work is encompassed, in terms of authorship, in the proposed EUCR?

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<sup>505</sup> Ioannis Kikkis, ‘Moral Rights’ published in Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) 233

<sup>506</sup> *ibid*

<sup>507</sup> Directive 2001/29/EC 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] OJ L167/10, Recitals (4) and (10)

<sup>508</sup> *ibid*, Recital 7

<sup>509</sup> TEU, Art 5

### 3.6 Economic rights in the Wittem draft European Copyright Code

Economic rights in copyright protect the author's right to exploit their work exclusively and derive a financial reward from use of their work by others.<sup>510</sup> These rights include the author's exclusive right to reproduce, distribute, perform publicly, broadcast and adapt their work.<sup>511</sup> Such rights can be licensed for others to do without infringement, either generally or exclusively, in exchange for remuneration. For authorial works, the rights last for a minimum of the life of the author plus a further 70 years.<sup>512</sup> It has been argued that 'European legislation should directly state the scope of the economic rights deriving from European copyright law' because differences between EUMS, in this respect, may hinder the single market imperative.<sup>513</sup> It can be argued that including the scope of economic rights directly in a draft harmonising copyright code has generally been well-received.<sup>514</sup> Hence, this ought to be considered when positing an EUCR.

In the ECC, Art. 4.1(2) states that '[t]he economic rights expire [...] years after the year of the author's death.' Its intention is to remove the current mandatory *post-mortem* 70 years duration and reduce it, presumably taking into account the minimum level proscribed by Berne of 50 years *post-mortem* duration and also TRIPS 50 years *post-mortem* duration.<sup>515</sup> In the absence of any further information on this proposal, it is presumed that "duration" is not to be left to EUMS to determine individually. If it is, Wittem's proposal creates further disparity in the EU, rather than reducing it, because it could lead to different durations of copyright protection in

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<sup>510</sup> WIPO, *Understanding Copyright and Related Rights* (Switzerland 2016) 9

<sup>511</sup> Berne Convention, Arts 8, 9, 11, 11*bis*, 11*ter*, 12, 14, 14*bis*, 14*ter* and 15

<sup>512</sup> 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 [2006] OJ L372/12, Art 1(1)

<sup>513</sup> Reto Hilty, 'Reflections on a European Copyright Code' published in Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) 364

<sup>514</sup> See Eleonora Rosati, 'The Wittem Group and the European Copyright Code' (2010) *JiPLP* 5(12) 862, 865 and Lucky Belder, Léon Dijkman and Arne Mombers, 'The Age of Copyright: Wittem's copyright reform proposal compared to Samuelson's Preliminary Thoughts' (2011) *QMJIP* 3 200

<sup>515</sup> Berne Convention, Art 7(1); TRIPS, Art 12

each EUMS. Without further explanation, it would be very difficult to see how this benefits the EU single market without causing refragmentation. The only reasoning posited for enacting the change was that Wittem members felt that the economic rights were too long. No further explanation was forthcoming for this reasoning, a criticism which was also highlighted by Dr Rosati.<sup>516</sup> As Rosati argues, ‘a contribution from leading academics might have been useful, strengthening the value of the Code.’<sup>517</sup>

Moreover, this clause does not distinguish between the types of works, some of which have different durations. An example is a broadcast which currently enjoys 50 years protection ‘after the first transmission of a broadcast’.<sup>518</sup> It was stated, in the Code’s Introduction, that related rights are not dealt with.<sup>519</sup> However, in its omission, it must be argued that rightholders, end-users and other stakeholders using this code would be more confused, in terms of duration, not less. As this is a somewhat contentious proposition, and, in the wake of continuing upwards harmonisation, in terms of copyright duration,<sup>520</sup> it is difficult to justify a change in this area of the law. Hence, for the purpose of the posited EUCR, duration for copyright and related rights protections will remain in line with current EU law.

Art. 4.2 ECC incorporates the current harmonised Art. 5(1) mandatory exception pertaining to ‘temporary reproductions’. This has been argued as a sensible approach and has been thus advocated by European scholars.<sup>521</sup> Moreover, it mirrors the current *InfoSoc* provisions in Art. 2(1) which creates such rights. Hence, this approach is likely to be retained in the posited EUCR

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<sup>516</sup> Rosati, 865 (n 514)

<sup>517</sup> *ibid*

<sup>518</sup> 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 [2006] OJ L372/12, Art 3

<sup>519</sup> Draft Wittem ECC (2010), 6

<sup>520</sup> 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 [2011] OJ L265/1

<sup>521</sup> Hugenholtz, 348 (n 462)

in terms of mandating harmonised exceptions to reproduction rights. Art. 4.3(2) codifies the doctrine of exhaustion but leaves it open as to the types of works exhausted (i.e. there is no mention of tangible or intangible works). As this incorporates EU jurisprudence into the Code, this would also be retained by the EUCR but with a consideration of the differing works.

### 3.7 Limitations in the Wittem draft European Copyright Code

Limitations to copyright infringement, referred to as “exceptions and limitations” in *InfoSoc*,<sup>522</sup> permit others to use a rightholder’s copyright-protected work without infringing their economic rights. Limitations were introduced by the 1967 Stockholm revision to the Berne Convention, but their uses are subject to a three-step-test in that

[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.<sup>523</sup>

Limitations exist to prevent “over-protection”.<sup>524</sup> Notwithstanding this, the use does not permit wholesale infringement of other rights, such as moral rights<sup>525</sup> and economic rights. Moreover, it has been argued, by Professor Hilty, that limitations ought to be viewed in six contexts: differentiation in terms of rights, distinctions between different rightholders, the users involved in the creation, the rationales for the limitation, flexibility and potential compensation measures for such use.<sup>526</sup> Hilty’s reasoning is that ‘limitations may differentiate regarding the *rationales* they pursue’.<sup>527</sup> No further reasoning is offered in this regard. It could be argued that this is a

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<sup>522</sup> Directive 2001/29/EC 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] OJ L167/10, Art 5 (n 387). In Ireland and the UK, use of works in this way is referred to as fair dealing (See Irish Copyright and Related Rights Act 2000, §50(4); UK CDPA 1988, §§ 28-44)

<sup>523</sup> Berne Convention, Art 9(2)

<sup>524</sup> Hilty, 365 (n 513)

<sup>525</sup> *ibid*

<sup>526</sup> *ibid*, 366-7

<sup>527</sup> *ibid*



sensible approach because, as Hilty also posits, different uses may require different limitations.<sup>528</sup> This is the approach taken in the ECC because Professors Hilty (and Dreier) drafted the Limitations chapter.<sup>529</sup>

It has been argued by Professor Ginsburg that Hilty and Dreier boldly attempted to draft a set of limitations to endeavour to converge differences between 300+ years of numerous national copyright systems and cultural traditions which, undoubtedly, would not necessarily satisfy all parties.<sup>530</sup> In particular, Ginsburg posited that the Limitations Chapter attempted to ‘favor EU wide uses of copyrighted works in which, in the drafters’ perception, the interests of third parties, including the public, outweigh those of the authors or copyright owners’.<sup>531</sup> As argued by Ginsburg, it is endemic in the opening statement of the Code’s drafters that the emphasis for the Code was to reflect core European values, such as freedom of expression, information and competition.<sup>532</sup> No mention was made of the right to property enshrined in the EU Charter of Fundamental Rights.<sup>533</sup> Notwithstanding these criticisms, it could be argued that this was a logical approach given that, despite the EU-majority civil law bias, *InfoSoc* (from which Wittem’s limitations were emulated), has, at its roots, a common law utilitarian aspect in terms of economic justification, rather than traditional AR. This is evidenced by continual reference to remuneration requirements for specific permitted exceptions under Art. 5 and in numerous times in the Directive’s Recitals, particularly Recital 4:

A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will *foster substantial investment in creativity and innovation*, including network infrastructure, and *lead in turn to growth and increased competitiveness* of European industry, both in the area of content provision and information technology and more

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<sup>528</sup> *ibid*

<sup>529</sup> Draft Wittem ECC (2010), 5

<sup>530</sup> Ginsburg, 268 (n 391)

<sup>531</sup> *ibid*

<sup>532</sup> *ibid*, 269

<sup>533</sup> Article 17(1)

generally across a wide range of industrial and cultural sectors. This will *safeguard employment and encourage new job creation*.

In contrast to Ginsburg's thinking, therefore, it could be argued that the ECC found a 'middle ground between the common and civil law approaches to exceptions as it defines the line between the exclusive rights of the author and the public domain'.<sup>534</sup> That said, in view of the fact that intellectual property law protection is enshrined in the EU Charter,<sup>535</sup> this ought to be re-stated and reflected in the proposed EUCR. Regarding Wittem's draft ECC, the following critical analysis will focus only on where there are outstanding issues, in terms of Wittem's proposal for harmonising limitations, as compared to those contained in *InfoSoc*.

Chapter 5 ECC outlines the limitations to copyright infringement. These are segregated by uses in terms of economic impact, human rights adherence, promotion of social, political and cultural objectives and enhancing competition,<sup>536</sup> emulating Professor Hilty's observations. Article 5.1 ECC, under the 'minimal use' heading, includes the "home copying" exception to copyright infringement, similar to Art. 5(2)(b) *InfoSoc*,<sup>537</sup> by permitting users to produce a 'back-up copy of a work by a person having a right to use it and insofar as it is necessary for that use'. However, there is a fundamental difference between Wittem's proposal, and the current exception laid down in *InfoSoc*: mandatory remuneration. For *InfoSoc*, permission to create "back-ups" is qualified by limiting the right to only '...private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation'.<sup>538</sup> No such compensation is required under Wittem, and no justification is put forward for such proposal, hence, supporting Ginsburg's argument that users' rights, and the

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<sup>534</sup> Lucky Belder, Léon E Dijkman, and Arne EM Mombers, 'The age of copyright: Wittem's copyright reform proposal compared to Samuelson's Preliminary Thoughts' (2011) QMJIP 1(3) 200, 210

<sup>535</sup> Art 17(1)

<sup>536</sup> Draft Wittem ECC (2010), Arts 5.1-5.4

<sup>537</sup> Directive 2001/29/EC 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] OJ L167/10 Art 5(2)(b)

<sup>538</sup> *ibid*

public, are placed ahead of the author's rights in the work. A key difference, as well, seems to lie in the term "minimal use" which is absent from Art. 5(2)(b) *InfoSoc*. However, it is not clear what Wittem's 'minimal use' encompasses. It may be that this is deliberately left open for EUMS judicial interpretation. Yet, this could defeat the objective of a unitary code to create less disparity in the EU. Moreover, it could be argued that this mandatory limitation may be contentious given that, in the UK for example, this exception was not implemented universally because of disagreements about levies on blank CDs/DVDs in the context of the music industry.<sup>539</sup> Nor is it included in Ireland's copyright laws.<sup>540</sup> Wittem's clause does not differentiate between the types of works permitted for "back up". Hence, this could arguably "sweep up" works that are currently excluded from the copyright exception in certain EUMS. Wittem's qualifier is that the use must be necessary, but it does not give examples of what this means. Whether or not to include Wittem's clause in the proposed EUCR may very much depend on what is determined to be "necessary", "minimal use" and how other EUMS handle the issue of creating "back-up" copies for all works, if, indeed, they do.

Art. 5.2(1), under the 'freedom of expression and information' heading, free use (i.e. without remuneration) includes the following exceptions as set down in *InfoSoc*, Art. 5(3): use by the press of works for reporting 'economic, political or religious topics or of broadcast works',<sup>541</sup> 'quotations for purposes such as criticism and review',<sup>542</sup> 'works of architecture or sculpture made to be located permanently in public places',<sup>543</sup> and for 'caricature, parody or pastiche'.<sup>544</sup>

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<sup>539</sup> *R (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin); [2015] Bus LR 1435. In the UK and Ireland, the use is limited to 'a lawful user of a copy of a computer program to make any back up copy of it which it is necessary for him to have for the purposes of his lawful use' Copyright, Designs and Patents Act 1988, §50A(1); Irish Copyright and Related Rights Act 2000, §80

<sup>540</sup> *ibid*

<sup>541</sup> *InfoSoc*, Art 5(3)(c) (n 537)

<sup>542</sup> *ibid*, Art 5(3)(d)

<sup>543</sup> *ibid*, Art 5(3)(h)

<sup>544</sup> *ibid*, Art 5(3)(k)

Although these appear to emulate *InfoSoc* exceptions, key detail is omitted from Wittem's ECC. For example, the press reporting exception does not include a caveat in situ that the moral rights of the author must be observed e.g. the right of attribution by requiring the author's name to be published (where possible). This caveat is included at Art. 5.6(2) ECC. However, given that a unitary Code is intended to harmonise, it perhaps ought to be included directly in each element, as per *InfoSoc*. In terms of Art. 5.2(2) ECC, Wittem introduced a limitation preventing use of a work for 'internal reporting within an organization' without remuneration.<sup>545</sup> However, as Professor Ginsburg states, '[i]t is very unclear what "internal reporting within an organization" means'<sup>546</sup> and, arguably, may fall foul of Berne's three-step-test in terms of 'unreasonably prejudice[ing] the legitimate interests of the author'.<sup>547</sup> This is particularly so where multiple combined copies of works are distributed within an organisation.<sup>548</sup> Moreover, under Art. 5.2(2)(b) ECC, it is unclear why use of works for 'scientific research' requires remuneration to the rightholder when no such requirement is included in *InfoSoc* providing the use is non-commercial.<sup>549</sup> If Wittem's limitation in this sub-section is intended to refer to commercial use of the work, or for commercially based research of scientific works, it should be clearer.

Similarly, Art. 5.3(2)(b) ECC provides that 'use for educational purposes' is permitted if a 'payment of remuneration [is made], and to the extent justified by the purpose of the use'. Only archiving, by educational establishments, is permitted without remuneration. What about for teaching though? *InfoSoc* limits this exception to non-commercial use<sup>550</sup> and, as Ginsburg argues, by not limiting this exception to non-commercial uses, it may be difficult to justify its

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<sup>545</sup> Draft Wittem ECC (2010), Art 5.2(2)(a)

<sup>546</sup> Ginsburg, 288 (n 391)

<sup>547</sup> Berne Convention, Art 9(2)

<sup>548</sup> Ginsburg, 288 (n 461)

<sup>549</sup> *InfoSoc*, Art 5(3)(a) (n 537)

<sup>550</sup> *ibid*, Art 5(2)(c) and 5(3)(a)

inclusion, as a limitation to copyright infringement, in terms of satisfying Berne's three-step-test.<sup>551</sup> Commercial use through limitation would surely compete with the rightholder's scope for commercial exploitation and, arguably, takes us within the realm of licensing, not limitations.

Art. 5.4 ECC relates to limitations collectively ascribed under the heading: *Uses for the purpose of enhancing competition*. This heading has been criticised by Ginsburg because 'there may be a fundamental incoherence in incorporating "competition" limitations into laws whose purpose is to endow authors with the competitive advantage that exclusive rights confer'.<sup>552</sup> Nonetheless, Art. 5.4(1)(b) permits 'use for the purpose of reverse engineering in order to obtain access to information, by a person entitled to use the work' without the need to seek permission or pay remuneration. It could be argued that this clause is far too wide as it contains no qualifiers or limitations in its use of the work, or, indeed, the type of work itself. As Ginsburg states, the *Software Directive's* comparable clause<sup>553</sup> limited such use to interoperability of independently created programs only.<sup>554</sup> Currently, Wittem's clause seems far too wide and should either be clearer that its intention is only to emulate the *Software Directive* limitation,<sup>555</sup> or, give much more detailed information as to the necessity for such a broad, all-encompassing clause. In terms of Art. 5.4(2)(ii), Wittem seem to be introducing a mandatory compulsory licensing option in the form of a limitation by permitting use of certain works, without authorisation, providing that 'negotiated remuneration' is paid even where the owner has refused. From an EU harmonisation perspective, it must be argued that the only justification

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<sup>551</sup> Ginsburg, 288 (n 391)

<sup>552</sup> *ibid*, 290

<sup>553</sup> Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42, Art 6

<sup>554</sup> Ginsburg, 290 (n 391)

<sup>555</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Art 6

for this can be found in Recital 6, *InfoSoc* where this could only be permitted if the failure to provide a licence for such use impeded the single market imperative. If there was no such impediment, it must be further argued that this limitation potentially infringes on the rightholders reproduction right, as set down in *InfoSoc*, Art. 2, and is prejudicial to the legitimate interests of the rightholder, contrary to Berne. As Ginsburg suggests, the inclusion of the third part of Berne's three-step-test only, in Wittem's ECC, Art. 5.4(2)(iii) leads the reader to question if the 'prior step, that the use will not conflict with a normal exploitation [of the work]' is 'simply assumed'.<sup>556</sup>

It has been argued that Berne's three-step-test is actually only a two-step test, based on the revisionary Stockholm Conference 1967 whereby step one, "special cases", and step two, "normal exploitation of the work", were essentially deemed to mean the same.<sup>557</sup> However, this does not justify Wittem's exclusion of the second part of the test for this limitation. Although Hugenholtz himself (one of the Code's drafters) advocated that '[t]he second step is arguably more critical [than the first]',<sup>558</sup> Hugenholtz further argued that, through interpretation of the 1967 Stockholm Conference '...there is a conflict with the second step if the exempted use would rob the right holder of a real or potential source of income that is substantive'.<sup>559</sup> This statement clearly contradicts the introduction of a competition-based limitation that denies the rightholder those very rights that Hugenholtz advocates. Therefore, it is difficult to see (1) why this more critical part has been omitted from Art. 4(2)(iii) and (2) how this limitation can be introduced, on the grounds of enhancing competition, when the reason that the rightholder of the work has exclusive rights, is to economically exploit the work exclusively. Moreover,

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<sup>556</sup> *ibid*, 291

<sup>557</sup> Daniel J. Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (2005) *Intellectual Property L. Rev* 9(1) 1, 15-16; P Bernt Hugenholtz and Ruth L. Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright' (2008) *Amsterdam Law School Research Paper* 1, 22

<sup>558</sup> *ibid*, 23

<sup>559</sup> *ibid*

given that the first, second and third parts of the three step test have been incorporated in entirety in Wittem's Art. 5.5, it could suggest that Wittem's intention was to not include the author's exclusive rights, in terms of mandating a compulsory licence, as this has been exclusively reserved for other limitations which exclude those introduced at 5.4(1)-(4). This is a derogation away from *InfoSoc* which incorporates the full three-step-test.<sup>560</sup> In the absence of further information as to how denial of this limitation impedes the single market imperative, it is very difficult to justify its inclusion as a limitation to copyright infringement.

Moreover, Wittem's Art. 5.7(2) limitation under the heading 'Amount and collection of remuneration' states, 'A claim for remuneration according to articles 5.2(2) and 5.3(2) can only be exercised by a collecting society'. It can be argued that this directly contravenes the *Collective Rights Management Directive* ("CRMD"), Art. 5(4) insofar as collecting revenues for online music licensing in the EU. This is because, under this Directive, rightholders do not have to be a member of a Collecting Society now. By default, this must mean that such rightholders are entitled to manage their own rights and collect revenue from that self-management.<sup>561</sup> Hence, this proposal cannot now be considered for the posited EUCR.

Finally, Art. 5.8 ECC, 'Limitations prevailing over technical measures', introduces a limitation whereby the 'rightholder shall have an obligation to make available means of benefiting from the uses mentioned in articles 5.1 through 5.5' but it excludes the "home copying" exception created at [5.3(2)(a)]. In theory, this could mean that technological measures to prevent copying

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<sup>560</sup> Directive 2001/29/EC 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] OJ L167/10, Art 5(5)

<sup>561</sup> It is to be noted that Wittem's Draft ECC was published before Directive 2014/26/EC of the European Parliament and of the Council of the 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72

could be overridden by virtue of this limitation. As Ginsburg critiques, this potentially contradicts *InfoSoc*, Art. 6 which obliges EUMS to prevent such circumvention.<sup>562</sup>

Hence, in terms of limitations to copyright infringement, the main considerations are as follows:

#### **SELECTED ISSUES: permitted exceptions**

1. Should the EUCR adopt Wittem's proposal, in terms of drafting limitations/exceptions under headings?
2. Should the proposed EUCR incorporate the limitations as drafted in Wittem's ECC?
3. If yes, should these be included "as is" or are amendments required before inclusion?
4. If no, should *InfoSoc* be recast and incorporated into the proposed EUCR "as is" or are amendments required before inclusion?

### 3.8 What conclusions have been drawn from the Wittem draft European Copyright Code?

In conclusion, critical analysis of the Wittem Group's Draft ECC (2010) has identified the following select issues for further evaluation in Chapter 4, wherein suggestions for reform will also be made:

- Originality
- Notions of Works

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<sup>562</sup> Ginsburg, 293 (n 391)



- Authorship
- Fixation
- Moral rights
- Permitted Exceptions

In terms of EU copyright harmonisation, the first conclusion to be drawn is that Wittem has implicitly conceded that given the vast breadth and scope of copyright law, concessions must be made when positing a unitary code as it is not possible, in the usual scales of research timeframes and funding, to consider all aspects of everything affecting copyright harmonisation. Hence, decisions must be made when attempting such projects, to deal with, arguably, those issues that affect rightholders, end-users and other such stakeholders the most in terms of impediment in the single market. Although there is no such statement on Wittem's Code, Hugenholtz acknowledged that 'it was decided to concentrate the project's efforts on formulating basic principles of European copyright law in the form of a Code.'<sup>563</sup> Moreover, it is the EU's policy that 'differences not adversely affecting the functioning of the internal market need not be removed or prevented'.<sup>564</sup> Hence, this is also the strategy of this author.

Regarding the substantive provisions, it can be argued that Wittem was correct, in terms of incorporating the EU's originality standard. However, a question mark is raised in terms of potential disparity across the EU as to when originality is required for a potential work that is not encompassed in the common law authorial LDMA works. Regarding authorship and fixation, the Code did not attempt to deal with any element of authorship that was not human-centric and in relation to commissioned works. It completely ignored collaborative and

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<sup>563</sup> Hugenholtz, 340 (n 462)

<sup>564</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 7 (n 387)

computer-generated works, as well as the fixation element required in some EUMS. Moral rights seems to find a middle way between the highest standards, as in France, and the lower common law standards found in Ireland/UK. The duration of moral rights, however, is the most contentious issue here, not dealt with to any satisfactory standards in the ECC, that this author should address in Chapter 4. Moreover, Wittem's Code seeks to reduce the current upper post-mortem limit for copyright duration down from 70 years. This is likely to be highly contentious given that the trajectory is upwards harmonisation. This author has drawn a line under further analysis of copyright duration as there is little EU legislative support for Wittem's current proposal. Finally, contentious issues remain in the draft ECC, in terms of the proposed limitations to copyright infringement, particularly those seeking to enhance competition. This issue will be further considered in Chapter 4 to determine if Wittem's proposals should be incorporated into an EUCR. Arguably, they should only be so if their omission would lead to a refragmentation of the single market,<sup>565</sup> and that they do, in fact, harmonise EU copyright law.

### 3.9 CONCLUSION

This chapter has answered research questions [4], [5] and [6], outlined at Chapter [1.7] in terms of (1) who else proposed EU copyright law harmonisation, (2) the steps taken by such persons to consider full copyright harmonisation and (3) the conclusions to these proposals. From this critical review, it can be argued that, predominantly, the Wittem Group have proposed EU copyright harmonisation through their draft ECC published in 2010. Moreover, a syndicate of authors have also discussed EU copyright harmonisation in a collection of essays, edited by

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<sup>565</sup> *ibid*, Recital 6

Tatiana-Eleni Synodinou, published in 2012. Notwithstanding Synodinou's anthology, it can be deduced that only the Wittem Group went as far as producing a draft Code.

The Wittem Group's published draft code was not an exhaustive attempt at EU copyright harmonisation as it contained only five main elements. Hence, there are outstanding elements of EU copyright harmonisation not covered by the Code including, but not exhaustively: related rights, fixation, e-licensing of intangible works and licensing of tangible works, digital rights management of works in respect of non-mandatory exceptions, legal protection of technical measures, defences, remedies and evidence in terms of copyright infringements, counterfeiting and, finally, secondary infringements invoking criminal sanctions. It can be argued that, in terms of the last two elements, counterfeiting and secondary infringements, it is understandable that these were not included in Wittem's Code because this author conceded, at Chapter [1.5], that these elements were too politically sensitive to tackle in this thesis and were, arguably, too contentious to include in a harmonised EUCR given that criminal law is not part of EU *acquis*. Notwithstanding this, Wittem's failure to include the remainder has left a gap in EU copyright harmonisation that this thesis seeks to address.

Hence, this critical analysis has revealed further specific research questions, in each of Wittem's topics included in the ECC that will be critically analysed in Chapter 4, along with the elements omitted from the Code, as outlined at Chapter [1.7]. Chapter 4 will now endeavour to critically analyse the topical research questions outlined in this chapter, in the context of the selected issues.

# CHAPTER FOUR

## Analysis of the “selected issues” from the Wittern Code

*‘...even if total harmonisation of national laws could be achieved, there will be no complete single market as long as there are territorially defined national copyrights and related rights’.*<sup>566</sup>

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<sup>566</sup> Annette Kur, Thomas Dreier and Stefan Luginbuehl, *European Intellectual Property Law: text, cases and materials* (2<sup>nd</sup> edn Edward Elgar Publishing 2019) 399

## 4. INTRODUCTION

As identified in Chapter 1, IPRs are territorial in nature.<sup>567</sup> This may impact rightholders seeking to exploit their works beyond the first country of publication and end-users wishing to use the copyright-protected works in areas other than the first-published country. Although works are reciprocally protected from infringement in Berne member countries,<sup>568</sup> it does not follow that the works are accessible in all CP states. This is due to “territoriality” because, even though a work is protected, there may not be a reciprocal right to even access the work if the national laws of the country of first publication prevent this. In areas of EU harmonised copyright law, this issue does not generally arise unless licensing issues are present (discussed in Chapter 5). However, in areas of non-harmonised copyright law within the EU, where it has already been conceded that there are 27 national copyright systems within the EU single market,<sup>569</sup> this could occur. The impact of this is that, potentially, it affects elements of the four fundamental freedoms, but notably, free movement of goods and services.<sup>570</sup> Chapter [1.5] highlighted areas of copyright law that remained unharmonised and conceded that, in view of the limitations of a doctoral thesis, discussion should centre on the areas that detrimentally affect the single market, its rightholders and end-users in the areas of EU competence. Ergo, Chapter 4 critically analyses research questions (7) – (9), in the context of the selected issues from Chapter 3<sup>571</sup>, as follows:

7. Do these outstanding areas of harmonisation impact the EU single market of copyright law detrimentally?
8. Are there unharmonised areas of EU copyright law that detrimentally affect the single market that cannot be resolved by this thesis?

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<sup>567</sup> C-192/04 *Lagardère Active Broadcast v SPRE* [2005] ECR I-7199 [46]

<sup>568</sup> Berne Convention, Art 5

<sup>569</sup> Reflection Document of DG INFSO and DG MARKT on Creative Content in a European Digital Single Market: Challenges for the Future, 22 October 2009, 12 sourced from Eleonora Rosati, ‘The Wittem Group and the European Copyright Code’ (2010) *JiPLP* 5(12) 862

<sup>570</sup> TEU, Art 26(2)

<sup>571</sup> Originality, notions of works, authorship, fixation, moral rights and permitted exceptions

9. What is the impact of these findings on the overall proposal for a unitary copyright regulation?

The purpose is to ascertain if EU harmonisation of these outstanding copyright areas is feasible. In doing so, this chapter will critically analyse the selected issues from Chapter 3 to answer the research questions. This is in the context of the following legal principles: proportionality,<sup>572</sup> subsidiarity,<sup>573</sup> differences which impact the functioning of the single market<sup>574</sup> and which extend to its citizens including rightholders and end-users,<sup>575</sup> the potential problems of territoriality in unharmonised areas creating fragmentation, the impact of this refragmentation in the single market<sup>576</sup> and any potential impediment of the EU policy of fostering cultural diversity.<sup>577</sup> The aim is to show that if the territorial impact of national copyright laws is detrimentally affecting the single market, then this should trigger EU copyright harmonisation in those areas, where possible. It will also be posited that the preference for this is by a unitary EUCR given the number of individual legal instruments already in operation and the fact that a regulation is automatically enforceable in MS without the need for a long transposition period. Suggestions for reform outlined in Chapter 4, for codification into a draft EUCR, will be formally drafted in Chapter 7 (Recommendations).

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<sup>572</sup> TEU, Art 5

<sup>573</sup> TEU, Arts 4(1) and 5(3)

<sup>574</sup> TFEU, Art 114; InfoSoc, Recital 7

<sup>575</sup> 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 [2006] OJ L372/12, Recital 7

<sup>576</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 6

<sup>577</sup> TFEU, Art 167(1)

## 4.1 Originality in a work

Chapter 3 considered the “originality” element of copyright law subsistence in the context of *InfoSoc* and key case law decided by the CJEU post-*Infopaq*.<sup>578</sup> As identified in Chapter [3.2], judicial upwards harmonisation occurred through a series of landmark CJEU decisions stating that works falling within *InfoSoc*, were original if they were the result of the ‘author’s own intellectual creation’.<sup>579</sup> As *InfoSoc* was a horizontal harmonising directive, and its elements interpreted by the CJEU, the impact of this was that all EUMS were duty-bound to apply the law when hearing disputes in their nation states that fell within the ambit of *InfoSoc*.<sup>580</sup> As a reminder, Proudman J applied this standard in the landmark English case *Meltwater*<sup>581</sup> which has been upheld in a number of English cases post-*Meltwater*.<sup>582</sup>

### 4.1.1 Disparity in “originality standards” amongst EUMS

There may be disparity, though, between EUMS depending on the level of creativity required, and if some EUMS exhibit higher standards than others, upon that set down in *Infopaq*, in unharmonised areas of copyright. The key issue, though, is whether or not these differences affect the functioning of the single market thus affecting the rights of copyright-holders, end-users and the free movement of goods/services.<sup>583</sup> Originality in a work, across EUMS,

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<sup>578</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [37]; C-393/09 *Bezpečnostni softwarová asociace v Ministerstvo Kultury* [2011] E.C.D.R. 3 (“BSA”); C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] E.C.D.R. 11 (“FAPL”); C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 (“Painer”) and C-173-11 *Football Dataco Ltd and Others v Sportradar GmbH and Others* [2012] EUECJ (Football Dataco”)

<sup>579</sup> *ibid*

<sup>580</sup> C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 [8]

<sup>581</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10 [56]

<sup>582</sup> *Mitchell v British Broadcasting Corporation (BBC)* [2011] EWPC 42 [28]-[29] (Birss J); *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPC 37 [56] (Birss J); *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482 [38] (Birss J); *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 [59] (Hacon J); *Sheeran & Ors v Chokri & Ors* [2022] EWHC 827 (Ch) [21] (Zacaroli J)

<sup>583</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 7

generally encompasses an element of subjective ‘creative choices’.<sup>584</sup> Austrian<sup>585</sup> works, for example, must be ‘original intellectual productions’,<sup>586</sup> but the originality threshold is lower post-*InfoSoc*.<sup>587</sup> Pre-2001, Austrian ‘jurisprudence... required photographic works to stand out from the ordinary, commonplace, usually produced by a special mental processing’.<sup>588</sup> Furthermore, ‘this presuppose[d] that the personality of the creator, particularly through the visual design and the intellectual processing, [came] into play’.<sup>589</sup> Additionally, the arrangement of a photograph had to be something that another artist would not do.<sup>590</sup> Post-*InfoSoc*, an intellectual creation arises in photographs ‘if they express...very personal choice of design elements’.<sup>591</sup> This is automatically assumed where it can be shown that another artist would have done something different, but it is not a pre-requisite.<sup>592</sup> Nothing is mentioned about the author’s ‘personality’ though there is a clear need for the author’s ‘stamp’. The choice of design elements must be personal; the hallmark of the author need not. This, of course, may not be the case now in view of the CJEU *Painer*<sup>593</sup> decision, for photographs, unless ‘very personal choice of design elements’ expresses the author’s personality. Beyond photographs, though, it is clear from Austrian case law that the ‘author’s own intellectual creation’ is towards the lower end of the spectrum.

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<sup>584</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [45]

<sup>585</sup> (Austrian) Federal Law on Copyright in Works of Literature and Art and on Related Rights 1998 as amended in 2011. The original legislative document was drafted in German. It was accessed online via WIPO using an automatic translation tool as embedded into the WIPO PDF legal document.

<sup>586</sup> (Austrian) Federal Law on Copyright in Works of Literature and Art and on Related Rights 1998, § 1(1)

<sup>587</sup> Dr Roman Heidinger, ‘The Threshold of Originality under EU Copyright Law’, presented in the Beijing Workshop of the CO-REACH INTELLECTUAL PROPERTY RIGHTS IN THE NEW MEDIA one-day workshop (Beijing, 18<sup>th</sup> October 2011), <[www.coreach-ipr.org/documents/Roman%20Heidinger%202011.pdf](http://www.coreach-ipr.org/documents/Roman%20Heidinger%202011.pdf)>.

<sup>588</sup> (Austria) 4Ob179 / 01d (2001)

<sup>589</sup> *ibid*

<sup>590</sup> *ibid*

<sup>591</sup> *ibid*

<sup>592</sup> (Austria) 4Ob170/07i (2008)

<sup>593</sup> C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 [94] (n 641)



Slovenian<sup>594</sup> works are original if they are ‘individual intellectual creations’.<sup>595</sup> French works of the mind<sup>596</sup> are original if they express or reflect the author’s personality. More precisely, copyright subsists if the works of the mind are the ‘fruit of a reflection of the author of the photograph or the subject [providing] the work bears the imprint of the personality of [the author]’.<sup>597</sup> Luxembourg copyright subsists in ‘creations of the mind’<sup>598</sup> providing it ‘reflect[s] its author’s personality and individuality’.<sup>599</sup> In Belgium, the SC ruled that originality need only be the ‘own intellectual creation of the author’.<sup>600</sup> The SC overturned the previous CoA ruling, that ‘[t]here must be a demonstrable activity of the human spirit’,<sup>601</sup> and stated that ‘[i]t is not required that the work be the imprint of the author's personality’.<sup>602</sup> This is because *InfoSoc*, using a literal interpretation, only requires that works must be the ‘author’s own intellectual creation’ with no mention of requiring their ‘personality’. The Belgian SC construed this requirement in three ways: (1) ‘own’ means that the author created the work; (2) ‘intellectual’ means ‘that the author must have thought about how he will create the work, which assumes a certain mental activity’ notwithstanding the necessity for creative input; and (3) ‘creation’ means that a product was created.<sup>603</sup> This last point is of notable importance as it

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<sup>594</sup> (Slovenia) Copyright and Related Rights Act of 1995 as amended on 15/12/06, accessed online via WIPO using an automatic translation tool embedded into the WIPO PDF legal document

<sup>595</sup> (Slovenia) Copyright and Related Rights Act of 1995, Chapter 2, § 1(1)

<sup>596</sup> French Intellectual Property Code (as amended 2003), L111-1

<sup>597</sup> (French) *Société BOWSTIR LIMITED, G.M. v EGOTRADE SARL*, TGI de Paris, 3ème chambre 1ère section, 6 May 2015. This judgment relates specifically to photographic works, however, the legal principles stated in this case relate to all works of the mind, see: Elizabeth F Judge and Daniel Gervais, ‘Of Silos and Constellations: Comparing Notions of Originality in Copyright Law’ [2010] *Cardozo Arts & Entertainment Law Journal*, [27] 375, 378-81; Vanderbilt Law and Economics Research Paper No. 10-01. Original text from the judgment: ‘...le fruit d’une réflexion de l’auteur de la photographie ou de son sujet, si l’oeuvre porte l’empreinte de la personnalité de [l’auteur]’.

<sup>598</sup> Olivier Reisch, ‘The International Comparative Legal Guide to: Copyright 2015’ available online:

<[www.linklaters.com/pdfs/mkt/luxembourg/CP15\\_Chapter10\\_Luxembourg.pdf](http://www.linklaters.com/pdfs/mkt/luxembourg/CP15_Chapter10_Luxembourg.pdf)>.

<sup>599</sup> *ibid*

<sup>600</sup> (Belgian) *ARTESSUTO SA v B & T TEXTILIA SA and Indecor-EUROPE NV* 26 Jan 2012 - N° C.11.0108.N, [15] Original transcripts drafted in French and Flemish. Available online respectively: <[www.droit-eco-ulb.be/fileadmin/fichiers/2012\\_01\\_26\\_Cass.pdf](http://www.droit-eco-ulb.be/fileadmin/fichiers/2012_01_26_Cass.pdf)> and

<[http://jure.juridat.just.fgov.be/pdfapp/download\\_blob?idpdf=N-20120126-1](http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20120126-1)>.

<sup>601</sup> *ibid*

<sup>602</sup> (Belgian) *ARTESSUTO SA v B & T TEXTILIA SA and Indecor-EUROPE NV* 26 Jan 2012 - N° C.11.0108.N, [4]

<sup>603</sup> (Belgian) *ARTESSUTO*, 231 (n 600)

implies that there must be an identifiable object. This was confirmed by the CJEU in the 2018 case, *Levola Hengelo*, where it is now a pre-requisite that ‘the subject matter must also be expressed in a manner which makes it identifiable with sufficient precision and objectivity’<sup>604</sup> (see Chapter 4.4.3].

From these few examples, there are differences in how the ‘author’s own intellectual creation’ element is interpreted nationally, with Ireland/UK at the lowest point of creativity, and France/Luxembourg at the top end of the spectrum requiring the individual personality reflected through all works. It can be argued that these differences potentially affect the functioning of the single market, in areas of non-harmonised copyright-protected works, if creations from one MS exhibiting a lower standard of ‘intellectual creation’ are denied protection in other MS because the work does not reach their higher “originality” threshold. This impacts on rightholders, who may be deterred from exploiting their works economically in a MS where the work may not reach the originality threshold required, and end-users because MS may not have lawful access to the works if the work is not distributed there. This would mean that the rightholder wishing to exercise their economic rights, would have to defect to exerting these under the Berne Convention. The problem, as previously identified, is that the individual cannot sue for their rights under Berne and, if their MS does on their behalf, the levels of protection are not necessarily the same as EU harmonised law. The likely route, as aforementioned, would be to sue the MS where the “breach” occurred, under *Rome II*.<sup>605</sup> But, this is difficult if the work does not meet the originality threshold of that MS. How can you sue for rights in a work that is not legally recognised as a copyright-protected work under that MS’ national laws? One other possibility is to sue under Art. 7(2) of the Brussels Regulation wherein

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<sup>604</sup> Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899 [40]

<sup>605</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, Art 8

a claimant may sue ‘in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur’. The problem with trying to rely on this provision, though, is that invariably the harm is economic. This provision only allows for suing where actual physical, and not financial, harm has occurred.<sup>606</sup> This is the problem with territoriality. It is a vicious circle that would be best resolved by some form of unity between MS. That would have to be either by all EUMS adopting the same level of originality in the ‘author’s own intellectual creation’, or, by some other means.

#### 4.1.2 Potential routes to harmonisation

It could be argued that Wittem’s suggestion to achieve such unity was to adopt a middle road to find common ground between the differing standards of interpretation:

The term ‘the author’s own intellectual creation’ is derived from the *acquis* (notably for computer programs, databases and photographs). It can be interpreted as the “average” European threshold, presuming it is set somewhat higher than skill and labour. This is possible if emphasis is put on the element of creation. For factual and functional works, the focus will be more on a certain level of skill (judgement) and labour, whereas for productions in the artistic field the focus will be more on personal expression.<sup>607</sup>

There is legitimate merit in adopting this type of approach as it essentially emulates, in some respects, the standard that EU lawmakers adopted for *InfoSoc*:

The CJEU sought to strike a fair balance between the relatively low standard of originality adopted in the UK and the higher standards applied in continental-European countries such as Germany and France.<sup>608</sup>

The potential problem with Wittem’s suggestion, though, is that it seems to go beyond the *InfoSoc/Infopaq* standard to create a tiered effect for finding “originality”, depending on the type of work. Currently, the only element of work which requires the highest standard of

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<sup>606</sup> C-364/93 *Marinari v Lloyds Bank Plc* [1995] ECR I-2719 [15]; *Marinari v Lloyds Bank Plc* [1996] QB 217

<sup>607</sup> Wittem Draft ECC (2010), Fn. 7

<sup>608</sup> Andrea Renda et al, ‘The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society’ 34 <[www.ceps.eu/wp-content/uploads/2015/11/SR120\\_0.pdf](http://www.ceps.eu/wp-content/uploads/2015/11/SR120_0.pdf)>

creativity in the EU, i.e. personality, is an original photograph. This is how the CJEU interpreted this element, for original photographs, in *Painer*<sup>609</sup> as required by the *Term Directive*: ‘a photographic work...is original if it is the author's own intellectual creation reflecting his personality’.<sup>610</sup> Wittem’s solution creates a tiered system potentially suggesting that all artistic works in general, not just photographs, ought to be elevated to reflect the author’s personality (“personal expression”), leaving other works to the “average” European standard. Presumably this would be the standard set down in *Infopaq*. This takes it beyond the scope of the *Term Directive* though, and current CJEU jurisprudence.

Consequently, if we come back to the *Infopaq* and *Painer* judgments, we can see a clear ruling that works are original if they reflect the author’s free and creative choices though the ‘choice, sequence and combination of those words [et al]’,<sup>611</sup> with the added element of reflecting the author’s personality in photographic works.<sup>612</sup> As identified previously, the *Infopaq* ruling has been applied in numerous CJEU cases thereafter. If unharmonised areas were harmonised, there is little doubt that this is the standard that would be applied by the CJEU. Thus, it can be argued that this element should now be regarded as settled law. The only justification for a difference in standards could be if the harmonisation to a common standard interfered negatively with the EU’s general policy objectives and, particularly, the objective to respect ‘national and regional diversity... bringing the common cultural heritage to the fore’.<sup>613</sup> Hence, if the common standard frustrated a MS’ cultural heritage, it could be argued that enforcing a common standard of originality, EU-wide, would very likely be disproportionate and

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<sup>609</sup> C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 [94] (n 641)

<sup>610</sup> 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 [2006] OJ L372/12, Recital 16 [and previously in 93/98/EEC, Recital 17]

<sup>611</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [45]

<sup>612</sup> C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 [94] (n 641)

<sup>613</sup> TFEU, Art. 167(4)

potentially in breach of TFEU, Art. 5. It is very difficult, however, to consider how a MS' cultural heritage and regional diversity could be detrimentally impacted. The effect of such harmonisation could garner many more creative works from those diverse cultures, into the free-flowing single market, who have the confidence that their work will be protected across the EU. Hence, the approach is that the CJEU, by interpreting *InfoSoc* in *Infopaq*, et al, have created a level-playing field in the single market of copyright when interpreting "originality" in a work. That is the standard to be applied and should be emulated in an EUCR.

#### 4.1.3 Suggestions for reform to harmonise EU copyright "Originality" standards for all EU Member States

By CJEU interpretation of 2001/29/EC, works are original if they reflect the author's free and creative choices though the choice, sequence and combination of the content, with the additional element of reflecting the author's personality in photographic works

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their works in the EU, providing they attain the EU standard of originality as outlined in *Infopaq* and/or *Painer*.

Notwithstanding this, by advocating this originality standard, and in view of the fact that *InfoSoc* was intended to be a horizontal harmonising directive<sup>614</sup> to regulate the relationship between individuals, we must consider if the CJEU, in its interpretation of *InfoSoc*, has actually extended this term of originality to all works. If so, this will most certainly impact those MS

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<sup>614</sup> Renda et al, (n 608)

with closed categories that are considered to be entrepreneurial works, not just authorial works: Ireland, Malta, Cyprus (and the UK if the EUCR is annexed to the TCA).

#### 4.1.4 Did InfoSoc extend the originality requirement to all works within the EU?

Post-*InfoSoc*, it could be argued, as identified in Chapter [3.3], that there is an irresolution in terms of the types of works to which originality applies in the EU. Currently, in closed category systems, originality generally applies only to authorial works which also encompasses software and databases. However, intellectual creations that fall within the ambit of the Berne categories require originality for all works.<sup>615</sup> The majority of EUMS, give effect to the Berne provision for originality and the field of works. Ireland/UK distinguish between authorial “LDMA” works and entrepreneurial “media-type” works: films, sound recordings, broadcasts and typographies. Only LDMA works require originality<sup>616</sup> notwithstanding that copyright will not subsist in a media work if it is a slavish copy of another work.<sup>617</sup> Malta requires originality only for literary, musical and artistic works.<sup>618</sup> Cyprus requires originality for all works.<sup>619</sup> This means that there is currently a difference in when originality is required in the EU for works between the “categorised” and “non-categorised” MS. Hence, there are two fundamental considerations. The first is whether *InfoSoc* extended the originality requirement to all works via the CJEU’s broad interpretation of the Directive in *Infopaq* et al and, secondly, if differences of originality requirements in works affect the functioning of the single market.

It was suggested by Dr Christian Handig as far back as 2012, cited in Synodinou’s anthology, that, in view of the *Infopaq* decision, the term ‘work’ should be considered as uniformly as

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<sup>615</sup> Berne Convention, Arts. 2(3), 8, 11, 14*bis*, 14*ter*

<sup>616</sup> Copyright, Designs and Patents Act 1988, §1(1)(a); (Irish) Copyright and Related Rights Act 2000 (as amended) §17(2)(a)

<sup>617</sup> Charlotte Waelde et al, *Contemporary Intellectual Property* (4<sup>th</sup> edn OUP 2016) 50

<sup>618</sup> (Maltese) Copyright Act 2000, §3(2) (as amended)

<sup>619</sup> (Cypriot) The Law on Intellectual Property and Related Rights of 1976 (as amended), §3(2)(b)

possible as it is up to the CJEU to determine its meaning pursuant to *InfoSoc*.<sup>620</sup> Notwithstanding this, Synodinou argues that the jurisprudence in this area is too uncertain, with regards to nationalism, fixation and closed categories, to formulise such proposal.<sup>621</sup> However, it has been further argued by Handig that, for harmonisation, EU copyright law must protect, or deny protection to, the same works throughout the Union.<sup>622</sup> In determining if originality is required for all works, we must first consider the law as interpreted by the CJEU.

It is clear that

... the need for uniform application of Community law and the principle of equality require that where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, as is the case with Article 2 of Directive 2001/29, they must normally be given an autonomous and uniform interpretation throughout the Community.<sup>623</sup>

From this, it must be argued that where there is no reference to MS' laws in an EU legal instrument, the CJEU must interpret the law uniformly binding on all MS. Hence, to determine if originality is required for all works post-*Infopaq*, we must consider the key legal issue in

*Infopaq*:

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.<sup>624</sup>

*InfoSoc*, Art. 2 relates to the reproduction right of authors, performers, producers and broadcasters. From a literal reading of this statement, it can be argued that originality is required for subject-matter falling within Art. 2(a). Hence, as the reproduction right is an economic right applicable to all works, it could be argued that the CJEU could extend the

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<sup>620</sup> Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) 94 citing C Handig, 'Infopaq International A/S v. Danske Dagblades Forening (C-5/08): is the term 'work' of the CDPA 1988 in line with the European Directives?' (2010) EIPR 32(2) 53

<sup>621</sup> *ibid*, 94

<sup>622</sup> *ibid*, 106

<sup>623</sup> C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [27]

<sup>624</sup> *ibid* [37]

“originality” requirement to all works. However, Art 2(a) relates only to ‘authors of their works’. This could suggest that, in terms of the reproduction right, at least, originality is only required for authorial works. Notwithstanding this, further in the *Infopaq* judgment, the CJEU clarify this by stating that, ‘reproduction of an extract of a protected work...is such as to constitute reproduction...within the meaning of Article 2 of Directive 2001/29, if that extract...expresses the author’s own intellectual creation.’ Post-*Infopaq*, the CJEU found in *BSA*<sup>625</sup> that works of graphic user interfaces (“GUI”) were original in the sense that they were the author’s own intellectual creation, but not because they were considered to be “software” within the meaning of the Software Directive”.<sup>626</sup> This is important because, had they done so, originality in the GUI would have been found under a *sui generis* law that would not have been applicable to all works. However, the court deemed it ‘appropriate to ascertain whether the graphic user interface of a computer program c[ould] be protected by the ordinary law of copyright by virtue of Directive 2001/29.’<sup>627</sup> This is applicable to all works. Hence, the GUI could be a copyright work<sup>628</sup> and reproduction without the author’s consent would infringe copyright under *InfoSoc*, Art 2. In *FAPL*,<sup>629</sup> it was stated that football matches were not works, but only because they were not the author’s own intellectual creation given that there was no creative freedom. However, in principle, football matches could be considered works; they only failed at the “originality” threshold. In light of these judicial decisions, it must be argued that through creative interpretation of *InfoSoc*, the CJEU has harmonised the element of originality to apply to all “works” in the sense that they must be the ‘author’s own intellectual creation’,<sup>630</sup> to qualify for copyright protection. This is binding on all MS.

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<sup>625</sup> C-393/09 *Bezpečnostní softwarová asociace v Ministerstvo Kultury* [2011] E.C.D.R. 3 (“BSA”)

<sup>626</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42

<sup>627</sup> *ibid.*, [44]

<sup>628</sup> *ibid.*, [46]

<sup>629</sup> C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] E.C.D.R. 11 (“FAPL”)

<sup>630</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [37]



The legal rulings create a problem for Malta and Ireland/UK, who still encompass a dual meaning of works: LMA/LDMA works that require originality; and others which do not providing they are not slavish copies. In view of the binding status of CJEU jurisprudence in its series of rulings post-*Infopaq*, it must be argued that such dual nature for finding copyright is no longer an option for these current MS. Moreover, as these cases were heard pre-2020; it may be argued that these rulings extend to the UK who is still applying EU law from pre-2020 CJEU rulings. Hence, it must be further argued that rightholders wishing to exploit their works across the EU, now have a harmonised standard of works that all require “originality”. Given that the controversial decision in *Infopaq* upwardly harmonised “originality”, it could be argued that UK courts would do the same in terms of works. Notwithstanding this, the court in *Meltwater*,<sup>631</sup> the first UK case to apply *Infopaq*, was under a duty to apply CJEU law via the *Marleasing* principle,<sup>632</sup> Given that the UK has withdrawn from the EU, no such duty exists. Notwithstanding this, we have seen that the courts have increasingly interpreted recent case law, in the context of *InfoSoc*, to expand copyright to numerous works.<sup>633</sup> For Ireland and Cyprus, it is clear. Where there is conflict, EU law prevails and it must be applied.

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<sup>631</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10

<sup>632</sup> C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 [8]

<sup>633</sup> *Mitchell v British Broadcasting Corporation (BBC)* [2011] EWPC 42 [28]-[29] (Birss J); *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPC 37 (Birss J); *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482 [38] (Birss J); *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd (Rev 1)* [2020] EWHC 148 (IPEC); [2020] WLR(D) 88 (Hacon J); *Sheeran & Ors v Chokri & Ors* [2022] EWHC 827 (Ch) [21] (Zacaroli J); *Shazam v Only Fools The Dining Experience and Others* [2022] EWHC 1379 IPEC [95] and [125] (John Kimbell QC sitting as a Deputy High Court Judge)

#### 4.1.5 Suggested reform for harmonisation of the EU copyright “originality” standard for all works

The specific issue outlined at Chapter [3.3], in terms of extending originality to all works, should now be answered affirmatively. By CJEU interpretation of Council Directive 2001/29/EC, any work that amounts to the author’s own intellectual creation will be copyright-protected. By analysis of the post-Infopaq judicial decisions, the law, in terms of extending originality to all works, has been accomplished by the CJEU, by application and interpretation of InfoSoc, Art. 2.

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their works in the EU, providing they attain the EU standard of originality as outlined in *Infopaq* and/or *Painer*.

Notwithstanding this, as ever, one resolution often leads to another irresolution. Given that originality now applies to all works, and particularly in view of the *BSA*<sup>634</sup> and *FAPL*<sup>635</sup> decisions, it must be questioned if the “categorised” systems of work prevalent in Cyprus, Malta, Ireland/UK, are now under threat.

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<sup>634</sup> C-393/09 *Bezpečnostni softwarová asociace v Ministerstvo Kultury* [2011] E.C.D.R. 3

<sup>635</sup> C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] E.C.D.R. 11

## 4.2 Notions of Works

We have seen above that, through creative judicial interpretation of *InfoSoc*, the originality requirement extends to all works. However, it does not follow that, within current EU-wide MS, works would be recognisable as copyright-protectable EU-wide, even if original. This is because there is disparity between EUMS' categories of works: those following the *Berne Convention* definition of literary and artistic works in the field of art, literature and science,<sup>636</sup> and others, notably Cyprus, Malta and Ireland (and the UK) that have specific closed categories. The starting point is the closed categories because, if the work does not fall within the category, it does not meet the copyright subsistence requirements for that EUMS. Such differences could fundamentally affect the functioning of the single market, rightholders and end-users' access to works.

### 4.2.1 Categories of Works

As a reminder, UK-Irish copyright-protected subject-matter is limited to eight categories of work: LDMA and media works.<sup>637</sup> Cyprus has similar categories to Ireland/UK except that it does not include "typographical works".<sup>638</sup> Malta copyright-protects artistic, audiovisual, databases, literary and musical works.<sup>639</sup> Notwithstanding this, the Maltese Act lists numerous works which fall within the ambit of these categories, arguably catching the majority of works encompassed in the UK/Irish/Cypriot categories. It not as wide-ranging as Berne, though. For Ireland/UK, there is no exhaustive list of the types of work within each category.

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<sup>636</sup> Berne Convention, Art 2(1)

<sup>637</sup> Copyright, Designs and Patents Act 1988, §1; (Irish) The Republic of Ireland Copyright and Related Rights Act 2000, §17(2)

<sup>638</sup> (Cypriot) Law on Copyright and Related Rights of 1976 (as amended) §3

<sup>639</sup> (Maltese) Copyright Act 2000 (as amended) §2

It may be argued that these countries have specific categories because common law copyright, itself, was granted to entice the production, and dissemination, of new works. The author/creator had to “earn it” by producing an original creation with the requisite amount of ‘skill, labour and judgment’.<sup>640</sup> As common law copyright bestows economic reward on the author for their creative endeavour, there are certain innovative and enterprising aspects embedded within this philosophy that encompass the author’s skillset. Specifically defined categories directly relate to this enterprising spirit and skillset.<sup>641</sup> Moreover, in a similar way to EU copyright law, Ireland/UK exhibited a piecemeal effect of legal protection in terms of when the works were first created. As a reminder, statutory copyright law in the UK, as we recognise today, is over 300 years old. Hence, new inventions have been creating new types of creative works from then on. As creative works increased, so too did copyright protection to safeguard the economic and other rights in these new creations to ensure dissemination.<sup>642</sup> This is a similar situation in which the EU now finds itself with its copyright directives. The question, is whether differences between “categorised” and “non-categorised” systems affect the functioning of the single market.

#### 4.2.2 Effect of closed categories of works on the EU single market

It can be argued that, similar to the “originality” issue discussed previously, if works from one MS are not protected in another because they do not fall into the requisite category of another, this potentially affects the functioning of the single market. In the UK case, *Lucasfilm v Ainsworth*,<sup>643</sup> the claimant lost their claim to copyright for the “Imperial Stormtrooper” helmet used in the Star Wars film series because they were not considered to be sculptures. Hence,

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<sup>640</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) 282 (Lord Evershed)

<sup>641</sup> Literary, dramatic, musical and so forth

<sup>642</sup> See Chapter [1.2]

<sup>643</sup> *Lucasfilm Ltd v Ainsworth* EWHC 1878 (Ch); [2008] ECDR 17 [121] (Mann J)

they did not fit within one of the requisite copyright categories of work for UK copyright to subsist. It is possible that this may have qualified for copyright protection elsewhere in the EU though if it amounted to a creative work expressing the author's own intellectual creation. Thus, authors of works may be far less likely to disseminate their work freely in the EU, beyond their own MS, if there was a concern that copyright would not be upheld in their work. If the law relating to "works" has not been harmonised, then national rules apply as the work has not come into the single market, in that respect. This could affect the free-flow of goods into the single market as well as preventing the rightholder from economically benefiting from his exclusive rights to publish the work throughout the Union. Rightholders may be less likely to disseminate their works if there is a risk they will not be rewarded economically. This also extends to performers whose rights may also be affected by dissemination of their performance. This is especially if it is distributed in the EU to a MS that does not recognise the work as being copyrightable because it fails to fit within one of the defined categories of work. This could mean that the work is disseminated and used but without paying the appropriate remuneration to the performer which would otherwise fall due. Moreover, as identified previously, enforcement is much more difficult for a work/right that remains unharmonised because the rightholder cannot sue in their national court or go to the CJEU for a resolution. Likewise, end-users could be detrimentally affected as there could be fewer works in the single market.

The overarching question, therefore, is: how likely is it that a work will be rejected because it does not fit into the requisite categories? The answer, since the *BSA*, *FAPL* and *Levola Hengelo*<sup>644</sup> judgments may be: not very likely. The reason being is that, in these judgments, the CJEU has stated that copyright protection is available under Art. 2 *InfoSoc* for GUI and

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<sup>644</sup> C-393/09 *Bezpečnostní softwarová asociace v Ministerstvo Kultury* [2011] E.C.D.R. 3 ("BSA"); C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] E.C.D.R. 11 ("FAPL"); Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899

potentially could have been for football matches if the originality threshold had been met. Moreover, since *Levola*, there has been a requirement that works must be ‘identifiable with sufficient precision and objectivity, even if not in permanent form’.<sup>645</sup> Hence, it may have been argued previously that sensory-perceptive works, such as perfume and so forth, were at risk of not being protected in MS who did not recognise copyright in such works, but could have been protected in others, as, indeed, they were, in The Netherlands.<sup>646</sup> However, even then, this was far more likely to have been on the basis of not meeting the originality or fixation thresholds,<sup>647</sup> rather than because the work did not fit within the required category. Moreover, in terms of goods distributed under a brand, the rightholder could be far more likely to exert some other form of protection to safeguard their economic rights, such as TM law.<sup>648</sup> It could be argued that *FAPL* exposed a fatal flaw, in terms of copyright categories, when the possibility of a football game being an intellectual creation was posited.<sup>649</sup> Moreover, the claim for copyright-protecting the taste of cheese failed because it was too ‘subjective’ not ‘sufficiently precise’.<sup>650</sup> The inference must be that had it met those requirements, it could have been protectable. As mentioned previously, these failed due to there being no originality. Had they succeeded, it is very difficult to see where they would have fit within the UK/Irish/Cyprus/Malta closed categories. Similarly, the selection and arrangement of a setting for a CD cover was not considered to be a dramatic work in the UK, due to there being no actual movement in the scene.<sup>651</sup> Yet, if it was considered to be the result of the author’s own intellectual creation elsewhere in the EU, due to the creative freedom to select and arrange the setting to suit the

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<sup>645</sup> *Levola Hengelo BV v Smilde Foods BV* (C-310/17) EU:C:2018:899; [2018] Bus LR 2442; [2018] 11 WLUK 155 (CJEU (Grand Chamber)) [40]

<sup>646</sup> (Netherlands) *Kecofa v Lancôme*, Dutch Supreme Court, case C04/327HR; [2006] ECDR 26

<sup>647</sup> (French) *Bsiri-Barbir v Haarmann & Reimer*, Cour de Cassation 13 June 2006, 210 RIDA 348

<sup>648</sup> C-487/07 *L’Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd*. [2009] [2009] ECR I-5185; *L’Oreal SA & Ors v Bellure NV & Ors* [2010] EWCA Civ 535; [2010] ETMR 47

<sup>649</sup> C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] E.C.D.R. 11 [96]-[98]

<sup>650</sup> C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899 [40]

<sup>651</sup> *Creation Records Ltd. & Ors v News Group Newspapers Ltd* [1997] EWHC Ch 370 [7] – [14] (Lloyd J)

individual “look” that the artist wanted to create thus imprinting his stamp on the work, then it could potentially be protected as a copyright work under EU law...just not UK, Cyprus or Irish law.

#### 4.2.3 Potential solutions for resolving disparity caused by closed categories affecting the EU single market

In terms of resolving this issue, Wittem’s ECC did not give any effect to a closed category system. Instead, it adhered to the standard Berne Convention criteria in that ‘[c]opyright subsists in a work, that is to say, any expression within the field of literature, art or science in so far as it constitutes its author’s own intellectual creation.’<sup>652</sup> Hence, we cannot look to Wittem for a solution.

It could be argued that, because originality has been extended to all works through judicial interpretation in *BSA* and *FAPL*, this ought to extend to categories of works as well.

Interpretation of *InfoSoc* could indicate this, due to its generously worded Art. 2:

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction *by any means and in any form*, in whole or in part [author’s emphasis]

This could suggest that the Art. 2 reproduction right relates to any work in any form. On this basis, it could be argued that the reproduction right extends to all works, regardless of their form. Notwithstanding this, there is nothing in these CJEU decisions that actually refers to this or to the removal of copyright work categories. The closest we have come is in *Painer*, where the court stated that,

nothing in Directive 2001/29 or in any other directive applicable in this field supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works.<sup>653</sup>

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<sup>652</sup> Wittem Draft ECC (2010), Art 1.1(1)

<sup>653</sup> *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 [97]

This vague wording may implicitly suggest that categories are no longer necessary, by application of *InfoSoc*, but it is just not sufficiently clear. UK courts have been reluctant to address this issue<sup>654</sup> and it is likely they will not do so unless absolutely necessary. Notwithstanding this, there is academic commentary to suggest that the implicit meaning by the CJEU in *BSA* is that once originality is found in a work, there is no need to identify the category that the work may fit into.<sup>655</sup> However, it is very difficult, from reading the case, to ascertain this postulation to be absolute. *BSA*<sup>656</sup> was referred to the CJEU from the Czech Republic. The (Czech) Copyright Act 2000, Art 2(1) cites the same categories as Berne: literature, art and science. These are the general wide-ranging categories found across most EUMS, not the closed categories of Ireland/Cyprus/Malta (and the UK). Hence, it could be too speculative to suggest that *BSA* implicitly removed the necessity to consider the category of work if originality was found. Stronger ground could have been found in *Painer* if such interpretation had been attempted by Birss J in *Abraham Moon*,<sup>657</sup> as postulated by the claimant. But, it was not. A stronger case could have been found again in *FAPL*<sup>658</sup> but, once the court determined that football matches could not be original, the court decision, in this regard, did not progress beyond that.

The strongest ground for positing that categories of works may have been negated from copyright subsistence requirements, may lie in the *Levola Hengelo*<sup>659</sup> judgment, as aforementioned. In this case, the CJEU denied copyright protection for the taste of cheese on the grounds that it was too subjective and variable to amount to the level of certainty, precision

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<sup>654</sup> *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPC 37 [98]

<sup>655</sup> Annette Kur, Thomas Dreier and Stefan Luginbuehl, *European Intellectual Property Law: text, cases and materials* (2<sup>nd</sup> edn Edward Elgar Publishing 2019) 74-5

<sup>656</sup> C-393/09 *Bezpečnostní softwarová asociace v Ministerstvo Kultury* [2011] E.C.D.R. 3

<sup>657</sup> *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPC 37 [98]

<sup>658</sup> C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] E.C.D.R. 11 [96]-[98]

<sup>659</sup> C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899



and objectivity required.<sup>660</sup> InfoSoc implemented the WIPO Copyright Treaty (“WCT”) provisions, to which the EU is a party. Article 1(4) WCT required the EU to give effect to Articles 1-21 of Berne. This determination had already been made in the CJEU cases, *Luksan*<sup>661</sup> and *DR and TV2 Danmark*.<sup>662</sup> By virtue of Art. 2(1) Berne Convention, to which the EU must give effect by its membership of WCT, ‘... literary and artistic works include every production in the literary, scientific and artistic domain, whatever the mode or form of its expression may be.’<sup>663</sup> A work, within *InfoSoc*, Art 2(1) had to be ‘expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form’.<sup>664</sup>

It must now be argued that there is a clear ruling emanating from the CJEU that, by interpretation of the WCT, Art. 1(4), *InfoSoc*, Art. 2(1) and Berne, Art. 2(1), a work is protected by copyright if it is expressed in a sufficiently certain and identifiable manner, whatever the mode or form of expression. Moreover, ‘only something which is the expression of the author’s own intellectual creation may be classified as a ‘work’ within the meaning of Directive 2001/29’.<sup>665</sup> Hence, it must now be argued that post-*Levola*, there is no need to fit *prima facie* copyright-protected works into closed categories, if they are original in the sense that that are the expression of the author’s own intellectual creation. Thus, it is argued that it is now very difficult to justify closed categories for EUMS since the 2018 *Levola* judgment. Ultimately, if an Art. 257 reference is referred to the CJEU, by a claimant wishing to exert copyright in a work not wholly identifiable by that MS’ categories, but is ‘sufficiently clear’ and ‘identifiable’

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<sup>660</sup> *Levola Hengelo BV v Smilde Foods BV* (C-310/17) EU:C:2018:899; [2018] Bus LR 2442; [2018] 11 WLUK 155 (CJEU (Grand Chamber)) [42]

<sup>661</sup> C-277/10 *Martin Luksan v Petrus van der Let* EU:C:2012:65 [59]

<sup>662</sup> C-510/10 *DR, TV2 Danmark A/S v NCB — Nordisk Copyright Bureau* EU:C:2012:244 [29]

<sup>663</sup> *Levola Hengelo BV v Smilde Foods BV* (C-310/17) EU:C:2018:899; [2018] Bus LR 2442; [2018] 11 WLUK 155 (CJEU (Grand Chamber)) [39]

<sup>664</sup> *ibid* [40]

<sup>665</sup> *ibid* [37]

with ‘sufficient precision’,<sup>666</sup> it is likely the CJEU, based on a wide interpretation of the law as stated above, would find that the work is copyright-protected.

#### 4.2.4 Suggested reform to harmonise “works” for EU copyright subsistence

By interpretation of the WCT, Art. 1(4), Council Directive 2001/29/EC, Art. 2(1) and Berne, Art. 2(1), a work is protected by copyright if it is expressed in a sufficiently certain and identifiable manner, whatever the mode or form of expression. Post-Levola, there is no requirement to fit *prima facie* copyright-protected works into closed categories, providing they are original in the sense that they are the expression of the author’s own intellectual creation.

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their works in the EU, providing they attain the EU standard of originality as outlined in *Infopaq* and/or *Painer*.

It can be argued that creative interpretation of *InfoSoc*, by the CJEU, has harmonised the originality standards required to find copyright in any work even if the work does not fit into the traditional categories of work required by closed category EUMS. Notwithstanding this, it can be argued that outstanding issues remain, in terms of “authorship”. Hence, we must consider two fundamental points to ascertain if differences in “authorship” affect the functioning of the single market: who created the work and if those creators are of a different type in EUMS.

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<sup>666</sup> *ibid* [40]

## 4.3 Authorship

As aforementioned, civil law EUMS traditionally protect works emanating from the author's soul and spirit.<sup>667</sup> This necessitated a human being to create the work. Common law countries, however, traditionally protect the economic investment of the author and other such rightholders to further the dissemination of works.<sup>668</sup> As has been argued in Chapter [1.3], the two parameters have evolved to become more aligned, particularly for economic rights protection. In terms of authorship of copyright works, it could be argued that EU copyright law requires a human author. This is evidenced by the originality standard as set down in *Infopaq et al* that requires an 'author's own intellectual creation'<sup>669</sup> for copyright to subsist in a work. In traditional common law countries, the work had to originate from the author<sup>670</sup> and exhibit sufficient 'skill, labour and judgment'.<sup>671</sup> Traditional "human-like" qualities such as a soul/spirit were not required.

### 4.3.1 Do we really need a human to create an intellectual work of the mind?

It is implicit, from the definition above, that the "author" is a physical human being i.e. flesh and blood, opposed to an artificially created "human-like" machine, like Sophia, who is a lawful citizen of Saudi Arabia but is actually an artificially intelligent ("AI") created robot.<sup>672</sup> Currently, Sophia can exhibit human-like qualities, such as facial expressions<sup>673</sup> and conversations. Moreover, Erica, an AI robot created by Japan's Hiroshi Ishiguro Laboratories,

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<sup>667</sup> Simon Newman, 'The development of copyright and moral rights in the European legal systems' (2011) EIPR 33 67, 70

<sup>668</sup> William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) J Leg Stud 18(2) 325

<sup>669</sup> C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [37]

<sup>670</sup> *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601, 609 (Peterson J)

<sup>671</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) 282 (Lord Evershed)

<sup>672</sup> Jaana Parviainen and Mark Coeckelbergh, 'The political choreography of the Sophia robot: beyond robot rights and citizenship to political performances for the social robotics market' (2021) AI Soc. 715

<sup>673</sup> Stephanie Hui-Wen Chuaha and Joanne Yu, 'The future of service: The power of emotion in human-robot interaction' (2021) J. Retail. Consum. Serv. 68

was invented specifically to act in a film called ‘b’, instead of a human actor.<sup>674</sup> However, it is argued that she is not yet a human-like-actor equivalent given that the inventors had to ‘simulate her motions and emotions through one-on-one sessions, such as controlling the speed of her movements, talking through her feelings and coaching character development and body language’.<sup>675</sup> This is not the same as a small child learning from its parents because there appears to be no “human instinct” in the machine. For example, when humans are hungry or thirsty, instinctively they will eat and drink, albeit due to specific bodily hormones.<sup>676</sup> The same cannot be said for robots like Sophia and Erica. Notwithstanding this, it has also been reported that a robot called Ai-Da exhibited her own drawings, paintings and sculptures in 2019 selling for over \$1 million.<sup>677</sup> Ai-Da creates the art works with a robotic arm and the use of software and algorithms, and by using her eyes which are actually cameras. One of the latest additions to her collection is a picture called the “Queen’s Platinum Jubilee”, a portrait of Queen Elizabeth II to celebrate her 70 years monarchical reign.<sup>678</sup> Notwithstanding this, it can be argued that it is the AI software that prompts Ai-Da to be able to select the colours, composition and, ultimately, it is the software that makes the different movements to select colours and composition that create a painting.<sup>679</sup> No two works that Ai-Da creates are exactly the same,<sup>680</sup> but no human consciousness is present either. Aside from the requirement of a “flesh and blood” human author, though, there is nothing preventing this work from meeting the subsistence requirements for copyright in the sense that it is an intellectual creation. The current

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<sup>674</sup> Hiroshi Ishiguro and Kohei Ogawa, ‘Anthropomorphic Robots’ published in Daragh Byrne and Dan Lockton (Eds.), *Spooky Technology: A reflection on the invisible and otherworldly qualities in everyday technologies* (Imaginaries Lab 2021) 183

<sup>675</sup> *ibid*

<sup>676</sup> Ghrelin and angiotensin II

<sup>677</sup> *ibid*

<sup>678</sup> ‘Ai-Da’ <[www.ai-darobot.com/exhibition](http://www.ai-darobot.com/exhibition)>

<sup>679</sup> Caroline Davies, ‘Mind-blowing’: Ai-Da becomes first robot to paint like an artist’ *The Guardian* (London, 4 Apr 2022) <[www.theguardian.com/technology/2022/apr/04/mind-blowing-ai-da-becomes-first-robot-to-paint-like-an-artist](http://www.theguardian.com/technology/2022/apr/04/mind-blowing-ai-da-becomes-first-robot-to-paint-like-an-artist)>

<sup>680</sup> Hiroshi Ishiguro, Kohei Ogawa, ‘Anthropomorphic Robots’ published in Daragh Byrne and Dan Lockton (Eds.), *Spooky Technology: A reflection on the invisible and otherworldly qualities in everyday technologies* (Imaginaries Lab 2021) 183

problem, of course, is whose “intellect” is it? Ai-Da is powered by a series of computer programs and algorithms that have ultimately been created by a flesh and blood human scientist. By current EU copyright law standards, the art works are not her own intellectual creations...yet.

#### 4.3.2 What happens when a machine can think for itself?

This begs the question, what do we do with the “human author” requirement when a machine can think, and create, for itself? Arguably, we probably do not need to think about this just yet. However, with the rise of AI, machine learning and digitisation during the last 70 years, it must be argued that wholly computer-generated (“CG”) work by robots like Ai-Da, or similar, cannot be ignored entirely if a unitary EUCR is to be posited. Indeed, there may come a point, in the not too distant future, where a robot is capable of thinking like a human. Or better. Furthermore, what happens when science has progressed to the extent that it is capable of uploading the mind of a human, including its consciousness, to a machine so that the machine has the ability to create copyrightable works in perpetuity, as though they were a flesh and blood human? In other words, what happens to copyright-protected works when a human author lives forever, through a machine? This may sound like the work of a terrifying, Mary Shelley-type science-fiction novel. But, it is no different to lawmakers drafting *Berne* 130+ years ago when inventions that facilitated our digital copyright-protected works, did not exist, and were not even capable of being envisioned by scientists of the day. Against this, it has been argued that ‘[a]rt, music and literature are quintessentially human, and any effort to allocate creativity to artificial intelligence feels wrong’.<sup>681</sup> However, it has also been argued that ‘[t]he development of superintelligent AI—machine intelligence more cognitively capable than humans in all practically relevant domains—would rank among the most important transitions

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<sup>681</sup> Andres Guadamuz, ‘Do androids dream of electric copyright? Comparative analysis of originality in artificial intelligence generated works’ (2017) IPQ 2 169, 174

in History[sic]'.<sup>682</sup> Such a mind may be capable of creating even more magnificently superior works than we have already, thus furthering our knowledge in the cultural fields of literature, art, science. Given that AI has infiltrated our lives so much already, we cannot necessarily ignore CG creations anymore, whether or not under the control of a human.

There are practical issues to consider, particularly from an AR perspective, such as, whether or not a machine will understand how to make free, selective and creative choices as required for originality in copyright.<sup>683</sup> It is difficult to envisage how a machine will display the stamp or personality of the author to take a photograph if the machine, itself, is the author.<sup>684</sup> Such concepts may have been more easily understandable in Ireland/UK where, traditionally, works were original if they have not been done before providing the 'author' could demonstrate a sufficient level of 'skill, labour and judgment'.<sup>685</sup> This is now much more tenuous, though, in view of the upwards harmonisation of *InfoSoc*, as interpreted by the CJEU. However, if we find ourselves in a world which is able to upload, not only the mind of a human, but also its stream of consciousness, it becomes more real and able to make those free, selective and creative choices reflecting its personality and stamp. A further question is whether a machine will know that it has infringed copyright in a work already produced. Without some kind of checklist of works in existence, this may be too onerous a task to bear. Ultimately, this may see a return to formalities and some kind of registration system that *Berne*, eradicated.<sup>686</sup> Moreover, as it has been argued at Chapter [4.1.3] that originality is now required for all works,

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<sup>682</sup> Nick Bostrom et al, 'Policy Desiderata in the Development of Superintelligent AI' <<https://nickbostrom.com/papers/aipolicy.pdf>>

<sup>683</sup> C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569

<sup>684</sup> *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 [94]

<sup>685</sup> *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601, 609 (Peterson J); *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) 282 (Lord Evershed)

<sup>686</sup> *Berne Convention*, Art 5(2)

then, invariably, this sweeps in the entrepreneurial, media-type works, such as films and so forth.

#### 4.3.3 Is there scope to extend copyright law to computer-generated creations under EU law?

Currently, EU law does not exist, *sui generis*, to copyright-protect works that do not have a flesh and blood human author. Hence, for inclusion in an EUCR, either a *sui generis* law needs creating, or, analysis of current directives/regulations is required to determine if current EU law could be interpreted to cover CG works. UK/Irish law permit CG copyright, though still envisage human authors:

In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.<sup>687</sup>

Disparity arises because Ireland/UK statutorily recognise that it is the machine that has created the work, albeit where a human made the arrangements for the machine to create the work.<sup>688</sup> Civil EUMS' national laws do not. Instead, and until harmonised in the EU, it would be for each national court to decide if CG work under the control of the human author, is capable of producing copyright-protected work, leaving far too much scope for fragmentation.

Ergo, the effect on the functioning of the single market is that works that have not been created by a flesh and blood human author, such as those generated by Ai-Da that sold for over \$1 million, may not be protected anywhere in the EU, other than Ireland (and formerly, the UK).

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<sup>687</sup> CDPA 1988, §9(3) and similarly in the (Irish) Copyright and Related Rights Act 2000, §21(f). Cyprus and Malta do not make provision for machine-based creations.

<sup>688</sup> This is likely to be on the basis that the human wrote the computer source code and it was a human mind that invented the device on which the source code is used; or possibly where a human leaves equipment around that a non-human then uses to create a work e.g. the “monkey-selfie” image taken by the Indonesian macaque monkey, Naruto. See: Andres Guadamuz, ‘Can the monkey selfie case teach us anything about copyright’ *WIPO Magazine* (February 2018) <[www.wipo.int/wipo\\_magazine/en/2018/01/article\\_0007.html](http://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html)>

This is because, whilst the creation may be the type to qualify as a copyrightable “work”, traditional interpretation of an “author” means that a non-human author cannot meet the originality threshold. Hence, rightholders of CG works from Ireland (and the UK) cannot guarantee that their rights will be protected anywhere else in EU27. This could be hugely disadvantageous. With the rise of AI and its creative works, it can be argued that this could deny protection to unlimited numbers of works, like Ai-Da’s, that could enhance the amount of creative works available in the EU for future inspiration, as well as the ‘flowering of the cultures of Member States’,<sup>689</sup> even if that is a new culture embodying AI. As such, it could be argued that a *sui generis* law, or interpretation of current law, is not a disproportionate measure to reduce fragmentation in the single market.

Given that CG work creation requires software, the first step towards recognising copyright in CG works lies with interpreting the *Software Directive*.<sup>690</sup> Recital 7 states that ‘[f]or the purpose of this Directive, the term ‘computer program’ shall include programs in any form, including those which are incorporated into hardware’.<sup>691</sup> Recital 11 outlines that ‘the expression of a computer program is protected’. In terms of authorship of the computer program, Art. 2(1) necessitates the author of a computer program to be ‘the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation.’ Hence, there is a clear requirement for a flesh and blood human author, and/or a legal entity encompassing such authors, in this definition, which gives effect to the international standards encompassed in the Berne Convention.<sup>692</sup> On this basis, it can be argued that the computer software powering

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<sup>689</sup> TFEU, Art 167(1)

<sup>690</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16 (“Software Directive (2009)”)

<sup>691</sup> *ibid*

<sup>692</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Recital 9; Berne Convention, Art 2(1)



an AI robot (or some other machine) is copyright-protected if the programmes amount to the ‘author’s own intellectual creation’. An AI robot, i.e. the hardware, cannot run without the software and, currently, needs a flesh and blood human author to create and input the software to the machine. Hence, it could be argued that as the human is the author of the software running the machine, works created by that machine amount to an expression of the author’s own intellectual creation. Thus, it could be further argued that the intellectual creations emanating from that machine, utilising the human-created software, encompass the expression of the computer program that was created by the human author.

On this basis, to copyright-protect CG creations under current EU law, we might argue that the software installed in the machine that created the environment for the machine to produce the work, albeit with an artificial hand opposed to a flesh and blood hand, are derived from human-centric copyright-protected computer programs and are an expression of the computer programme protected by EU law.<sup>693</sup> Although the human-created software requires a machine to understand and interpret the program, it can be argued that this is no different to a human author using hardware, such as a laptop, and its computer software in the form of an editing suite, to create a work, as in *Painer*.<sup>694</sup> Given that Ai-Da, the AI robot, can create many different pictures, opposed to just the same image, arguably this is no different to a human working within the constraints of a computer-based graphics program to create art works and so forth. In both circumstances, there must be a human author under EU law. Hence, there is nothing, in theory, precluding copyright for works, created by a machine, with authorship vested in the person who made this possible: the author of the computer programme used to create the work which is an expression of the computer programme protected by EU law within the *Software Directive*. Thus, it can be argued that it is a CG work created under the control of a human

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<sup>693</sup> *ibid*

<sup>694</sup> C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533

author whose own intellectual creation made the environment possible for its creation. Moreover, there is nothing, in EU law, that states explicitly that all stages of creation must encompass active human involvement. It is just that the work must amount to the author's own intellectual creation.<sup>695</sup> Hugenholtz identifies that 'it remains unclear whether and to what extent the original features of the work should (all) be preconceived or premeditated by the author'.<sup>696</sup> Moreover, Hugenholtz argues that 'it is sufficient that the author has a general conception of the work before it is expressed, while leaving room for unintended expressive features'.<sup>697</sup> Hence, it could be argued that if a machine creates a work that was intended by use of the programme itself, why should it matter if it was the machine that created it given that it was the human's own intellectual creation from where the programme originated? Moreover, as Hugenholtz argues, in

AI systems, where users are effectively no more than passive "players", the user clearly does not have a valid claim to authorship in the AI-assisted output (i.e. in anything beyond its initial prompt) – leaving the developer of the AI system as the only candidate for authorship of the AI-assisted output.<sup>698</sup>

This comes back to the natural person who created the software, used in the machine that produced the work in line with the author's vision of what the software could do. The resultant AI output, the "work", amounts to an expression of the copyright-protected computer program.<sup>699</sup>

Although it may be argued to be pushing the boundaries of an intellectual creation, currently, there is still a human author within the creative process which does not detract from civil law traditional human-centric AR principles. There will still be the future problem of whether or

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<sup>695</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [37]

<sup>696</sup> P Bernt Hugenholtz and João Pedro Quintais, 'Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?' (2021) *IIC Int Rev Ind Prop Copyr Law* 52 1190

<sup>697</sup> *ibid*

<sup>698</sup> *ibid*

<sup>699</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Recital 11

not to protect works entirely created by a machine that exhibit the qualities required for human authorship but, thankfully, we are not there just yet. Hence, we do not need to concern ourselves with that conundrum, for the purpose of a first draft of an EUCR. Instead, what we have are the first steps that show how current EU law can encompass works that, at the end of the work-chain, have been CG, but are protected as intellectual creations in EUMS due to an element of human input, thus authorship.

The final point, on this matter, is the issue of copyright duration. As this would be protected as an authorial work, copyright must last for the life of the author plus 70 years.<sup>700</sup> In Ireland/UK, however, CG works last for 50 years akin to media-type works. Hence, this proposal, if enacted, would be binding on Ireland wherein copyright duration for a CG program would be upwardly harmonised to 70 years post-mortem. It is too speculative to suggest what the UK would do, in these circumstances. Arguably, it should encompass the change given that the Software Directive has not been repealed from the UK CDPA. Notwithstanding this, it would require judicial interpretation of the new law which, itself, has not been encompassed into UK law, and would be unlikely to. In conclusion of this issue, it must be argued that such a change would impact Ireland but would most likely leave the UK's law untouched. This is something to consider when positing annexation to the TCA.

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<sup>700</sup> 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 [2006] OJ L372/12

#### 4.3.4 Suggested reform for harmonisation of copyright protection of computer-generated creations

By interpretation of Council Directive 2009/24/EC, a computer-generated work is protected by copyright if the work is an expression of the computer program which encompasses the author's own intellectual creation. The author(s), in this case, is the author(s) of the software powering the computer, natural and/or legal.

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their computer-generated works in the EU, providing the author(s) of the software attains the EU standard of originality as outlined in *Infopaq* and/or *Painer*.

#### 4.3.5 Authorship in collaborative and commissioned works

On the basis above, we must consider the elements of collaborative (joint) authorship and commissioned works because creative works emanating from such creations, generally do not arise from sole authorship. With the exception of the *Software Directive*, there is no harmonised law for joint authorship or commissioned works.

##### 4.3.5.1 Collaborative works: joint authorship

As has been seen at Chapter [3.4.1.2] Wittem did not include a reform for collaborative works in its published draft ECC (2010). Notwithstanding this, as has already been identified by this author at [3.4.1.2], by comparative analysis of MS' Copyright Acts, it can be deduced that the majority include "joint authors" in their works to the extent that copyright arises in the work, as a whole, provided it is indivisible. The majority of MS also include a caveat that each author

can take action independently in case of infringement. What is not clear, from the majority of EUMS' laws, is what happens when joint authors cannot agree to edits proposed for the collaborative work and its use thereafter. Hence, this is the starting point for positing harmonisation in this area of law.

The *Software Directive* (2009) states that '[i]n respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly'.<sup>701</sup> No such provision exists, in EU legislation, for other works of authorship. Arguably, this could be detrimental to the functioning of the single market, particularly if it prevents collaboration between entities. Clearly, this will not affect software engineers/companies. In terms of other works, however, there are no uniform EU rules as to who owns what, how this is determined and what happens to the work thereafter. This is left to private contract law. This strategy may be detrimental to the single market generally if it prevents goods/services distribution in the EU, but particularly in relation to research and development ("R&D") of copyright-protected goods and services. As a reminder, the *Trade Secrets Directive*<sup>702</sup> was passed due to concerns that deficits in EU investment funding were affecting R&D innovation. Fragmented national markets may not have reached the venture-capitalist financial markets in the same way that a harmonised single market would, delivering comparable protection. Collaborators in one MS endeavouring to conduct research with those in others, would be bound by their own national laws/private contracts. Fragmented laws could equal fragmented markets as they are risky, in terms of attracting investment, and from guarding against IP theft. On the basis that unharmonised collaborative authorship laws could detrimentally affect the single market, and

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<sup>701</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Art 2(2)

<sup>702</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1

that the majority of MS encompass this area of law in their national laws, this thesis proposes that this area of law should also be harmonised and drafted into the proposed EUCR.

In terms of the standard of harmonisation, nothing is included in the Berne Convention, in terms of joint authorship, except with regards to copyright expiry, in that ‘the terms measured from the death of the author shall be calculated from the death of the last surviving author’.<sup>703</sup> Neither the WCT, nor TRIPS, contain any provisions for joint authorship. Hence, we must come back to the MS’ national laws to find synergy. The majority of MS require the work to be indivisible but affix each joint authorship with the right to take action independently against infringements. However, there is disparity amongst EUMS regarding joint authorial permission in terms of editing the collaborative work. Some EUMS expressly include that joint permission is required but is subjected to court review where the withholding of permission may not be justified.<sup>704</sup> The remainder are silent and make no provision in this regard. It must be argued that a lack of harmony, in terms of authorial permission for editing and use of the work, could cause detriment in the single market if this issue is left unharmonised. This would mean that an important area of collaborative works, editing and use, is left to individual MS and private contracts. Thus it is argued that this element should be included in the reform to prevent detriment and fragmentation in the single market.<sup>705</sup> These elements will be posited as suggestions, as minimum standards, for harmonisation of authorship in collaborative works.

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<sup>703</sup> Berne Convention, Art 7bis

<sup>704</sup> Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia and Spain

<sup>705</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 6

#### 4.3.5.2 Suggested reform for collaborative authorship of copyright-protected works in the EU

By interpretation of EUMS' national laws, authorship of a collaborative work means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

Each joint author shall be separately entitled to institute proceedings for infringement of copyright.

Any alteration or exploitation of the work shall require the consent of all joint authors. Where a joint author refuses his authorisation without sufficient reason, any other joint author may institute proceedings to obtain such authorisation.

In line with the international minimal standards set down in the Berne Convention, Art 7bis, the terms measured from the death of the author shall be calculated from the death of the last surviving author.

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their collaborative works in the EU, subject to protection of these minimum standards and that the work is *prima facie* copyright protectable from the standards set down in *Infopaq* and *Painer*.

#### 4.3.5.3 Rights in commission-based works

In terms of commission-based authorship, this is unharmonised in the EU. The draft Witten ECC proposed the following reform:

Unless otherwise agreed, the use of a work by the commissioner of that work is authorised to the extent necessary to achieve the purposes for which the commission was evidently made.<sup>706</sup>

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<sup>706</sup> Witten Draft ECC (2010), Art 2.6

An explanatory note at Footnote [21] in the ECC expanded on this by stating ‘[s]uch purposes must have been known to, or obvious to the author, for example, from the terms of the commissioning agreement’. This provision clearly applies to all works but seems vague in its drafting. Moreover, according to the footnote, the majority of the reasoning, most likely, will be left for a court to determine, based on private contract law. Hence, it is not entirely clear how this clause, by itself, would lessen detriment in the single market of commission-based copyright-protected works.

A comparative critical analysis of MS’ Copyright Acts reveals that at least eight MS do not expressly make provision for this in their laws.<sup>707</sup> However, others do, but only in terms of portraits<sup>708</sup> and the majority who do include this provision, expressly assign the economic rights to the commissioner.<sup>709</sup> The remainder permit commissioning but do not specify the work. From this deductive reasoning, it can be argued that the following harmonious elements exist between EUMS:

- two thirds of EUMS make provision for commissioned works expressly in their Copyright Acts;
- of these, a further third only permit commissioning for portraits expressly in their copyright acts; and
- the majority of the two-thirds majority assign the economic rights to the commissioner.

From this deductive reasoning, minimum standards, in terms of commissioned works can be deduced from the EUMS’ copyright laws, as outlined above. On this basis, these elements will be posited as suggestions, as minimum standards, for harmonisation of economic rights in commissioned works.

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<sup>707</sup> Estonia, France, Greece, Malta, Poland, Romania, Slovakia and Slovenia

<sup>708</sup> Austria, Denmark, Finland, Hungary, Ireland, Italy, Netherlands and Sweden

<sup>709</sup> Belgium, Bulgaria, Czech Republic, Cyprus, Finland, Italy, Latvia, Lithuania, Spain and Sweden



#### 4.3.5.4 Suggested reforms for harmonisation of commissioned works

By interpretation of EUMS' national laws, economic rights of a commissioned work transfer automatically to the commissioner upon completion of the work.

Authorship of the commissioned work remains with the creator of the work.

The author's moral rights in the work shall not interfere with the commissioner's economic rights in the work.

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their commissioned works in the EU, subject to protection of these minimum standards and that the work is *prima facie* copyright protectable from the standards set down in *Infopaq* and *Painer*.

#### 4.3.6 Works made in the course of employment

As identified at Chapter [3.4.1.1], almost half of EUMS expressly provided for automatic transfer of the economic rights in the work from the author (employee) to the employer,<sup>710</sup> whilst the majority provided the same for any work without restriction. As a reminder, the Wittem Group attempted to harmonise this area of copyright law in the draft ECC, as follows:

Unless otherwise agreed, the economic rights in a work created by the author in the execution of his duties or following instructions given by his employer are deemed to be assigned to the employer.<sup>711</sup>

In the absence of any inclusion for “works made in the course of employment” in the Berne Convention, it can be argued that Wittem's clause seems to take into consideration the majority of EUMS' national laws, as the basis for creating minimum standards. On this basis, and

<sup>710</sup> Austria, Bulgaria, Croatia, Denmark, France, Greece, Italy, Latvia, Lithuania, Malta, Spain and Sweden

<sup>711</sup> Draft Wittem ECC (2010), Art 2.5

without further assessment, it is concluded that this author will adopt this clause for the draft EUCR. This is because no detriment is caused to MS and harmonising on the basis of minimal standards in this area adheres to the proportionality principle in EU law-making.<sup>712</sup>

#### 4.3.6.1 Suggested reforms for harmonisation of works made in the course of employment

By interpretation of EUMS' national laws, and unless otherwise agreed, the economic rights in a work created by the author in the execution of his duties or following instructions given by his employer are deemed to be assigned to the employer.

The author's moral rights in the work shall not interfere with the employer's economic rights in the work.

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their works in the EU, subject to protection of these minimum standards and that the work is *prima facie* copyright protectable from the standards set down in *Infopaq* and *Painer*.

## 4.4 Disparities in Fixation requirements in a Copyright Work

In terms of further disparities within EUMS, it can be argued that the element of "fixation" in a copyright-protected work is not harmonised. Traditionally, this was a common law element but there are some civil law EUMS who also encompass this requirement. Currently, in the EU, there are 27 national laws of copyright relating to "fixation". Generally speaking, [c]ivil law jurisdictions based on author's right (*droit d'auteur*) do not require fixation. Common law

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<sup>712</sup> TFEU, Art 5(1)

jurisdictions generally require some form of fixation as a prerequisite to copyright protection'.<sup>713</sup>

#### 4.4.1 When is “fixation” required and where?

Fixation for copyright subsistence is required by three of the 27 EUMS: Cyprus, Ireland, Malta.<sup>714</sup> The UK also requires fixation. Irish/UK works must be evidenced to document the form of the author’s expression of their idea.<sup>715</sup> In Ireland/UK, LDM works must be reduced to a material form.<sup>716</sup> Artistic works have no such legal requirement, most likely because ‘the nature of each of the types of work which fall within the definition of artistic work is such that the work will have taken a material form’.<sup>717</sup> Furthermore, sound recordings, films broadcasts and typographies have no such express legal requirement largely because they will, by their very nature, be fixed in some material form.<sup>718</sup> In Ireland, ““fixation” means the embodiment of sounds or images or any combination of sounds or images, or the representations thereof, from which they can be perceived, reproduced or communicated through a device’.<sup>719</sup> In Cyprus, LMA works must be reduced to a material form for copyright to subsist.<sup>720</sup> The Maltese Copyright Act 2000 outlines the same as Ireland but expressly includes ‘digital representations’ as well.<sup>721</sup>

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<sup>713</sup> T Cook and L Brazell, *The Copyright Directive* (Jordan Publishing Ltd 2004)4 [1.14]

<sup>714</sup> Interestingly, from 1813, Malta was a de facto colony of the UK until its independence in 1964; Ireland was originally part of the UK in the 19<sup>th</sup> Century until the creation of the Irish Free State in 1922 and Cyprus was ruled by the UK, as its protectorate, from 1878 (after ousting the Ottoman Empire) until it became an independent republic in 1960.

<sup>715</sup> Alexandra George, ‘The metaphysics of intellectual property’ (2015) WIPOJ 7(1) 16, 24

<sup>716</sup> Copyright, Designs and Patents Act 1988, §3(2); (Irish) The Republic of Ireland Copyright and Related Rights Act 2000, §18(1). See also: Nicholas Caddick QC et al, *Copinger & Skone James on Copyright* (17<sup>th</sup> edn Sweet & Maxwell 2019) 3-186

<sup>717</sup> Caddick, 3-194 (*ibid*). See also *Abraham Moon & Sons Ltd v Thornber* [2012] EWPC 37; [2013] FSR. 17 [104]

<sup>718</sup> *ibid*, 3-195/197. See also, Joshua Marshall, ‘Case Comment: Copyright "works" and "fixation": where are we now?’ (2019) IPQ 3 252, 254

<sup>719</sup> (Irish) Copyright and Related Rights Act 2000, §2 and §18 <

<sup>720</sup> (Cypriot) Law on Copyright and Related Rights of 1976 (as amended), §3(2).

<sup>721</sup> (Maltese) Copyright Act 2000, §2 and §3(2)

For LDM works requiring “fixation”, they must be fixed into a tangible or intangible identifiable object. *Berne* has also made voluntary provision for this formality.<sup>722</sup> As copyright arises upon the genesis of the creation for AR, fixation is not usually required. The creation alone is sufficient, regardless of form. Notwithstanding evidential and practicality issues, by virtue of the French Intellectual Property Code, for example, it can even be an incomplete work of the mind providing it is an expression of their own intellectual creation.<sup>723</sup> The subject-matter must still be ‘identifiable with sufficient precision and objectivity’, though.<sup>724</sup> This statement is further supported by the Code’s interpretation in an unreported Paris Supreme Court case<sup>725</sup> which deemed a fashion show a performance. In the French Code, choreographed works require “fixation” which would include the fashion show. In the French case, however, the court ruled that “fixation” was only ‘an evidentiary requirement for the infringement action, not a pre-requisite to copyright existence’.<sup>726</sup> However, in the French case, *Lancôme*, the court ‘unequivocally rejected the possibility of granting copyright protection to a scent under art.[sic]L.112-1 of the Intellectual Property Code’.<sup>727</sup> Hence, it could be argued that although French legislators drafted the Code sufficiently wide to incorporate vague creations, French courts are less likely to find copyright in such works unless they have a degree of precision to identify them. As such, the “fixation” gap may not be as wide as was once thought. In view of *Levola Hengelo*, it must be argued that no such provision exists now to “fix” vague, incomplete creations if they are not ‘identifiable with sufficient precision and objectivity’.<sup>728</sup>

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<sup>722</sup> Stockholm Act 1968, Art 2(2)

<sup>723</sup> ‘A work shall be deemed to have been created, irrespective of any public disclosure, by the mere fact of realization of the author’s concept, even if incomplete’ (French Intellectual Property Code, Art L111-2).

<sup>724</sup> C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899 [40]

<sup>725</sup> (French) *Roberts A. D. et al. v Chanel et al.*, French Court of Cassation, 5 February 2008 (unreported)

<sup>726</sup> Megan Carpenter and Steven Hetcher, ‘Function over Form: Bringing the Fixation Requirement into the Modern Era’ (2014) *Fordham L Rev* 82 2221, 2259 citing Estelle Derclaye, ‘French Supreme Court Rules Fashion Shows Protected by Copyright—What About the UK?’ (2008) *J Intell. Prop. L. & Prac.* 286. The case is unreported.

<sup>727</sup> Marshall, 254 (n 718) citing (French) *Les sociétés Lancôme, Cour de Cassation, civile, Chambre commerciale, 10 December 2013, No.11-19872*

<sup>728</sup> C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899 [40]

In summary, remaining EUMS are silent,<sup>729</sup> regarding “fixation”, or have wide-ranging catch-all provisions. Bulgaria protects work expressed in ‘any objective form’.<sup>730</sup> The Czech Republic copyright protects works ‘expressed in any objectively perceivable manner including electronic form, permanent or temporary, irrespective of its scope, purpose or significance’<sup>731</sup> In Denmark, literary and artistic works in either written or spoken form; music, dramatic, cinematographic, photographic works and those encompassed within “fine arts” expressed in some other manner, are protected.<sup>732</sup> Estonia requires works to be ‘expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices’,<sup>733</sup> whilst Finland works to be literary, spoken or ‘expressed in some other manner’.<sup>734</sup> In Hungary, ‘[p]rotection shall not be dependent on any quantitative, qualitative or aesthetic characteristics or be subject to any value judgement as regards the standard of creation’.<sup>735</sup> Italy has no requisite mode or expression for copyright subsistence.<sup>736</sup> Latvia is the closest to the UK/Cyprus/Malta/Ireland. It outlines fixation as ‘the embodiment of sound or images into a *material form* which provides a possibility to communicate it to the public, perceive or reproduce it by means of a relevant device’.<sup>737</sup> Croatia identifies copyright subsistence ‘irrespective of the manner and form of its expression’<sup>738</sup> as does Greece,<sup>739</sup> Lithuania,<sup>740</sup>

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<sup>729</sup> Austria, Belgium, France and Germany.

<sup>730</sup> (Bulgarian) Copyright and Neighbouring Rights Act 2000, Art 3

<sup>731</sup> (Czech) Copyright Act 2006, Art 2(1)

<sup>732</sup> (Danish) Consolidated Act on Copyright 2014, Art 1(1)

<sup>733</sup> (Estonian) Copyright Act 1992, §4(2)

<sup>734</sup> (Finnish) Copyright Act 2015, §1(1)

<sup>735</sup> (Hungarian) Act LXXVI of 1999 on copyright, §1(3)

<sup>736</sup> (Italian) Law for the Protection of Copyright and Neighbouring Rights 1941, Art 1

<sup>737</sup> (Latvian) Copyright Law 2000, № 4 (author’s emphasis)

<sup>738</sup> (Croatian) Copyright and Related Rights Act 2014, Art 5(1)

<sup>739</sup> (Greek) Copyright, Related Rights and Cultural Matters Law (1993), Art 2(1)

<sup>740</sup> (Lithuanian) Law on Copyright and related Rights 1999, Art 2(19)

Luxembourg,<sup>741</sup> The Netherlands,<sup>742</sup> Poland,<sup>743</sup> Portugal,<sup>744</sup> Romania,<sup>745</sup> Slovenia,<sup>746</sup> Spain<sup>747</sup> and Sweden.<sup>748</sup>

Hence, most EUMS do not expressly include “fixation” in their laws as a pre-requisite for copyright protection. These countries have the potential to protect innumerable works, subject to meeting their own originality requirements falling within their own, or *Berne*, wide-ranging work definitions.<sup>749</sup>

#### 4.4.2 Effect of fragmented “fixation” laws on the functioning of the EU single market of copyright law

It can be argued that disparity may arise, within the EU single market where some EUMS require certain works to be “fixed” in a material form, and others do not. Arguably, the most important disparity relates to evidential proof if the EUMS, in which a rightholder is claiming protection, does not recognise copyright because the work is not fixed to their national standards. Notwithstanding this, “fixation” makes provision to avoid infringement and unlimited, time-consuming, costly legal-wrangling over copyright subsistence and ownership disputes. It has been postulated that

The courts have often experienced a difficulty in according a work copyright protection where the first embodiment of the work is considered to have or to have had a transient or ephemeral existence.<sup>750</sup>

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<sup>741</sup> (Luxembourg) Copyright and Related Rights and Databases 2001, Art 1(1)

<sup>742</sup> (Netherlands) Dutch Copyright Act 1912, §10(12)

<sup>743</sup> (Polish) Act on Copyright and Related Rights 1994, Art 1(1)

<sup>744</sup> (Portuguese) Code of Copyright and Related Rights 1927, Art 1(1)

<sup>745</sup> (Romanian) Law on Copyright and Neighbouring Rights 1996, Art 7 (also includes the words ‘independently of their merit and purpose’, Art 7)

<sup>746</sup> (Slovenia) Copyright and Related Rights Act 1995, Art 5(1)

<sup>747</sup> (Spanish) Intellectual Property Act 1996, Art 10(1)

<sup>748</sup> (Swedish) Act on Copyright in Literary and Artistic Works 2013, Art 1(7)

<sup>749</sup> The majority of civil law EU Member States use the *Berne* categories (literature, art and science) or variations of them.

<sup>750</sup> Caddick QC et al, 3-110 (n 716)

Protection from public disclosure for this idea can be achieved through a non-disclosure agreement, should it need to be revealed to a select few before fixation. Against this, though, it has been argued that the justification for this assumption does not withstand the longevity of copyright protection.<sup>751</sup> A temporary work that is ultimately degraded or destroyed, but furthers knowledge in the field of literature, art and science receives no such protection under mandatory “fixation”. Yet, a work that did require just more than minimal effort in a common law country, with little or no value towards knowledge furtherance, could be protected.<sup>752</sup> However, if copyright can arise in a temporary work, how will we know if any subsequent copying was merely incidental if the original work is no longer identifiable? Arguably, other forms of evidence may satisfy this burden, on the balance of probabilities, such as independent witnesses who can attest to having seen the original work. However, this depends entirely on the accuracy of the description that such witness can recall upon cross examination in court.<sup>753</sup> It could be argued that, in view of the impact on the functioning of the single market, more legal certainty is required. Notwithstanding this, it could be argued that the CJEU may have resolved this problem of disparity, to some extent, as it may have harmonised the requirement for some form of “fixation” in copyright works through the *Levola Hengelo* case.<sup>754</sup>

#### 4.4.3 An argument for fixation harmonisation under *Levola Hengelo v Smilde Foods* and the effect on the functioning of the single market

EUMS that choose not to expressly require fixation for works, may now find themselves having to re-draft their laws to comply with the CJEU case: *Levola Hengelo v Smilde Foods*.<sup>755</sup> The

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<sup>751</sup> Megan Carpenter and Steven Hetcher, ‘Function over Form: Bringing the Fixation Requirement into the Modern Era’ (2014) *Fordham L Rev* 82 2221, 2259 citing Estelle Derclaye, ‘French Supreme Court Rules Fashion Shows Protected by Copyright—What About the UK?’ (2008) *J Intell. Prop. L. & Prac.* 286. The case is unreported.

<sup>752</sup> *ibid*

<sup>753</sup> *ibid*

<sup>754</sup> C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899 [40]

<sup>755</sup> *ibid*

court in this case, decided in the context of *InfoSoc*,<sup>756</sup> outlined that to attract copyright protection, works must be original if they are the author's own intellectual creation<sup>757</sup> and, that the expression is the author's own intellectual creation.<sup>758</sup> As it was the expression of the cheese that had to be the author's own intellectual creation, rather than the idea of the cheese, this could only be determined if 'the subject-matter [was] expressed in a manner which ma[de] it identifiable with sufficient precision and objectivity, even if not in permanent form'.<sup>759</sup> Essentially, relevant stakeholders needed to know, with sufficient certainty and objectivity, what was protected to avoid infringement.<sup>760</sup>

It could be argued that this is sensible, in view of the expanse of the single market. With potentially unlimited categories across 27 MS, an innumerable amount of works are now capable of being copyright-protected, due to increasing mechanical, electronic and telecommunication inventions. Fixation is a compelling form of proprietary evidence in a creative work,<sup>761</sup> particularly where there are so many more than probably envisaged when national IP laws evolved. From an evidential and practical viewpoint, users need to know that a particular creation exists, in a particular form, to avoid copyright infringement. In Ireland/UK, for example, if users do not know the creation exists, and could not have been expected to know, an 'innocent' infringement occurs wherein no financial remedy is available.<sup>762</sup>

However, there are issues with this ruling that do make it somewhat tenuous, in terms of the "fixation" requirement argument. It does not consider the personalistic, individual sensory

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<sup>756</sup> Directive 2001/29/EC 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] OJ L167/10

<sup>757</sup> *ibid* [36]

<sup>758</sup> *ibid* [37]

<sup>759</sup> *ibid* [40]

<sup>760</sup> Marshall, 256 (n 788)

<sup>761</sup> Carpenter Hetcher, 2239 (n 751)

<sup>762</sup> Copyright, Designs and Patents Act 1988, §97(1); (Irish) Copyright and Related Rights Act 2000, §128(2)



perception of copyright subsistence in AR systems, that serve to illustrate an author's blueprint in the work. Furthermore, the CJEU argument centred on the individual's reception of the work, rather than its characteristics.<sup>763</sup> Its characteristics can be objectively assessed with sufficient precision through fixation. Hence, in this case, lack of fixation ought to be the issue for objectivity and clarity, not the composition of the work. It could be argued that all creative works are subject to individual, subjective reception, not just olfactory creations.<sup>764</sup> Notwithstanding this, as this is now the requirement set down by the CJEU, it is binding upon all EUMS. Given that the CJEU have clearly stated that works must be identifiable, precise and objectively assessed, it must be argued that, as this is binding on all EUMS, there is now a requirement of some element of fixation in a work. Moreover, if that work is not in a permanent form, it is very difficult to see how it could satisfy the *Levola* requirements if it cannot be identified with sufficient precision and objectively assessed. Hence, it must be argued that this must be the minimum standard of fixation now that must be incorporated into an EUCR but that the manner and form of how this is to be achieved should, in the interests of subsidiarity, be left to MS to determine.

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<sup>763</sup> Joshua Marshall, 'Case Comment: Copyright "works" and "fixation": where are we now?' (2019) IPQ 3 252, 256, 258

<sup>764</sup> *ibid*

#### 4.4.4 Suggested reform to harmonise fixation standards for EU copyright subsistence

By interpretation of Council Directive 2001/29/EC by the CJEU in *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899, the minimum standard of “fixation” requirement is that the subject matter must be expressed in a manner which makes it identifiable with sufficient precision and objectivity. The manner and form should be left to Member States to determine.

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their works in the EU, which will be recognised as copyright-protected throughout the Union, providing that the works are identifiable with sufficient precision and uncertainty.

### 4.5 Could the Wittem draft ECC proposals for harmonising moral rights apply to a unitary EU Copyright Regulation?

Under TFEU, Art 351, there is a legal obligation to adhere to international agreements concluded before 1 January 1958. All EUMS must give effect to minimum standards of moral rights encompassed within *Berne*:

1. The right to claim authorship of the work (paternity);
2. The right to object to derogatory or prejudicial treatment of the work (integrity);
3. These must last at least as long as the economic rights but may last beyond the author’s lifetime if permitted by the signatory.<sup>765</sup>

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<sup>765</sup> Berne Convention for the Protection of Literary and Artistic Works 1886, Art 6bis

A further moral right developed in France, but also retained by other MS, is the right of divulgation which can be defined as ‘the artist's right to determine whether and when to treat the work as complete and whether, when and how to divulge it.’<sup>766</sup> Excluding the right of divulgation, Ireland/UK encompasses two further moral rights:

1. The right against false attribution; and<sup>767</sup>
2. The right to privacy in commissioned photographs.<sup>768</sup>

These two latter rights are not of concern for this thesis because it can be argued that they do not impede the functioning of the single market or affect rightholders and end-users detrimentally. If such detriment does occur, it can be argued that other EU laws exist where disputes arise in these matters.<sup>769</sup> A fundamental issue, however, relates to the longevity of the moral rights and the potential impact on the single market. Hence, French moral rights will be the principle law for discussion in this sub-chapter as they have the strongest rights in this area of law. By default, they have the strongest opportunity of potentially impeding the single market imperative, particularly if their national laws prevent rightholders from exercising their economic rights within the EU which then impacts detrimentally on the availability of works for end-users.

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<sup>766</sup> John Henry Merryman, ‘The Moral Right of Maurice Utrillo’ (1995) *Am. J. Comp. L.* 43(3) 445, 447

<sup>767</sup> Copyright, Designs and Patents Act 1988, §84; (Irish) Copyright and Related Rights Act 2000, §113

<sup>768</sup> Copyright, Designs and Patents Act 1988, §85; (Irish) Copyright and Related Rights Act 2000, §114

<sup>769</sup> For false attribution, civil law EUMS could invoke unfair competition laws under Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7, and for right to privacy, the ECHR, Art 8 and the Charter of Fundamental Rights of the EU 2012, Art 7 can be utilised

On this basis, it can be argued that a key element is the French moral right of divulgation and the fact that, in France, moral rights last for an indeterminable time. Moreover, given that it has been postulated in this thesis at Chapter [4.1.3] that all works are now protected by originality and that the concept of works has been harmonised (Chapter [4.2.3]) it must also be argued that this aspect of moral rights has also been harmonised in the sense that they no longer only apply to just the traditional common law authorial works; they must now apply to all works. Hence, this relates to all works in the single market that, potentially, could be affected.

#### 4.5.1 Author's Moral Right of Divulgation in the Wittem draft ECC

As a reminder, under the proposed Wittem ECC Art. 3.2, the right of divulgation is extended to all EUMS and will last for the author's lifetime. This directly contravenes French law whose national rights in this sphere last forever.<sup>770</sup> It is possible that this proposal would be very unpopular with French legislators and rightholders if their moral right of divulgation was curtailed in duration. As this is a major change to French moral rights laws which, in some respect, epitomise the French AR system, it is possible that stakeholder consultations may have to be held for interested parties before France could sanction such a change to their moral rights laws.

It could be argued that the Wittem Code may provide a solution to this likely concern through their Art 3.6 proposal. The draft ECC, Art. 3.6 covers the interests of third parties by limiting the scope of moral rights, namely the rights of divulgation, attribution and integrity, to situations only where such exercise would not 'harm the legitimate interests of third parties to an extent which is manifestly disproportionate to the interests of the author'. Examples of third parties include private entities, such as publishers, and also the general public for improving

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<sup>770</sup> (French) Intellectual Property Code, Article L121-1

access to the work.<sup>771</sup> It is not clear what “legitimate interests” in the ECC means as the drafters did not clarify this. It is likely, though, that ‘legitimate interest’ relates to genuine economic exploitation of the work in which the use does not impede the fundamental rights.<sup>772</sup> This suggestion seems to incorporate the potential safeguards encompassed within the Berne-Three-Step Test, employed for justifying limitations to copyright infringement (see[4.6]). However, this places the ‘interest of the author’ to be largely economic-related which is not necessarily the case with French moral rights laws. It can be argued that French moral rights uphold the wishes and integrity of the author’s personal autonomy to decide what happens to the work.

In terms of proposing a fundamental change to the law, as a reminder, under TFEU, Art. 114(1), EU lawmakers can

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.

Moreover, EU lawmakers, by virtue of TFEU, Art. 118, have the competence to

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.

However, as a bare minimum, in terms of intellectual property laws, it can be argued that EU lawmakers must:

- uphold the Charter of Fundamental Rights of the EU, Art. 17 (“the Charter”),<sup>773</sup>
- not impede the establishment of a single market,<sup>774</sup>

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<sup>771</sup> Draft Wittem ECC (2010), Fn. 34

<sup>772</sup> Gerald Dworkin, ‘The Moral Right of the Author: Moral Rights and the Common law Countries’ (1995) Colum.-VLA J.L.& Arts 19 229, 264

<sup>773</sup> TEU, Art 6 the right to property

<sup>774</sup> TEU, Art 3(3)

- adhere to the principles of subsidiarity and proportionality,<sup>775</sup>
- respect cultural diversity,<sup>776</sup> and
- ensure the rights to free movement, predominantly of goods and services.<sup>777</sup>

On this basis, it can be argued that moral rights are not proprietary rights within the meaning of the Charter, Art. 17. They form part of the broader scope of personality rights<sup>778</sup> which enable the author to control what happens to their work posthumously. Moreover, if differences in EUMS' laws do not impede the single market imperative, it must be argued that any change to harmonise MS' laws which results in downwardly harmonising rights, in the works, potentially should be regarded as unnecessary and not proportionate.<sup>779</sup> In terms of assessing 'cultural diversity', no definition is given in the TFEU. It has been argued that

Cultural diversity refers to the many ways that the cultures of groups and societies are expressed. These expressions are passed on within and among groups and societies, and include artistic creation and its enjoyment.<sup>780</sup>

However, this particular definition relates to Decision 2006/515/EC on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO) and seems more relevant to preserving traditional cultural expressions in indigenous communities, opposed to the author's moral rights in works that are already protected.<sup>781</sup> Hence, it can be argued that this legal issue essentially rests on whether the differences in EUMS' moral laws affect the functioning of the single market. If they do, EU

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<sup>775</sup> TEU, Art 5

<sup>776</sup> *ibid*

<sup>777</sup> TFEU, Art 26(2)

<sup>778</sup> Merryman, 446 (n 836)

<sup>779</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 7

<sup>780</sup> Commission Directive 2006/15/EC of 7 February 2006 establishing a second list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Directives 91/322/EEC and 2000/39/EC [2006] OJ L38/36, Art 4

<sup>781</sup> *ibid*, see particularly Annex 1(a)

lawmakers have the competence under TFEU, Art. 114 and Art. 118 to enact measures to prevent this.

The Wittem proposal for the right of divulgation is to include it for all EUMS wherein it would last for the author's lifetime. Under Wittem's proposal, this would mean that posthumously, the deceased's successor would not be able to withhold publication, via the right of divulgation, because the right would no longer exist. Under the current French law, the work may never be published unless a successor consent to publication. Hence, the impact of the change in law for France is twofold. The first part preserves the status quo wherein the author can choose not to consent to publication during their lifetime. However, the second part enacts a downwards change in French moral rights because the successor(s) to the work would have no say in what happens posthumously. This has potential ramifications for authors, who may be deterred from publishing works if they feel their posthumous wishes will not be respected, and successors, who wish to withhold publication to preserve the wishes of the deceased but may be legally frustrated from doing so.

Notwithstanding this, it must be argued that the French-based author, in theory, can only secure what happens to their work up to their death. There is nothing preventing successors of the copyright-protected work from posthumously divulging the work, even if it is against the deceased's wishes, because, who would bring an action in these circumstances? Unless a legal representative was a trustee of an estate which expressly forbade such divulgation, arguably, there would be no one to complain.<sup>782</sup> The difference between the Wittem proposal and the present law, therefore, is that, currently, successors can block divulgation of works *ad infinitum*. Wittem's proposal would prevent this as the moral rights would expire upon death.

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<sup>782</sup> Jani McCutcheon, 'Death Rights: Legal Personal Representatives of Deceased Authors and the Posthumous Exercise of Moral Rights' [2015] IPQ 242, 243

Given that copyright in the “authorial-type” works, passed to the successors, generally lasts for 70 years *post-mortem*, it is difficult to see why Wittem did not propose this moral right should expire with copyright. Logically, this could have been a more inclusive middle way to reduce differences between the two extremes. Notwithstanding this, such a change could still effect opposition from French stakeholders, authors and so forth who may not view such a change positively. Hence, the sociolegal grounds on which EU lawmakers may enact this change under Art. 114 and Art. 118 must be considered.

In practice, under the current French moral right of divulgation, where an author, or their successors do not wish to divulge the work, that work must be treated as never having been written before. On that basis, it is difficult to see how the functioning of the single market would be impeded. It could be argued that it is no different than if the work, in reality, had never being produced. Notwithstanding this, there are at least two ways in which this could be argued against. The first comes back to the common law copyright justification of utilitarianism to incentivise the production of works for the public good. Moreover, creative works act as a source of inspiration for others to generate further creative works for dissemination within society, extolling many educational, social and socio-economic benefits on society as a whole. However, French stakeholders may not consider this as having any relevance given that the essence of AR is exactly that: to protect the author.

This brings us to the second point: compulsory licensing, as outlined in the Berne Convention.<sup>783</sup> Arguably, if a work was deemed of manifest importance to the public, could it be possible that permission to publish the work could be sought from the courts to mandatorily release such information? An obvious example is a scripted cure for a particular type of cancer.

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<sup>783</sup> Berne Convention, Art 11*bis*(2)



More recently, though, what if a French scientist had found a cure to eliminate entirely the Covid-19 virus that effectively shut down the world for almost two years in 2020, but refused to publish the written formula/instructions of how to cure this virus, thus leaving countries in dire straits? Even though the Berne Convention makes provision for compulsory licensing wherein ‘[i]t shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised’, this is qualified because ‘[t]hey shall not in any circumstances be prejudicial to the moral rights of the author’.<sup>784</sup> Hence, this potentially precludes licensing of such works. Arguably, claimants wishing to publish such works could have a better case using the compulsory licensing provision of patent law via TRIPS, Art. 31. But, what if this moral right had applied to the Dead Sea Scrolls? It is well-documented that such artefacts are of huge importance because they help modern-day society understand concepts such as the ‘Bible and the Jewish world at the time of Jesus’.<sup>785</sup> TRIPS would not help in this circumstance and the public would be denied the opportunity for the receipt of knowledge that could advance society...all because a successor of the dead sea scrolls, 2000 years later, objected to their publication. What if Hippocrates’ successors to his literary works had effected their right to refuse divulgation, had that opportunity prevailed then? Taken in this context, it seems very difficult to justify an absolute, *ad infinitum* inalienable right to prevent divulgation. But currently, the French moral right of divulgation precludes EUMS from enforcing publication of the works against the wishes of authors/successors.

It is suggested that one last option, to avoid imposing downwards harmonisation on EUMS to enforce publication, could be found in the ECHR, in Art. 8 upholding ‘the right to respect

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<sup>784</sup> Berne Convention, Art 11*bis*(2)

<sup>785</sup> Daniel Falk, ‘The Dead Sea Scrolls are a priceless link to the Bible’s past’ *The Conversation* (30 October 2018) <[Page 192 of 382](https://theconversation.com/the-dead-sea-scrolls-are-a-priceless-link-to-the-bibles-past-105770#:~:text=Fame%20and%20forgeries,at%20the%20time%20of%20Jesus.></a>></p></div><div data-bbox=)

for...private and family life'<sup>786</sup> but where 'interference by a public authority...is permitted in terms of the exercise of this right [where it] is necessary...in the interests of public safety or the economic well-being of the country, for...the protection of health or morals...'.<sup>787</sup> On this basis, arguably, Hippocrates' works could have been mandated for publication, on the grounds of the public's health et al, that would warrant such interference. But what of works such as the Dead Sea Scrolls et al? Regrettably, the importance of understanding past elements of society that are manifestly important to world-wide cultures do not impact the public's health et al. Hence, we come back to the probability that if a change in the law is postulated, then it will be for EU lawmakers to enact this, rather than judicial interpretation of current laws. On analysis, it must be argued that, in the absence of any further option to encourage divulgation, the French moral right of divulgation can prevent such works being published unless caught by the ECHR or TRIPS, Art 31.

The fundamental question, therefore, is whether this impedes the functioning of the single market. TEU Art, 114 mandates the enactment of laws to counteract 'health, safety, environmental...and consumer protection'. On this basis, it would have to be shown that prevention of such publication would impede the functioning of the single market in one of these areas, or the four fundamental freedoms. It is difficult to envisage the importance of such a work that would engender such impact unless it fell within the scope of TRIPS, Art 31 and/or the ECHR, Art 8(2). As such, there are already remedies available to take action to enforce publication in these circumstances. On balance, it must be argued that TFEU, Art. 114 should not mandate a change to the French moral right of divulgation, to enforce publication of works *per se*, as they are not encompassed within the scope of Art. 114. The only other option under the TFEU, Art 101 is where competition would be hindered in the single market. However, as

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<sup>786</sup> ECHR, Art 8(1)

<sup>787</sup> ECHR, Art 8(2)

there is no financial or other such gain for the author/successor refusing to divulge the publication, unless it fell into the scope of the ECHR/TRIPS, it is difficult to justify the mandated change in national law on the basis of impeding competition in the single market.

On this basis, it can be argued that it is difficult to justify enforced divulgence of the work in the way that the Wittem ECC suggested. In the interests of proportionality, subsidiarity, EU competence in law-making and adherence to international human rights laws, nor should it as it is unlikely to impede the functioning of the single market, without there already being some form of legal mechanism in place to counteract this.

#### 4.5.2 The “right to consent” proposal in the Wittem draft ECC

Of particular concern, is the proposed “consent” issue harmonised across all EUMS in Wittem’s draft ECC at Art. 3.5. Currently, French law permits assignation of the economic rights, but the rightholder cannot consent i.e. waive his moral rights as proposed by the ECC.<sup>788</sup> Wittem’s proposal permitted such consent which may breach the fundamental EU proportionality objectives.<sup>789</sup> To assess if this proposal is proportionate, it must be considered if current French law, preventing any such waiver or consent to waiver, affects the functioning of the single market detrimentally, including rightholders and end-users.

Arguably, it might, depending on the perspective considered. From an author’s perspective who may be a strong proponent of this moral right and would not wish to waive it, the French law is preferable because it means that the rightholder cannot waive the right under any circumstances. Consequently, it could be argued that this safeguard prevents authors in weaker bargaining positions, being pressured into waiving such moral rights, that they would prefer to

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<sup>788</sup> (French) Intellectual Property Code, Article L121-4

<sup>789</sup> TEU, Art 5

uphold, but feel as though they cannot in order to secure the copyright contract/deal on offer. In contrast, it potentially prevents the author, and/or a new rightholder from exploiting their work economically from the perspective of the author who is not overly concerned about their moral right to integrity, in other words, what happens to their work after publication. In practice, of course, there is nothing preventing a rightholder, who wishes to consent to not exercising his moral rights, from doing just that. It could be argued that just because a MS' law prevents someone from exercising this right, it does not follow that the rightholder will necessarily object to certain uses of their work that others may view as derogatory and prejudicial to their honour. Hence, careful drafting of a copyright contract, outlining the types of uses that the rightholder would not object to in future use, could potentially circumvent this problem if needs be. However, there would always be the risk that the rightholder could be exploited and pressured into signing a contract of this nature, again, to secure the contract. No system is perfect though. Hence, it largely depends on how much the French "no-waive" moral right impedes the functioning of the single market.

In terms of the single market, it is very difficult to assess precisely the impact on the single market of authors who cannot waive their moral rights in their creative works. Essentially, it largely depends on how tradable an author's moral right is. However, it can be argued that, currently, all French authors are prevented from consenting to agree to not exercise their moral rights because French law places the personality of the author above the author's own economic rights and autonomous wishes. This places them at risk of their works not being as tradable in the single market which also impedes the end-user. This is different to the author who wishes not to publish at the outset because it can be argued it is as if the work did not exist. It is not the same as parties wishing to set their own terms for trading EU-wide, but who are legally frustrated by their own national law. Essentially, there is a risk that fewer works will be

available in the market and the author's attempts to trade competitively EU-wide are frustrated by national law. However, Chapter [1.4] reported that creative industries exports within the EU from the UK, with a loosely estimated population of around 70 million people and with one of the lowest levels of common law inclusion of moral rights,<sup>790</sup> and France, with a similar population and with the most stringent moral rights laws, are similar with only a 2% upwards difference... in France's favour.<sup>791</sup> Hence, it cannot be stated with any certainty that trade would be affected between the MS. On the contrary, the reported figures of the time show that France's creative contribution to the EU is higher than the UK's with, arguably, the lowest levels of moral rights laws to frustrate trade. Thus, it must be argued, that on the basis that there does not appear to be concrete evidence that the functioning of the single market is affected by this stringent moral right, there is no justification for imposing this on France.

However, it must be remembered that this moral right, in France, lives forever. Hence, it can be argued that the successor is also bound to this moral right, long after the author has died and long after the social, political, legal and cultural demographics of society have moved on.<sup>792</sup> Hence, it could be argued that it is not the moral right that is necessarily at issue *per se*, but its duration. Hence, there is an argument that, in the interests of the single market, in terms of rightholders and end-users, a more measured approach should be taken in this regard whereby, this moral right should last only as long as the original author's lifetime. Notwithstanding this, we must come back to two points: that the creative outputs of France outstrip those of a former MS with the same population who has the lowest protection of moral rights; and the

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<sup>790</sup> UKIPO, 'Use of Intellectual Property rights across UK industries' (2020)

<https://www.gov.uk/government/publications/use-of-intellectual-property-rights-across-uk-industries/use-of-intellectual-property-rights-across-uk-industries>

<sup>791</sup> WIPO, 'The Economic Contribution of Copyright Industries in France' (2016) 39 [www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_fr.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_fr.pdf)

<sup>792</sup> Michael Rushton, 'The Moral Rights of Artists: Droit Moral ou Droit Pécuniaire?' (1998) J. Cult. Econ. 22(1) 15, 19

justification for imposing laws where they clearly are not needed for the functioning of the single market.

Against this, it must also be argued that this does not take into account the fact that, unlike, the right of divulgation, the actual wishes of the author are being ignored under current French moral rights laws due to their inalienability. It must be argued that, in a Union of 27 MS where free trade should be guaranteed to all, the inability for an individual to trade under autonomous terms that are available elsewhere in the Union, impedes their opportunity to trade within the EU and, thus, affects the functioning of the single market. Hence, we come back to *InfoSoc*,

#### Recital 7

The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

On that basis, it could be argued that this environment is such where intervention by EU lawmakers to remove impediments to the functioning of the single market can be justified, and applied, to laws intended to harmonise within the Union.

### 4.5.3 Suggested reform to harmonise EU Moral Rights

By a basic economic assessment of the creative outputs of the MS with the most stringent moral rights as compared with the (former) MS with the lowest level of moral rights in terms of the functioning of the single market, and in conjunction with Directive 2001/29/EC, Recital 7, the following moral rights should be codified in an EUCR:

- (1) Right of divulgation (optional)
- (2) Right of attribution (mandatory)
- (3) Right of integrity (mandatory)
- (4) Right to waiver wherein two options will be explored:
  - a. Authorial right to waiver; or
  - b. Authorial right to waiver with Fair Remuneration

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their works in the EU, in a manner which does not prejudice their moral right, as outlined above, as provided for by their national laws.

### 4.6 Permitted Exceptions: an argument for mandatory exceptions in the 2001/29/EC “Information Society Directive”, Art. 5

It has been shown how the CJEU has interpreted *InfoSoc*, in line with the TFEU, Art. 114, TFEU Art. 118, the WCT and Berne to harmonise various aspects of EU copyright law including, originality, notions of work and fixation. Notwithstanding this, an area that also has the potential to detrimentally impact the functioning of the single market is the copyright

defence of “permitted exceptions”, as set down in *InfoSoc*, Art. 5.<sup>793</sup> The exceptions that have the scope to affect the functioning of the single market, or are deemed obsolete, will be critically analysed and suggestions for reform made to incorporate into the proposed EUCR.

#### 4.6.1 Permitted Exceptions

In line with *Berne*<sup>794</sup> TRIPS,<sup>795</sup> the WCT<sup>796</sup> and the WPPT,<sup>797</sup> permitted exceptions to copyright infringement are set out in *InfoSoc*, Art 5. Apart from the Art. 5(1) exception relating to works which are ‘temporary acts of reproduction... transient or incidental...integral and [an] essential part of a technological process’ (temporary reproductions’),<sup>798</sup> there is no obligation on MS to incorporate the remaining permitted exceptions into national laws. Hugenholtz identifies this ‘political’ compromise as a ‘weakness of the harmonization process’ which has a ‘negative effect on legal certainty in the Member States’.<sup>799</sup> This is because what may constitute lawful use of the work in one EUMS may be infringing in another. *InfoSoc* codified the bare minimum standard for copyright infringement exceptions, but, did not attempt genuine limitation-harmonisation for rightholders and end-users. Instead, *InfoSoc* allows EUMS to “pick and mix” limitations from a “shopping list” of some twenty-one broadly worded categories of exemptions’.<sup>800</sup> This may cause disparity for the functioning of the single market and also for the dissemination of educational, cultural and historic works throughout the Union. Important examples where disparity may occur from the optional *InfoSoc* exceptions are: the

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<sup>793</sup> Directive 2001/29/EC 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] OJ L167/10, Art 5

<sup>794</sup> Berne Convention for the Protection of Literary and Artistic Works 1886, Art 9(2)

<sup>795</sup> TRIPS, Art 13

<sup>796</sup> WIPO Copyright Treaty 1996, Art 10

<sup>797</sup> WIPO Performances and Phonograms Treaty 1996, Art 16

<sup>798</sup> Hereafter “temporary reproductions” Art 5(1)

<sup>799</sup> P Bernt Hugenholtz, *The dynamics of harmonization of copyright at the European level*, in Christophe Geiger, *Constructing European Intellectual Property* (Edward Elgar Publishing 2013) 276

<sup>800</sup> *ibid*



right to make reproductions on any medium (“private copying”),<sup>801</sup> reproductions made by publicly accessible museums (“archiving”),<sup>802</sup> reproductions for the illustration of teaching (“illustration of teaching”),<sup>803</sup> reproduction by the press,<sup>804</sup> criticism and review,<sup>805</sup> use for the purpose of parody (“parody”),<sup>806</sup> incidental inclusion of a work or other subject-matter (“incidental inclusion”) and use by communication or making available for private study and research (“private study and research”).<sup>807</sup>

Currently, Ireland has transposed six of the optional permitted exceptions into their statutory copyright law: research and private study, and, illustration of teaching,<sup>808</sup> criticism and review,<sup>809</sup> reporting current events,<sup>810</sup> incidental inclusion<sup>811</sup> and archiving.<sup>812</sup> In relation to the most important identified above, it is missing the “parody” and the “private copying” exceptions. For the UK, the *WIPO Review* reported, in 2013, that the range of defences were expanding to incorporate a further nine possible exceptions to copyright, of which three were prominent: private copying, fair dealing and parody.<sup>813</sup> To date, out of the eight most important exceptions identified above which have the potential to detrimentally impede the single market, seven have been incorporated into UK law: archiving,<sup>814</sup> illustration of teaching,<sup>815</sup> criticism,

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<sup>801</sup> Directive 2001/29/EC 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] OJ L167/10, Art 5(2)(b)

<sup>802</sup> *ibid.*, Art 5(2)(c)

<sup>803</sup> *ibid.*, Art 5(3)(a)

<sup>804</sup> *ibid.*, Art 5(3)(c)

<sup>805</sup> *ibid.*, Art 5(3)(d)

<sup>806</sup> *ibid.*, Art 5(3)(k)

<sup>807</sup> *ibid.*, Art 5(3)(n)

<sup>808</sup> (Irish) Copyright and Related Rights 2000, §50 transposing 2001/29/EC, Art 5(3)(a)

<sup>809</sup> *ibid.*, §51(1) transposing 2001/29/EC, Art 5(3)(d)

<sup>810</sup> *ibid.*, §51(2) transposing 2001/29/EC, Art 5(3)(c)

<sup>811</sup> *ibid.*, §52 transposing 2001/29/EC, Art 5(3)(i)

<sup>812</sup> *ibid.*, §59-§70 transposing 2001/29/EC, Art 5(2)(c)

<sup>813</sup> WIPR, ‘UK copyright law: a change for the better?’ (26 Apr 2013). Available online at: [www.worldipreview.com/article/uk-copyright-law-a-change-for-the-better](http://www.worldipreview.com/article/uk-copyright-law-a-change-for-the-better)

<sup>814</sup> The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (S.I. 2014/1372), reg. 1, Sch. para. 14 amending the Copyright, Designs and Patents Act 1988, §37-§44A transposing 2001/29/EC, Art 5(2)(c)

<sup>815</sup> The Copyright and Related Rights Regulations 2003 (S.I.2003/2498) reg. 9(a) amending the Copyright, Designs and Patents Act 1988, §29 transposing 2001/29/EC, Art 5(3)(a)

review, quotation and news reporting,<sup>816</sup> caricature, parody or pastiche,<sup>817</sup> incidental inclusion<sup>818</sup> and private study and research.<sup>819</sup>

#### 4.6.1.1 Permitted Exceptions: Article 5(2)(b) “Private Copying”

Endeavours to retain the eighth, a private copying exception, into UK copyright law failed, despite having been introduced into law in October 2014. Given that there was no tax levy in relation to the exception,<sup>820</sup> music industry stakeholders applied for judicial review of the decision.<sup>821</sup> This was upheld by the English courts in 2015 as there was insufficient evidence put forward by the Respondents to justify the conclusion that the exception caused minimal harm.<sup>822</sup> The exception was quashed and never re-introduced.<sup>823</sup> This position is unlikely to alter in the near future unless the issue of levies is corrected and is in line with the CJEU ruling in the Austrian case *Austro-Mechana v Amazon*.<sup>824</sup> In *Austro*, the court held that although it was recognised that the actual harm to the rightholder is generally caused by the end-user who does not recompense the rightholder when copying their work independently, evidential problems generally mean that the financial ‘risk’ is absorbed by some other means: levies that are applied to the equipment that makes the copying possible.<sup>825</sup> On this basis, it must be argued

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<sup>816</sup> The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356) regs. 1, 3(3) amending the Copyright, Designs and Patents Act 1988, §30(1) transposing 2001/29/EC, Art 5(3)(c) and (d)

<sup>817</sup> The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356) regs. 1, 5(1) amending the Copyright, Designs and Patents Act 1988, §30A transposing 2001/29/EC, Art 5(3)(k)

<sup>818</sup> The Copyright and Related Rights Regulations 2003 (S.I.2003/2498) reg. 2(1), Sch. 1 para. 3(1)(d)(e) amending the Copyright, Designs and Patents Act 1988, §31 ) transposing 2001/29/EC, Art 5(3)(i)

<sup>819</sup> The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (S.I. 2014/1372), regs. 1, 4(1) 14 amending the Copyright, Designs and Patents Act 1988, §32-§36A transposing 2001/29/EC, Art 5(3)(n)

<sup>820</sup> A tax charged on purchased recordable media such as CDs and DVDs. It is mandated to offset losses, caused to right-holders, by people making multiple copies, for their own exclusive use, of a work such as a CD music album or DVD movie already purchased by them. In reality, most purchased music CDs and movie DVDs are copyright protected so that no such copying can take place.

<sup>821</sup> IPO, ‘Quashing of private copying exception: Judicial review of private copying exception (20 July 2015) <[www.gov.uk/government/news/quashing-of-private-copying-exception](http://www.gov.uk/government/news/quashing-of-private-copying-exception)>

<sup>822</sup> *R (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin); [2015] Bus LR 1435

<sup>823</sup> IPO, ‘Quashing of private copying exception: Judicial review of private copying exception (20 July 2015) <[www.gov.uk/government/news/quashing-of-private-copying-exception](http://www.gov.uk/government/news/quashing-of-private-copying-exception)>

<sup>824</sup> C-572/14 *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Amazon* ECLI:EU:C:2016:286

<sup>825</sup> *ibid.*, [21]-[22]

that Wittem’s proposal, at Art. 5.1 ECC, to mandate a home copying exception without remuneration, of some form, to the rightholder must be rejected as it would directly contravene established CJEU case law, interpreting *InfoSoc*. Hence, the proposed EUCR would retain the exception, currently drafted in *InfoSoc*, Art. 5(2)(b), as an optional exception.

#### 4.6.1.2 Permitted Exceptions: Article 5(2)(c) “Archiving”

A further exception relates to “archiving”, contained in *InfoSoc*, Art. 5(2)(c). Essentially,

libraries, archives and museums will now be better able to protect our cultural heritage and preserve their collections. The existing preservation exception has been expanded to cover all types of copyright work, and now applies to museums and galleries as well as libraries and archives.<sup>826</sup>

As before, this is optional in *InfoSoc*. It can be argued that failure to compel EUMS to incorporate this into their national laws, as a “mandatory” exception, could cause refragmentation in the EU single market of “archiving”.

This is particularly acute for libraries and museums engaging in mass digitisation for their archives to preserve works. Even if some MS had incorporated the Art. 5(2)(c) exception into their own national laws, institutions still have the insurmountable problem of obtaining thousands, if not millions, of licences from rightholders in other EUMS where the exception has not been implemented.<sup>827</sup> UK Cultural Heritage Institutions (“CHI”) may have been able to preserve their own cultural works,<sup>828</sup> but there were no guarantees that other MS would make the same provision. This clearly contravenes TFEU, Art 167 where the EU has a duty to foster cultural diversity amongst the Union. On this basis, it is argued that the “archiving” exception, currently drafted in *InfoSoc* as Article 5(2)(c), should be mandatory and moved from its current location in Article 2, to Article 1, to create a new ‘Article 5(1)(c)’ mandatory exception.

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<sup>826</sup> *ibid*

<sup>827</sup> Hugenholtz, 285 (n 869)

<sup>828</sup> Copyright, Designs and Patents Act 1988, §40-§43; (Irish) Copyright and Related Rights Act 2000, §59 - §70 and §221

#### 4.6.1.3 Permitted Exceptions: Article 5(3)(a) “Teaching” and Article 5(3)(n) “Research and Private Study”

With regards to the “teaching and scientific research” and “research and private study” exceptions contained in Arts. 5(3)(a) and 5(3)(n) respectively, it can be argued that the “optional” status of these may also cause further refragmentation. Under Art 5(3)(a) EUMS may permit

use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved

Under Art. 5(3)(n) EUMS may permit

use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.

However, it can be argued that the world has now transgressed into a fully functioning digital content and service provider. During the COVID-19 pandemic of 2020, universities and other such educational establishments worldwide had to switch from campus-based institutes to wholly, fully functioning online establishments within days, delivering real-time lectures/seminars online. It can be argued that this was successful, partly because of the exceptions transposed into national laws permitting copyright-protected content for teaching, archiving and research/private study. It meant that tutors, researchers and students could access resources remotely that had been archived and/or shared in a protected virtual learning environment. Many students returned to their home countries before their borders closed. Students in MS which had no such exceptions, may have had less access to knowledge, in these circumstances, than their Irish/UK or other EUMS counterparts despite studying for the same qualification at the same institute.<sup>829</sup> Hence, it can be argued that optional exceptions for these

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<sup>829</sup> This is particularly prevalent where students are seeking educational sources outside the remit of the syllabus (as encouraged by many HEIs) and who are conducting independent research.

important areas do not fit within this new online world adequately to strike a balance between rightholders and end-users. On this basis, and in line with the Wittem ECC proposal, it is argued that Art. 5(3)(a) and Art 5(3)(n) should both be mandatory to transpose in each EUMS. On this basis, they should be moved to create a new Art. 5(1)(d) and a new Art 5(1)(e) respectively.

However, problems may arise from this exception, whether mandatory or optional, depending on the type of works used and shared in educational settings. This is particularly acute where a multi-territorial licence may be needed for students to access music or audiovisual works that may be accessible in the “home” country of the establishment, but not elsewhere due to licensing restrictions. Also, it could be argued that there is a potential conflict between the rightholder’s communication right and the end-user. Hence, the teaching and research/private study exceptions, if made mandatory, must strike a fair balance between the rightholder and the end-user in terms of accessing and using such works. To do this, it is suggested that the Wittem proposal made at Art 5.3(2) may assist by requiring some form of ‘payment of remuneration, and to the extent justified by the purpose of the use’. Hence, it must be argued that to mandatorily introduce this, such use must comply with the Berne Three-Step-Test i.e. that the use is limited to ‘special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’.<sup>830</sup> Moreover, licences ought to be sourced for use of works where the rightholder’s economic rights are unfairly prejudiced. This will require an assessment on why the work is being included with consideration given to commercial reasons for such use.<sup>831</sup> If the use is wholly commercial, this is likely to ‘unreasonably prejudice the legitimate interests of the author’. The issue of licensing of music and audiovisual works is considered in Chapter

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<sup>830</sup> Berne Convention, Art 9(3)

<sup>831</sup> *Football Association Premier League Ltd and others v Panini UK Ltd* [2003] EWCA Civ 995; [2004] 1 W.L.R. 1147 [26] (Chadwick LJ)

5.1 in the context of the CRMD 2014/26/EU. Hence, further suggestions to current Arts. 5(3)(a) and 5(3)(n) exceptions will not be made at this stage in the thesis. Suffice to say, though, that without mandatory harmonisation of the areas that have the capacity to affect the functioning of the single market detrimentally, this area remains fragmented and restricted to national audiences.<sup>832</sup> This piecemeal effect, overall, impedes the Union’s objective of fostering cultural diversity within the EU<sup>833</sup> and promoting a single market for free trade.<sup>834</sup> Notwithstanding this, the suggestions for changing the status of the exception discussed, from “optional” to “mandatory”, should assist with removing such disparity in these areas.

#### 4.6.1.4 Permitted Exceptions: changes in law impacting current InfoSoc Exceptions

With regards to the *InfoSoc*, Art 5(3)(b) optional exception, ‘uses, for the benefit of people with a disability’ (“accessibility”), it can be argued that this should now be removed, and not presented as an “optional” exception due to much greater mandatory obligations that EUMS must adhere to as provided by the EU’s membership of the Marrakesh Treaty.<sup>835</sup> The Marrakesh Treaty provisions will be considered fully in Chapter [5.2] in the context of Directive (EU)2019/79, on copyright and related rights in the Digital Single Market (“DSMD”). Finally, it will be shown in Chapter [5.2] that the *InfoSoc*, Art 5(3)(c) exception with regards to press reproduction rights should be mandatory in view of Directive (EU)2019/790, Art 15.

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<sup>832</sup> Hugenholtz, 285 (n 799)

<sup>833</sup> TFEU, Art 167(4)

<sup>834</sup> TEU, Art 3(3)

<sup>835</sup> The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled 2014

#### 4.6.2 Suggestions from the Wittem ECC for “permitted exceptions” reform: to use or not to use?

In terms of structure, the Wittem Draft ECC incorporated the limitations under six headings, outlined at Chapter [3.6]. Although this author agrees that there is a sensible logic to this, it can be argued that, due to the longevity of *InfoSoc*, there is little to be gained by taking apart its logistical framework. Hence, the proposed EUCR will not use the Wittem ECC headings for the permitted exceptions. The current status quo, in terms of structure, will be maintained as in *InfoSoc*. Moreover, the majority of Wittem’s proposals for reforming “limitations” will not be incorporated into the proposed EUCR either, because the law has changed, or, the suggestions are at risk of contravening the Berne Three-Step-Test. The one exception is the Wittem proposal for ‘reproduction for education purposes against payment of remuneration’ exception. This could be incorporated into the EUCR as it may better reflect the education setting within which we now find ourselves. The author has critically analysed the permitted exceptions set down in *InfoSoc* to determine that, with regards to Arts. 5(3)(b) (“accessibility”) and 5(3)(c) (“press reproduction rights”), these can be removed due to their now obsolete status post-DSMD. In relation to *InfoSoc*, Arts. 5(3)(a) and 5(3)(n) should be mandatory and the remainder incorporated into the proposed EUCR as they currently appear. Notably, Art. 24 of the more recently passed Digital Single Market Directive has included amendments to *InfoSoc* to update the wording of Arts. 5(2)(c) and 5(2)(a) to reflect changes enacted by the DSMD. Notwithstanding this, the wording of these Articles is as follows:

‘Directive 2001/29/EC is amended as follows:

(a) In Article 5(2), point (c) is replaced by the following:

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council’

And:

‘In Article 5(3), point (a) is replaced by the following:

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790.’

However, these do not seem to mandate the exceptions posited by this thesis. On that basis, the following suggestion is made for reform of InfoSoc, Art 5:

By a critical analysis of Directive 2001/29 and Directive 2019/790, it is suggested that the following amendments be enacted to reflect the mandatory status proposed in this thesis to these two optional exceptions:

the “archiving” exception, currently drafted in *InfoSoc* as Article 5(2)(c), should be mandatory and moved from its current location in Article 2, to Article 1, to create a new ‘Article 5(1)(c)’ mandatory exception.

Art. 5(3)(a) and Art 5(3)(n) should both be mandatory to transpose in each EUMS. On this basis, they should be moved to create a new Art. 5(1)(d) and a new Art 5(1)(e) respectively.

There should be no detrimental impact on the functioning of the EU single market in this area and rightholders can distribute their works in the EU, in a manner which does not prejudice their moral right, as outlined above, as provided for by their national laws.



## 4.7 CONCLUSION

This chapter included a critical analysis of the differences and their impact on the functioning of the single market between EUMS in six key areas of copyright law subsistence: Originality, Notions of a Work, Authorship, Fixation, Moral Rights and Permitted Exceptions. It has been argued in Chapters [4.1]-[4.2] that, in terms of originality standards and notions of works, these areas have now been harmonised by the CJEU through their creative interpretation of *InfoSoc*, in conjunction with the WCT and Berne. As such, recommendations will be made in Chapter 7 to encompass these harmonised standards in the proposed EUCR. In terms of Authorship, it was argued in Chapter [4.3] that differences mainly lay in the potential impediment to authors whose computer-generated works may not have been protected in author-centric EUMS. However, it has been shown that such works can be protected in the EU by the *Software Directive* as expressions of works resulting from the author's own intellectual creation. Moreover, it was also argued that differences in law, in terms of authorship, could potentially affect the functioning of the single market regarding collaborative and commissioned works, and works made in the course of employment. Hence suggestions for harmonisation were made, largely based on existing MS' laws and will be included in Chapter 7 (Recommendations) for codification into the proposed EUCR. The element of Fixation, discussed at Chapter [4.4] was analysed to show that, since the CJEU case of *Levola Hengelo*, works must be identifiable and sufficiently certain which will undoubtedly put an obligation on the author to prove the existence of the work in which they are claiming copyright. This development will be included in Chapter 7 for inclusion in the proposed EUCR. Moral rights were discussed at Chapter [4.5], in the context of Wittem's ECC proposals with the emphasis on the effect of these proposals on French law. A critical analysis of the French moral right of divulgation revealed that although there may be limited circumstances where end-users could be detrimentally impacted, there were sufficient protections in the ECHR and TRIPS, Art. 31

to counteract these. In terms of the Wittem proposals for the duration of the moral rights on integrity and attribution, in relation to their proposal of a “right to consent to waiver”, it was agreed that this could detrimentally affect rightholders wishing to trade on autonomous terms EU-wide. Likewise, such detriment would extend to end-users’ access to such works if, the prevention to trade on their own terms, meant that such works were not made available EU-wide. Hence, a proposal to level up (or down) national moral rights laws, in line with the suggestions in Wittem’s ECC, was suggested to be put forward in Chapter 7 for inclusion in the proposed EUCR. Finally, permitted exceptions to copyright infringement, as contained in *InfoSoc*, and suggested for reform by the Wittem Draft ECC were critically analysed at Chapter [4.6]. Although the majority of the Wittem proposals will not be incorporated into the posited EUCR, critical analysis showed that some of the optional permitted exceptions should now be mandatory in response to legal reforms post-InfoSoc. These recommendations will also be made in Chapter 7.

In this regard, it can be argued that the outstanding areas of originality, notions of a work and “fixation” no longer impact the EU single market of copyright law detrimentally. Differences, to that effect, still remain for Authorship and Moral Rights, for which suggestions to harmonise these have been made and will be put forward as recommendations in Chapter 7. In respect of the six areas analysed in Chapter 4, it can be argued that there are no unharmonised areas of EU copyright law that detrimentally affect the single market that cannot be resolved by this thesis. Collaborative and commissioned works within Authorship, potentially, could detrimentally affect the functioning of the single market. However, reforms have been suggested in this area to include who retains ownership of the work and how economic/moral rights are divested, or have the ability to impact the works for inclusion in the Chapter 7 recommendations. Hence, the impact of these findings on the overall proposal for a unitary

copyright regulation is that recommendations for inclusion in an EUCR to further EU harmonisation can be achieved for all areas covered in Chapter 4.

# CHAPTER FIVE

**Analysis of “selected issues” in the digital single market not included  
in the Wittem Draft European Copyright Code**

## 5. INTRODUCTION

It can be argued that the inception of the internet, combined with new technology, has increased disparity within certain areas of copyright law in the EU, namely, the digital content and service markets. This may impede the single market imperative thus impacting on the fundamental freedoms to trade in goods and services within the EU. Currently, there is no overall EU harmonisation of digital services. Digital broadcasting and licensing services, opposed to satellite/analogue,<sup>836</sup> remain unharmonised despite two directives passed for the legal protection of audiovisual services during the last decade alone.<sup>837</sup> Copyright infringement of digital services/content is handled at national levels, subject to national laws, pursuant to *Rome II*.<sup>838</sup> As identified in Chapter [1.3.3], a piecemeal approach has been adopted to reduce areas of fragmentation arising in the digital single market.

As reported in Chapter 2, the CJEU<sup>839</sup> recognised ‘early on that the territorial exercise of rights of intellectual property negatively affects the free circulation of goods’.<sup>840</sup> This is compounded by the digital era as it is now considerably easier to access and exploit copyright-protected content when the user is shielded by virtual anonymity.<sup>841</sup> Moreover, it has been suggested that ‘globalization’s biggest enabler is the Internet...and has become the single most important

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<sup>836</sup> 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 L248/15 (“SatCab Directive”); Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1 (“AVSD (2010)”); Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69 (“AVSD Directive (2018)”)

<sup>837</sup> *ibid* AVSD (2010); AVSD (2018)

<sup>838</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, Art 8

<sup>839</sup> C-78/70 *Deutsche Grammophon Gesellschaft v Metro-S.B.-Großmärkte*, [1971] EUECJ, 499-500 [11]

<sup>840</sup> P Bernt Hugenholtz, *The dynamics of harmonization of copyright at the European level*, in Christophe Geiger, *Constructing European Intellectual Property* (Edward Elgar Publishing 2013) 279

<sup>841</sup> Midjohodo Franck Gloglo, ‘Finding the law: the case of copyrights and related rights enforcement in the digital era’ (2013) 4 WIPOJ 230

network'.<sup>842</sup> Gurnsey commented almost 30 years ago that copyright laws were too inflexible to accommodate new technical developments.<sup>843</sup>

In view of this, Chapter 5 critically analyses new directives that were passed to counteract copyright law harmonisation problems arising from expansion of the digital single market. The focus remains on protection of copyright and related rights, infringement and access to works in terms of the functioning of the EU single market. Specific focus, in the context of rightholders and end-users, will centre on the differences between EUMS' national laws that may detrimentally impact the digital single market. The focus will be on analysing the impact of the new laws passed to counteract such issues. The selected issues for critical analysis are:

- licensing of music works minimally harmonised by the *Collective Rights Management Directive*
- the reasoning for the failure to harmonise licensing of audiovisual works ("AVWKs") in a manner similar to the *Collective Rights Management Directive*
- digital rights management in respect of further non-mandatory exceptions encompassed in the *Digital Single Market Directive* and its impact on the *InfoSoc* permitted exceptions
- Community Exhaustion relating to digital and non-digital works
- Audiovisual works licensing and a general failure to enact harmonised licensing rules.

The reasoning for the issues selected are twofold: (1) these issues were not included in the Wittem Code so they have not yet been thoroughly analysed as to how they may fit within a Copyright Code/Regulation, and (2) disparity in these areas could detrimentally impact the functioning of the single market leaving less protection for rightholders and fewer works in the EU for end-users. Solutions to harmonise these selected issues will be posited for inclusion in

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<sup>842</sup> *ibid*

<sup>843</sup> J Gurnsey, *Copyright Theft* (Aslib Gower 1995) 156

the proposed EUCR. The basis of this critical analysis are research questions (7) – (9), as in Chapter 4, as follows:

7. Do these outstanding areas of harmonisation impact the EU single market of copyright law detrimentally?
8. Are there unharmonised areas of EU copyright law that detrimentally affect the single market that cannot be resolved by this thesis?
9. What is the impact of these findings on the overall proposal for a unitary copyright regulation?

## 5.1 Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (“Collective Management Rights Directive”)

Collective Rights Management Organisations (“CMOs”) are privately owned companies which organise and negotiate licences on behalf of rightholders so that their works can be disseminated to, and accessed by, end-users in the EU. The problem, for the digital single market, is where there are bundles of national rights encompassed in a single work. In these circumstances, ‘copyright in a single work of authorship can be “split up” into multiple territorially defined national rights, which may be owned or exercised for each national territory by a different entity.’<sup>844</sup> Thus, permission to use the works must be sought from each rightholder in the work to clear the licences. This is so that the works can be lawfully reproduced,<sup>845</sup> communicated to the public<sup>846</sup> and broadcasted<sup>847</sup> within the single market so that end-users can listen to these works. This is a momentous task. Particular reference to the

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<sup>844</sup> Hugenholtz, 278 (n 840)

<sup>845</sup> Directive 2001/29/EC 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] OJ L167/10, Art 2

<sup>846</sup> C-306/05 *SGAE v Rafaelés Hoteles SA* [2006] ECLI 764

<sup>847</sup> C-607/11 *ITV Broadcasting Ltd and others v TVCatchup Ltd* [2013] ECLI 147

multi-territorial (“MT”) licensing problems arising from the growth of the online music industry was made by the Commission in 2011.<sup>848</sup> This is largely because individual copyrights and related rights may be held by composers, songwriters, music publishers, performers and creative designers who may all reside in different EUMS.<sup>849</sup>

Directive 2011/29/EC...on the harmonisation of certain aspects of copyright and related rights in the information society requires a licence for each of the rights in the online exploitation of musical works.<sup>850</sup>

Rightholders seeking dissemination of their works and royalties from their use generally join a CMO to counteract this problem, thus enabling their works to reach larger markets. Problems for rightholders and end-users can arise, though, where certain CMOs hold a monopoly in the internal market and where CMOs have different standards for membership, royalty payments and fees.<sup>851</sup> The Commission identified in the 2012 Impact Assessment, for the then proposed CRMD, that ‘[i]n general (but not always), there is only one CS representing all or some of the rights of a category of rightholders in a given territory.’<sup>852</sup> Hence, a criticism of the previously unharmonised system was that there were

significant differences in the national rules governing the functioning of collective management organisations, in particular as regards their transparency and accountability to their members and rightholders.<sup>853</sup>

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<sup>848</sup> Commission, ‘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’ (Communication) COM (2011) 287 final ch1, 2, 3

<sup>849</sup> Hugenholtz, 278 (n 840)

<sup>850</sup> Commission, ‘On content in the Digital Single Market’ (Communication) COM(2012) 789 final, 16, Recital 21

<sup>851</sup> Commission, ‘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’ COM(2012) 372 final, 10

<sup>852</sup> *ibid*, 11

<sup>853</sup> Directive 2014/12/EU of the European parliament and of the Council of the 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72, Recital 5



Moreover, a key issue affecting the single market was that national rules, relating to music rights management, created fragmentation between EUMS.<sup>854</sup> It can be argued that this impeded rightholders who could not be guaranteed a level playing field in terms of how, when and the amount of royalty fees they would receive.<sup>855</sup> Moreover, rightholders could not be guaranteed to be able to join their preferred CMO. Generally, this would be based nationally because CMOs ‘traditionally granted only territorial licences for their own/domestic repertoire and for the repertoire managed on the basis of reciprocal representation agreements’.<sup>856</sup> Hence, there was less choice for rightholders to be able to select a CMO across the breadth of the EU that may have been better able to protect their interests and obtain a broader reach for their music works. In addition, new music providers were tied to much higher costs to use the repertoire, offered by the CMO, as they had to purchase ‘blanket’<sup>857</sup> licences for repertoires which included music they did not necessarily want.<sup>858</sup> Such practice meant that the music providers wishing to licence works for use had to negotiate much larger numbers of licences<sup>859</sup> than perhaps they would have if they had had more access to, and choice of, CMOs. Ergo, it can be argued that this could have deterred newcomers to the market of online music services providers who could not afford to compete in this area. Arguably, this contravened TFEU, Art. 53(1) ‘...to make it easier for persons to take up and pursue activities as self-employed persons’, and also the right to conduct business set down in the CFREU, Art 16. Moreover, it could also be argued as being anti-competitive contrary to TFEU, Art. 101. Finally, the 2012 Commission

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<sup>854</sup> *ibid*, Recital 38

<sup>855</sup> Dinusha Mendis, ‘Directive 2014/26/EU on collective management of copyright and related rights and multiterritorial licensing of rights in musical works for online use in the internal market’ [10.17] 296 published in Arno R. Lodder and Andrew D. Murray (Eds.), *EU Regulation of E-Commerce: A Commentary* (Edward Elgar Publishing Ltd 2017)

<sup>856</sup> EU Commission, ‘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’ COM(2012) 372 final, 13

<sup>857</sup> In other words, collective licensing of multiple works that did not require individual consents to use the works covered by the blanket licence

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/546245/ct12714-licence.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546245/ct12714-licence.pdf)>

<sup>858</sup> Mendis, [10.16] (n 855)

<sup>859</sup> *ibid*

Impact Assessment also identified there were ‘insufficient checks and balances on the functioning of collecting societies’.<sup>860</sup> This contributed to rightholders, especially those out of the CMO’s jurisdiction, not always being able to exercise their rights, particularly in terms of voting (as members).<sup>861</sup>

Hence, EU lawmakers have attempted to regulate CMOs in the single market of online music works by passing Directive 2014/12/EU.<sup>862</sup> The aim was to ‘improve the governance and transparency of CMOs’<sup>863</sup> by setting minimum standards in terms of MT licensing facilitation as well as expanding the repertoire of online music in the single market.<sup>864</sup> The problem, however, is that, due to only minimum standards of harmonisation, it can be argued that there may still be fragmentation within the single market of online music, particularly regarding dissemination and access.

### 5.1.1 Collective Rights Management Directive: lack of transparency when giving ‘objectively justified reasons’ to refuse CMO management

An area of fragmentation in the CRMD, that may have been overlooked, relates to the actual artist (the rightholder). It can be argued that there is a potential issue in terms of the impact of 2014/12/EC, Art. 5(2)

Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights...irrespective of the Member State of nationality, residence...*Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights...*provided that their management *falls within the scope of its activity* (author’s emphasis).

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<sup>860</sup> EU Commission, ‘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’ COM(2012) 372 final, 15

<sup>861</sup> *ibid*

<sup>862</sup> Directive 2014/12/EU of the European parliament and of the Council of the 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72

<sup>863</sup> Mendis, [10.03] (n 855)

<sup>864</sup> *ibid* [10.28]

There appears to be an express obligation for CMOs to contract with rightholders and/or end-users who have selected their particular organisation. However, by reference to the wording, ‘*Unless the collective management organisation has objectively justified reasons to refuse management*’, there is a caveat that such representation may be refused. The 2012 Commission Impact Assessment does not give any guidance on what these ‘objectively justifiable reasons’ may be. Notwithstanding this, the Directive also states that the management must fall ‘*within the scope of its [the CMO’s] activity.*’ Hence, it could be argued that without the necessary checks and balances in place to check the legitimacy of the reasoning for such refusal, there is scope for discrimination and anticompetitive practices.

The MPI noted that such refusal may be given ‘solely on the grounds of their cultural origin or background or of their limited economic value’.<sup>865</sup> If CMOs do not like the cultural aspect of the music, or the music is not sufficiently profitable, they may refuse to include it in their repertoire. This is potentially discriminatory practice, thus diluting the range of digital content available to subscribers in the digital single market. Moreover, it could contravene TFEU, Art 167(1) which imposes an obligation to foster cultural diversity in the EU. However, it could be argued that where CMOs hold a dominant position in the EU in the relevant markets, such practice may be curtailed by the threat of legal action brought for abuse of their dominant position under TFEU, Art 102.<sup>866</sup> Notwithstanding this, Hugenholtz comments that the majority of CMOs operate on a national level. Therefore, they may not hold a dominant position within the EU; nor may they be ‘large enough or sufficiently efficient to compete at

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<sup>865</sup> Josef Drexler et al, ‘Comments of the Max Planck Institute for Intellectual Property and Competition law on the Proposal for a Directive of the European Parliament and of the Council on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372’ (2013) 44 IIC 327

<sup>866</sup> T-504/93 *Tiercé Ladbroke SA v Commission* ECR [1997] II-923

the European level'.<sup>867</sup> Moreover, it has been further argued that, in contradiction to music providers, the removal of the previous 'blanket licence' system, a practice which effectively enabled all works to reach a much wider audience, could mean that niche artists may struggle to promote their works against the internationally recognised artists.<sup>868</sup>

It could be argued that the risk of an artist not being listed may have been tempered somewhat by CMOs' willingness to enter into MT agreements to facilitate collective management of music copyrights. In 2016, UK CMO, *PRS for Music*, entered into the first ever European joint venture with Swedish Society *STIM* and Germany's Society, *GEMA*, under the name "ICE". Its purpose is to facilitate cross-border licensing of music works to end-users.<sup>869</sup> Other methods of MT licensing have been facilitated with private law agreements between CMOs worldwide.<sup>870</sup> Furthermore, a pan-European Hub to facilitate cross-border licensing, consisting of eight current CMOs, has been in operation since around 2013.<sup>871</sup> It is run, and managed collectively, by the CMOs. However, that still leaves at least 15 MS without some form of collaboration to facilitate MT music copyright management. Without an express obligation to report 'objectively justifiable reasons' in the CRMD, it still leaves niche and lesser known artists at risk of discrimination. This has the potential to affect access to their works in the single market of online music and the opportunity for such artists to grow and expand their repertoires, within the EU.

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<sup>867</sup> Hugenholtz, 284 (n 840). They may, however, hold a national dominant position and would be caught by national competition laws e.g. in the UK, CMOs could be caught by the Competition Act 1998.

<sup>868</sup> Mendis, [10.52] (n 925)

<sup>869</sup> *ibid*

<sup>870</sup> PRS for Music currently has 150 such agreements with world-wide collaborators: PRS for Music, 'Online multi-territory licensing' <[www.prsformusic.com/licences/online-multi-territory-licences](http://www.prsformusic.com/licences/online-multi-territory-licences)>

<sup>871</sup> Armonia Online <[www.armoniaonline.com/](http://www.armoniaonline.com/)>. Current collaborators are: Austria (AKS), Belgium (SABAM), France (SACEM), Hungary (Artisjus), Italy (SIAE), Luxembourg (SACEM), Portugal (SPAUTORES), Spain (SGAE) as of 30 June 2022

Hence, to reduce the impact of this potentially affecting the functioning of the single market, its rightholders and end-users, we must come back to the issue raised in the 2012 Impact Assessment regarding checks and balances: ‘governance’ and ‘transparency’.<sup>872</sup> Where is it here? The CRMD, Art. 18 expressly covers transparency and reporting and requires CMO’s to furnish its members with information covering a variety of aspects such as fees, deductions et al ‘not less than once a year, to each rightholder to whom it has attributed rights revenue or made payments in the period to which the information relates’.<sup>873</sup> The problem with this, of course, is that artists need to be an actual member to receive such information. Hence, obligations pursuant to this section will not help non-members understand why membership has not been granted. Article 22, CRMD, though, necessitates an Annual Transparency Report which ‘shall contain at least the information set out in the Annex’.<sup>874</sup> The problem here is that nowhere in the Annex does it necessitate the reasons for membership refusal or offer any guidance for reasons for ‘objectively justified’ refusal. Moreover, the term ‘objectively justified reasons’ is not included in the CRMD, Art. 3, definitions. The 2012 Impact Assessment is also silent on guidance as to what, generally, could amount to an ‘objectively justified reason’. Annex 1(c) necessitates ‘information on refusals to grant a licence pursuant to Article 16(3)’. But, where is the necessity to provide information on refusals to grant membership at the outset, given that the aim of the directive was to promote transparency and governance and to reduce anticompetitive practices? Moreover, although Art. 6(4) necessitates compliance with Arts. 20, 29(2) and 33, this does not help the niche artist wishing to join the CMO. Article 20 requires transparency only to the CMO’s members, other CMOs and users.

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<sup>872</sup> Commission, ‘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’ COM(2012) 372 final, 15

<sup>873</sup> Directive 2014/12/EU of the European parliament and of the Council of the 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72, Art 18(1)

<sup>874</sup> *ibid*, Art 22(2)

Hence, this would require a user/CMO making such request for information in terms of whether there were works from particular artists that they wanted to licence/arrange licenses for that were not covered in their agreement. Article 29(2) covers ‘Agreements between collective management organisations for multi-territorial licensing’ but, again, this only relates to its members. Similarly, Art. 33 covers ‘complaints’ and, again, is only relevant to active members and other CMOs. Fundamentally, there is no mandate of disclosure of ‘objectively justifiable reasons’ in Art. 21, concerning ‘disclosure of information to the public’. However, it could be argued that the EU GDPR<sup>875</sup> may affect such public disclosure in these circumstances.

In view of this, we must consider who is actively managing the conduct of the CMOs. In the UK, for example, the government has produced a Collecting Societies Codes of Conduct Study, published in 2012,<sup>876</sup> but only for consideration of such Code. Moreover, as it was published in 2012, it pre-dates the CRMD. Hence, there is no government-mandated Code to regulate CMOs in the UK. Similarly, the Brussels-based CMO, *Impala*, has a published Code of Conduct which also dates back to 2012. Ireland currently has no government-mandated Code of Conduct either. Hence, governance and any Code of Conduct is left to the individual CMO to manage. The Irish Music Rights Organisation (IMRO) Code of Conduct was drafted post-Directive, in 2017, but indicates that the CMO is effectively self-governed.<sup>877</sup> Moreover, its transparency section is aimed at ‘members, licensees, rightsholders and all our stakeholders’.<sup>878</sup> There is no scope under this section to transparently govern the CRMD, Art. 5(2) obligation. The Code states that ‘[t]he criteria for admission are prescribed by the IMRO Board. IMRO

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<sup>875</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC OJ L119/1 (“General Data Protection Regulations”)

<sup>876</sup> UKIPO, ‘Collecting Societies Codes of Conduct: Independent report commissioned by the Intellectual Property Office (2012)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/310172/iprese\\_arch-collecting-071212.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/310172/iprese_arch-collecting-071212.pdf)

<sup>877</sup> IMRO Code of Conduct (2017) section 4

<sup>878</sup> *ibid*, section 5

will only refuse admission where there is an objectively justified reason for doing so.’<sup>879</sup> Clearly, this incorporates the CRMD, Art 5(2) requirement, but again, with a self-governing body and no mandate to publish such refusals, how can it be assured that discrimination has not occurred that could directly affect works available in the single market of online music? Ultimately, with no EUMS independent regulators, this could invariably come down to the MS’ competition regulator to regulate CMOs. But, this will not help those struggling to join their preferred CMO and who, due to lack of governance and transparency, may not receive ‘objectively justif[iable] reasons’ under CRMD, Art. 5(2). Aside from the MS competition regulator, who else is going to enforce compliance with the CRMD, Art 5(2) obligation? The niche artist will need deep pockets to sue the CMO for not allowing membership, and is most unlikely. The artist is left with two options: find another CMO or individually manage their own rights. This is a momentous task; hence the necessity for CMOs.

In summary, it can be argued that there seems to be no systematic methodology for following up this very important requirement, in terms of transparency, promoting the single market imperative and fostering cultural diversity. Hence, it cannot be assured that compliance with Art 5(2) is being undertaken or actually guaranteed. Thus, it could be argued that the only way to achieve this would be to draft in the obligation to report refusals for membership in the annual report, similar to the Annex 1(c) requirement to include ‘information on refusals to grant a licence pursuant to Article 16(3)’. This way, governance and transparency could be upheld and enquiries made, in terms of such decisions, if needs be.

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<sup>879</sup> *ibid*, section 8(2)

### 5.1.2 Why was the Collective Rights Management Directive limited to online music works?

It is notable that the CRMD was limited to online music works wherein EU lawmakers made no attempt, at all, to incorporate audiovisual works (“AVWKs”) into this Directive to provide for minimal harmonisation of CMOs in this area. Potentially, this is a missed opportunity to attempt some form of harmonisation in this area. It could be argued that this is because

The picture is different for authors in other sectors (e.g. authors of literary works or of audiovisual works) where direct licensing (by the publisher, by the film producer) is predominant. This is partly because of high cost of monitoring uses of musical works (e.g. public performance in restaurants, discos, etc.)... Audiovisual producers resort to collective management even less (mostly for the licensing of cable retransmission rights).<sup>880</sup>

In terms of harmonising the licensing of AVWKs in the digital environment, we should firstly consider international law, the Berne Convention, given that, as stated above, parties may not reside in the same geographic region. As identified in the European Audiovisual Observatory 2020 paper, various elements encompass AVWKs that must be considered for licensing: authorship, duration, moral rights and performers rights.<sup>881</sup> The first element, “authorship”, is problematic from the outset, given that there may be multiple authors in the work.<sup>882</sup> Under the principle of national treatment,<sup>883</sup> each author in the work must be afforded the same rights in each CP as the nationals. In terms of harmonising for the EU, this, by itself, is not wholly problematic if the authors are all resident in the EU as it can be argued that the scope of authorship has been harmonised by *Infopaq* in terms of works.<sup>884</sup> If authors are resident outside the EU, though, this is where problems arise as not all CPs may afford the same rights to the same authors. The same can be said for moral rights, as we have already seen in Chapter [4.5],

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<sup>880</sup> Commission, ‘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’ COM(2012) 372 final [2.1], Fn. 29

<sup>881</sup> European Audiovisual Observatory, ‘Copyright licensing rules in the EU’ (2020) IRIS Plus 2020-1, 4

<sup>882</sup> *ibid*, 11

<sup>883</sup> Berne Convention, Art 5

<sup>884</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569, Art 2



wherein each CP may afford higher, or lower, levels of moral rights that are invariably linked to the authors of the work. Differences in duration and type can be fatal when trying to create harmonised standards. In terms of performers and duration, as before, this can vary internationally. The Rome Convention only protects performers rights for 20 years,<sup>885</sup> although in the WIPO WPPT, it is 50 years.<sup>886</sup> In the EU, though, performers' rights last for 70 years.<sup>887</sup>

Notwithstanding this, it can be argued that the CRMD contains no such reference to the terms of licensing, as in the relative geographic law, and the elements falling within licensing contracts. It is largely related to supporting collaboration between CMOs, for facilitating licensing of online music works in terms of governance, transparency and affording more powers to artists to choose who to represent them.<sup>888</sup> On this basis, it could be argued that the same could, and should, at the very least, be made available for AVWKs. However, it is suggested that this will no doubt come back to the complexity of rights in the AVWKs.

It has been argued that whilst 'there are three levels of rights involved in music', the addition of AVWKs increases the complexity.<sup>889</sup> This is due to the number of persons involved in the stream of creation of AVWKs. These may include, for example, screenplays, the original book on which the screenplay was made, music works used in the production and any artworks and photographs making up the actual setting.<sup>890</sup> Each of these needs separate rights clearance,

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<sup>885</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 (Rome I), Art 14

<sup>886</sup> WIPO Performances and Phonograms Treaty, Art 17

<sup>887</sup> 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 [2011] OJ L265/1, Art 2(a)

<sup>888</sup> Commission, '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' COM(2012) 372 final

<sup>889</sup> Mihály Ficsor and Mitko Chatalbashev, 'Collective Management in Central and Eastern Europe' published in Daniel Gervais (Ed.), *Collective Management of Copyright and Related Rights* (3<sup>rd</sup> edn Kluwer Law International 2013) [4.1]

<sup>890</sup> *ibid*

sometimes from different CMOs who may have expertise in different areas of the work.<sup>891</sup> In contrast, it can be argued that for online music works, the rights are fewer and centre generally on the production of the recording. Arguably, some rightholders involved in the stream of creation of AVWKs may have died, due to the longevity of copyright protection. However, it could be argued that this would be the same for both music and AVWKs, hence, the differences between the two genres maybe not so diverse.

Moreover, geographical limitations are also problematic. It could be argued that the scope for rightholders residing in different geographical locations, opposed to EU-created music works, is far greater, taking it beyond European shores. This is particularly the case for streaming companies wishing to negotiate the rights to stream the more popular “Blockbuster” works,<sup>892</sup> opposed to locally produced works. Notwithstanding this, it may also be argued that this is the same for those in the music industry whose contributors may reside in any number of countries. For example, *Syco Entertainment*<sup>893</sup> represents artists from all over the world. People involved in music productions are not always based in the same country. In this example, songwriters collaborating with *Syco*, who contributed to the songs of one of the UK’s most successful “boybands”, *One Direction*, are based in London, New York and Los Angeles. Moreover, there are also the creative designers and producers involved with the music production whose interests also need representing by CMOs involved in EU rights management. It can be argued, therefore, that the same issues arise for music works, as they do for AVWKs. But these were not encompassed in the CRMD.

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<sup>891</sup> *ibid*

<sup>892</sup> Commission, ‘Impact Assessment on the modernisation of EU copyright rules’ SWD(2016) 301 final [3.3.1]

<sup>893</sup> SYCO Entertainment, <https://simoncowellonline.com/syco/>

On balance, and notwithstanding these valid assertions, we must come back to the fact that, when compared with an AVWK, there are ultimately less rights to consider in music works. Moreover, the hierarchy in the audiovisual licensing environment is centred on the producer.<sup>894</sup> It can be argued that no such hierarchy seems to exist for music works. On balance, it is suggested that the necessity to license music works would probably have meant that it was not justifiable to delay a solution to this licensing problem, resolved by the CRMD, simply to permit more time to resolve the AVWK complexity. Given that we are nearing 10 years since the CRMD was passed, and we are still no nearer to achieving the same in terms of AVWKs, it must be argued that EU lawmakers were justified in not including AVWKs in the CRMD. Had they done so, arguably, we could still be waiting for it today.

### 5.1.3 Suggested reform to harmonise mandatory publication of “objectively justified reasons” in the Collective Management Rights Directive

By analysis of Directive 2014/26/EU, a new Article 5(6) clause should be inserted into 2014/12/EU as follows:

“Collective management organisations shall reply without undue delay to requests from individuals, indicating, inter alia, the objectively justified reasons for refusal of membership to the organisation and information needed in order for the collective management organisation to offer a membership.”

To ensure governance and transparency, the following clause should be drafted into the Annex for inclusion in the Annual Transparency Report pursuant to 2014/26/EU, Article 22:

“1(d): information on refusals to grant a licence pursuant to Article 5 clearly setting out objectively justified reasons for refusal pursuant to Article 5(3)”

*[Note for drafters, the current 1(d) clause in the Annex should be re-drafted as 1(e) et al]*

<sup>894</sup> Commission, ‘Impact Assessment on the modernisation of EU copyright rules’ SWD(2016) 301 final, 14

## 5.2 Directive (EU)2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (“Digital Single Market Directive”)

Chapter [4.6] critically analysed the permitted exceptions in *InfoSoc*, Art. 5 that had the most potential to affect the functioning of the single market in terms of its rightholders, end-users and the fundamental freedoms of trading in goods and services. As a reminder, these related to: private copying, archiving, illustration of teaching, reproduction by the press, criticism and review, parody, incidental inclusion and research and private study. The research exposed that, in terms of digital rights management/online works, the optional exceptions to archiving, illustration and teaching, and research and private study ought to be mandatory, not optional. This was the suggestion at Chapter [4.6.3] to bring this into line with recent changes to these exceptions by a later Directive: (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (“DSMD”). DSMD strengthened those exceptions from *InfoSoc*. Moreover, DSMD has purportedly introduced stronger measures for counteracting blatant online infringement relating to unlawful reproduction,<sup>895</sup> communication<sup>896</sup> and distribution to the public<sup>897</sup> of copyright-protected content, largely caused by user-generated content (“UGC”) shared on social media platforms. Unharmonised rules in these areas had the potential to refragment the online digital single market. Hence, the aim of DSMD was to provide clarity and legal certainty to the following key issues (amongst others):

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<sup>895</sup> Directive 2001/29/EC 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] OJ L167/10, Art 2

<sup>896</sup> *ibid.*, Art 3

<sup>897</sup> *ibid.*, Art 4

- **Exceptions and Limitations in**
  - Research Organisations (“RO”) (not-for-profit)
  - Cultural Heritage Institutions (“CHI”) for
    - Preservation of works
    - Out-of-Commerce Works (“OoC Works”)
    - Extended Licensing for OoC Works
  - Primary schooling through to HEI in Educational Establishments (“Education Exception”)
  - Cross-border licensing for AVWks
  
- **Fair remuneration for**
  - publishers for content re-published on ‘aggregator’ sites (e.g. Google News)
  - authors/performers in weaker bargaining positions than publishers
  - “Best seller” clauses enabling a contract adjustment
  
- **Online content sharing services to prevent**
  - Mass uploading of UGC without rightholder consent
  - UGC platforms evading responsibility under 2000/31/EC, Art 14(1) <sup>898</sup>
  - Leaving copyright infringing content on the UGC platform

Notwithstanding these developments, it has been argued that DSMD is ‘ill-conceived and inconsistent with the rules of the EU copyright acquis’,<sup>899</sup> notably the *E-Commerce Directive*,<sup>900</sup> and lacks proportionality.<sup>901</sup> Regardless of these criticisms, the DSMD must be read in conjunction with the *Database*,<sup>902</sup> *Collecting Societies*,<sup>903</sup> *InfoSoc*,<sup>904</sup> *Rental and*

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<sup>898</sup> “Hosting” whereby the service provider claims they did not know that copyright infringing content was on their website. Also known as the “safe harbour” provision (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1, Art 14(1)) (“E-Commerce Directive”)

<sup>899</sup> Bernt Hugenholtz, ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute) <[https://apps.eui.eu/EUI\\_API/EVENTSV2/Attachments/Index?id=12473](https://apps.eui.eu/EUI_API/EVENTSV2/Attachments/Index?id=12473)>

<sup>900</sup> E-Commerce Directive (n 939)

<sup>901</sup> Ana Ramalho, ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute) 4.7.1.2.1

<[https://apps.eui.eu/EUI\\_API/EVENTSV2/Attachments/Index?id=12473](https://apps.eui.eu/EUI_API/EVENTSV2/Attachments/Index?id=12473)>

<sup>902</sup> Directive 96/9/EC of the European Parliament and of the Council of the 11 March 1996 on the legal protection of databases [1996] OJ L 77/20

<sup>903</sup> Directive 2014/26/EU of the European parliament and of the Council of the 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72

<sup>904</sup> Directive 2001/29/EC 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 OJ L167/10

*Lending*<sup>905</sup> and *E-Commerce*<sup>906</sup> Directives, as each influences the others. This sub-chapter will critically analyse the DSMD with particular focus on its two most contentious Articles: Art. 15 and Art. 17.

### 5.2.1 Mandatory Exceptions for Research, Cultural Heritage and Education: a critical analysis

Taking these issues separately, it can be argued that DSMD has provided more cross-border legal certainty for RO, CHI and EE, than *InfoSoc*, as these exceptions are now mandatory.<sup>907</sup>

#### 5.2.1.1 Education Exception in the Digital Single Market Directive

DSMD introduced a mandatory exception under Art. 5 for ‘digital and cross-border teaching activities’.<sup>908</sup> This is ‘to allow the digital use of works, and other subject matter for the sole purpose of illustration for teaching’<sup>909</sup> provided it is only available for the establishment’s pupils, students and staff and indicates the source and name of the work (“Education Exception”).<sup>910</sup> However, where ‘suitable licences...are easily available on the market’, these should be obtained where a MS has permitted this qualification.<sup>911</sup> It can be argued that, to some extent, this reflects the Wittem Group’s perspective in their draft ECC at Art. 5.3(2)(a). Wittem’s proposal incorporated remuneration to the rightholder, no doubt to try and strike a fairer balance between the rightholder and the end-user. However, Wittem’s proposal mandates such remuneration. The DSMD seems to have found a bridge between the Wittem proposal of

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<sup>905</sup> 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 OJ L376/28

<sup>906</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L178/1

<sup>907</sup> Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC [2019] OJ L130/82, Arts 3-6

<sup>908</sup> *ibid*, Art 5

<sup>909</sup> *ibid*, Art 5(1)

<sup>910</sup> *ibid*, Art 5(1)(a)

<sup>911</sup> *ibid*, Art 5(2)

mandatory remuneration and the exception, set down in *InfoSoc*,<sup>912</sup> which required no such remuneration. However, the DSMD, Art. 5 amendments do not apply to the Art 5 permitted exceptions in *InfoSoc*. Hence, this Article will need amending, in line with the proposals outlined at Chapter [4.6.1.3] for the corresponding exceptions in *InfoSoc*, Arts. 5(3)(a) and 5(3)(n).

Moreover, despite such measures, and if the proposed amendments to *InfoSoc* Art. 5 were adopted, it can be argued that there is still disparity. From the wording of DSMD, Art. 5, some MS will need to negotiate licences; others may not. Notwithstanding this, the provision also places onus on rightholders to facilitate licences for such use of their work, should they wish to receive proportionate remuneration.<sup>913</sup> Hence, this incentivises the rightholder to (a) take a more active role than possibly has been executed previously and (2) engage the use of a much-wider-range-than-previously CMO, as facilitated by the CRMD, Art. 5. However, the DSMD Art. 5(1) exception comes with a caveat. Art. 5(2) states that ‘Member States may provide that the exception or limitation...does not apply as regards specific uses or types of works...’. This leaves much room for differences between EUMS as to the types of works that may be caught by this clause. As ever, disparity does not necessarily call for a reform, though.<sup>914</sup> It must be assessed on whether or not it causes refragmentation in the single market of online works.

On that basis, this author posits that the new DSMD Art. 5 “Education Exception” does have the potential to cause fragmentation because it has failed to consider the numerous learning

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<sup>912</sup> Directive 2001/29/EC 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 OJ L167/10, Arts. 5(3)(a) and 5(3)(n)

<sup>913</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92, Art 5(2)

<sup>914</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 7

techniques and pedagogy of the Union's 20 million university students.<sup>915</sup> It has been suggested that over 65% of students are visual learners.<sup>916</sup> Visuality relates to both static and moving images. The inclusion of a voluntary provision permitting EUMS to disallow the *Education Exception* to 'specific uses or types of works'<sup>917</sup> means that education establishments may fall foul of the exception when using online audiovisual teaching aids in their virtual learning environments ("VLE"). Even if a licence is 'easily available', which, in the case of an audiovisual work is most unlikely, there is no guarantee that students accessing works in the VLE from outside the country of licence, will be able to access the work, unless a MT licence has been negotiated. This is not so easily come by for music works. As identified at Chapter [5.1.2], it is far trickier for audiovisual works largely due to the number of rights contained in a work:<sup>918</sup>

Where there is an extensive distribution chain for a particular audiovisual work, it can be difficult to identify which parties must pay and, accordingly, which relevant collective management organisations could have problems with the management of the corresponding amounts to be paid to the relevant co-authors.<sup>919</sup>

Moreover, it could be too easy for MS to take the view that as it is too difficult to seek licences, they will just exercise their discretion, under DSMD, Art 5(2) to refuse to make an exception for the illustration of teaching. Arguably, as will be seen in Chapter [4.2.4], the onus now will be on social media platforms to negotiate licences for publication to their social media channels. Should such licences occur, the problem falls away. However, there are no such guarantees that licences will be negotiated. Moreover, if they are not, and the content refused

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<sup>915</sup> As of 2017. Europa, 'Tertiary education statistics' <[https://ec.europa.eu/eurostat/statistics-explained/index.php/Tertiary\\_education\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Tertiary_education_statistics)>

<sup>916</sup> Alina-Mihaela Buşan, 'Learning Styles of Medical Students - Implications in Education' (2014) *Curr Health Sci J* 40(2) 104

<sup>917</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 5(2)

<sup>918</sup> *ibid*, Recital 51

<sup>919</sup> Szymon Gogulski and Jacek Zwara, 'Audiovisual works and problems with copyright law' (International Law Office, 17 September 2018) <[www.internationallawoffice.com/Newsletters/Intellectual-Property/Poland/Sotysiski-Kawecki-Szlzak/Audiovisual-works-and-problems-with-copyright-law#](http://www.internationallawoffice.com/Newsletters/Intellectual-Property/Poland/Sotysiski-Kawecki-Szlzak/Audiovisual-works-and-problems-with-copyright-law#)>



publication at the outset, then fewer works will be available for the illustration of teaching. Given the complexity, thus far identified, with licensing AVWKs, this seems to be a missed opportunity to begin the seeds of harmonisation via MT licensing of AVWKs for an *Education Exception*.

As such, the current model may have a detrimental effect on the learning experience of students disproportionately across the Union. Although probably not envisaged by lawmakers and stakeholders in negotiations taking place during the passing of DSMD, it may be argued that failure to attempt some form of harmonisation of AVWK exceptions, at EU level, disadvantages students, as well as general end-users. The Accessibility Directive<sup>920</sup> transposed obligations under the international Marrakech Treaty 2014<sup>921</sup> to permit making accessible copies for distribution by authorised bodies (not for profit).<sup>922</sup> However, this relates to blind, visually impaired or otherwise print-disabled persons. There is nothing to assist students, generally, in their education using one of the most popular learning techniques (visual learning). Arguably, if it is a static image<sup>923</sup> or GIF/video contained within a specific password-protected area of the database, then this may be accessible by relevant users and where a licence was not so easily negotiated. Clearly, this will catch AVWKs. Hence, it could be argued that as there is an exception for this under DSMD Art. 5(1), and that students are accessing the content via the VLE, there is no detrimental effect on the digital single market. However, this

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<sup>920</sup> Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L242/6 (“Accessibility Directive”)

<sup>921</sup> The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled 2014

<sup>922</sup> See particularly the Copyright, Designs and Patents Act 1988, §31; (Irish) Copyright and Related Rights Act 2000, §104

<sup>923</sup> Even this may be problematic now where the use of a photograph on a school’s website was deemed to be a copyright infringement under InfoSoc Directive 2001/29/EC, Art 3(1); C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] ECLI C 634

does not take account of the fact that students accessing the content from their home countries, if different from the educational establishment location, may find themselves geo-blocked<sup>924</sup> if their IP address is logged out of jurisdiction. This is because, by their IP address, which would reveal their geographic location, they may not be considered a lawful user, even though they are, in terms of being a student accessing materials freely distributed to students in the VLE.<sup>925</sup> Such students would have to rely on accessing the materials in the VLE via the establishment's glitchy remote access, which can be temperamental at the best of times. Thus, we find ourselves in a similar situation to that in *FAPL v QC Leisure*<sup>926</sup> where students in one EUMS cannot access works in another and are forced to rely entirely on those only available in their geographic location. Lack of harmonisation for AVWKs has the potential to fragment the market, causing a detrimental effect to end-users as well as rightholders who may wish to licence use of the work but are prevented by other rightholders, in the work, who do not.

Hence, there is very little to assist EU-wide dissemination of AVWKs for use in education amongst EUMS. The only solution put forward in DSMD is for MS to make a 'negotiation' mechanism available for facilitation of AVWKs licences.<sup>927</sup> Although mandatory, it can be argued that the provision merely endeavours to facilitate communication between parties by offering what most MS already incorporate in their legal systems. Furthermore, as identified at Chapter [1.3.4], end-users cannot utilise the *Beijing Treaty* to access works for furtherance of education because it exists to protect performers of AVWKs, not to facilitate access to works.

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<sup>924</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L60I/1 ("Geo-blocking Regulations")

<sup>925</sup> Geo-blocking Regulations, Art 1(5)

<sup>926</sup> (C-429/08) *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* [2011] E.C.D.R. 11

<sup>927</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 13

This issue also cross-relates to limited exceptions to copyright infringement of performers' rights in the *Rental and Lending and Related Rights Directive*.<sup>928</sup> This Directive permits use, and making available, of performance-fixed works for education purposes.<sup>929</sup> The proviso, though, is that communication 'do[es] not conflict with a normal exploitation of the subject matter and do[es] not unreasonably prejudice the legitimate interests of the rightholder'.<sup>930</sup> However, this is not mandatory. EUMS can choose whether or not to include this limitation. Students wishing to access performance-related fixed works are wholly dependent on individual MS transposing the limitation into national law. In view of the suggestions in Chapter [4.6.3] to mandate educational exceptions, it must be argued that the exception in the *Rental and Lending Directive*, in terms of Art. 10(1)(d), ought to be mandated as well, in line with InfoSoc and DSMD.

#### 5.2.1.2 Other Exceptions in the Digital Single Market Directive

Mandatory exceptions have been introduced in DSMD for CMOs to conclude non-exclusive licences for non-commercial purposes with CHIs to reproduce, distribute, publish and make available to the public OoC works regardless of whether all rightholders have mandated such consent.<sup>931</sup> Rightholders have exclusion rights under DSMD, but silence would mean acquiescence for CHIs to use their OoC works.<sup>932</sup> OoC reproductions may also be used cross-border between EUMS for cultural preservation of works and fostering cultural growth amongst Union members.<sup>933</sup> This is an improvement on *InfoSoc* which does not even permit this as an optional exception. Finally, mandatory provisions have also been included to

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<sup>928</sup> 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 [2006] OJ L376/28

<sup>929</sup> *ibid.*, Art 10(1)(d)

<sup>930</sup> *ibid.*, Art 10(3)

<sup>931</sup> Otherwise known as "Extended Collective Licensing". Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 8

<sup>932</sup> *ibid.*, Art 8(4)

<sup>933</sup> *ibid.*, Art 9

facilitate fair remuneration for authors/performers for their work.<sup>934</sup> Under a ‘Transparency Obligation’, authors/performers must receive a financial account of the exploitation of their works at least annually<sup>935</sup> and may re-negotiate terms, under a ‘contract adjustment mechanism’, if the works have made far more profit for the licensee than first envisaged.<sup>936</sup> Furthermore, DSMD, Recital 79 noted that ‘[a]uthors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal’. DSMD makes provision for such cases to be heard via a suitable voluntary Alternative Dispute Resolution procedure.<sup>937</sup> Although this is endemic in most EUMS, it may impose a stronger obligation on MS to persuade citizens to engage in ADR, particularly where authors/performers are in weaker bargaining positions than publishers. For example, UK judges may stay proceedings in court or at a Case Management Conference to encourage parties, strongly, to engage with some form of ADR thus keeping it out of the public eye of the court.<sup>938</sup> French courts have the authority to order necessary measures to facilitate proceedings.<sup>939</sup> Furthermore, the 2008 Mediation Directive,<sup>940</sup> applying to cross-border civil and commercial disputes, promotes mediation to EU citizens.<sup>941</sup> It may be argued therefore, that, via the DSMD, the EU has taken steps to ensure that the harmonising author-performer right to ADR, for digital content disputes, can be upheld in all EUMS, where possible.

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<sup>934</sup> *ibid*, Art 18

<sup>935</sup> *ibid*, Art 19(1)

<sup>936</sup> *ibid*, Art 20(1)

<sup>937</sup> The “Best Seller” clause in a copyright contract. Digital Single Market Directive (EU) 2019/790, Art 21

<sup>938</sup> (English) Civil Procedure Rules, Part 1, r 1.1 and r 4.1

<sup>939</sup> (French) The French Code of Civil Procedure, Art 3

<sup>940</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3

<sup>941</sup> *ibid*, Recitals 5, 7, 16

## 5.2.2 Suggested reform to incorporate the mandatory “education exception” into performers’ rights in the Rental and Lending Rights Directive to align with the DSMD

With regards to Directive 2006/115/EC the following reform is suggested:

Article 10 Member States shall provide for a limitation to the rights referred to in this Chapter in respect of:

- (1) use solely for the purposes of teaching or scientific research.

*[Note for drafters, the current 10(1)(d) clause should be re-drafted as 10(1) and the word “may” replaced with “shall” (as indicated above). The current 10(1)(a)-(c) should be re-drafted into 10(2) with the word “may” retained. Current Articles 2 and 3 will become 3 and 4 respectively]*

## 5.2.3 Article 15: press publication neighbouring right

It can be argued that the most contentious mandates in DSMD are Arts. 15<sup>942</sup> and 17,<sup>943</sup> formerly Arts. 11 and 13 in the pre-publication draft. They have been subjected to much review and criticism.

Article 15 created a mandatory neighbouring right exception for press publishers, aside from the copyright acquired from authors who write for their publications. It introduced a mandatory publisher’s right to exclusively authorise (or not) re-publishing of their copyright-protected digital content and the making available to the public of such content relating to performers,

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<sup>942</sup> Protection of press publications

<sup>943</sup> Content-sharing service providers

phonogram and film producers, and broadcasters.<sup>944</sup> It lasts for a period of 2 years after publication<sup>945</sup> but does not extend to hyperlinks, individual words or very short extracts. Those lengths are not defined, but presumably they are less than eleven words, post-*Infopaq*.<sup>946</sup> Essentially, third-party publishers (“news aggregators”) re-publishing news, must now only include a brief headline of the article, or, remunerate the original press publishers if they wish to re-publish the content. This is a contentious addition because the *Berne Convention* expressly excludes copyright for reporting ‘news of the day’.<sup>947</sup> Notwithstanding this, three key issues arise from excluding copyright for ‘news of the day’. The first is that this provision was drafted in a Convention that has not been amended since 1979. Secondly, public internet, social media and UGC platforms had not been invented during the last amendment. Thirdly, it must be argued that re-publishing journalistic endeavours, in full, amounts to nothing more than blatant copyright infringement. It is not reporting news; it is copying someone else’s report. Digitisation has facilitated slavish copying with ease. It cannot be argued that a directive that specifically seeks to address such issues arising from a digital single market would permit such obvious copyright infringement. There is nothing preventing anyone from writing up their own interpretation of news of the day using the same factual information. But, it cannot be allowed that copyright infringement continues, under the auspices of merely reporting ‘news of the day’, in a Convention that was last revised over 40 years ago and which amounts to reporting someone else’s interpretation and expression of that factual news.

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<sup>944</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 15 (1), (“DSMD”) making reference to *InfoSoc*, Arts 2 and 3(2)

<sup>945</sup> *ibid*, Art 15(4). The original proposal was 20 years, but this was vehemently argued against by numerous stakeholders (Presentation Abstracts, ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute)

<[https://apps.eui.eu/EUI\\_API/EVENTSV2/Attachments/Index?id=12473](https://apps.eui.eu/EUI_API/EVENTSV2/Attachments/Index?id=12473)>

<sup>946</sup> DSMD, Art 15(1)

<sup>947</sup> Berne Convention, Art 2(8); Hugenholtz, (n 961)

However, it has been argued that similar remuneration schemes introduced in Spain and Germany have failed<sup>948</sup> resulting in less, not more, journalists and depreciation of living wages for those journalists.<sup>949</sup> Regarding effective harmonisation, it can be argued that Article 15 provides some legal clarity. However, this may be at the expense of less availability of works across the Union if aggregators, due to licensing issues, cannot bring news to their customers who may never read the original publishing source, particularly if it is hidden behind a paywall. Nevertheless, in the absence of any further suggestive reforms, it is better than nothing. Hence, this thesis will not propose any amendments to the Article 15 neighbouring right for press publishers.

#### 5.2.4 Article 17: content sharing platforms

Regarding Art. 17,<sup>950</sup> the German courts referred a case to the CJEU, in 2018, on whether *YouTube* could use the ‘safe harbour’ provision<sup>951</sup> to evade liability for copyright-restricted acts of communication to the public from its UGC.<sup>952</sup> On the 16 July 2020, the A-G issued an Opinion stating that

the operator of a video-sharing platform and the operator of a file-hosting and -sharing platform do not carry out an act of ‘communication to the public’ within the meaning of that provision when a user of their platforms uploads a protected work there.<sup>953</sup>

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<sup>948</sup> Raquel Xalabarder, Ana Ramalho and Valeria Falce, ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute)

<[https://apps.eui.eu/EUI\\_API/EVENTSV2/Attachments/Index?id=12473](https://apps.eui.eu/EUI_API/EVENTSV2/Attachments/Index?id=12473)>

<sup>949</sup> Jennifer Baker, ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute) <[https://apps.eui.eu/EUI\\_API/EVENTSV2/Attachments/Index?id=12473](https://apps.eui.eu/EUI_API/EVENTSV2/Attachments/Index?id=12473)>

<sup>950</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17

<sup>951</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1, Art 14(1)

<sup>952</sup> Directive 2001/29/EC 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] OJ L167/10, Art 3; C-682/18 *LF v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH* [2021] ECLI 503

<sup>953</sup> C-682/18 Opinion of the AG for *LF v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH* [2020] ECLI 856 [92]

It is very important to note here that the legal framework underpinning this referral was *InfoSoc*, not DSMD. The reference for ‘communication to the public’ was answered in the negative because it relates to primary liability carried out by the actual party who uploaded the content.<sup>954</sup> Facilitation of this, via a UGC platform, is ‘secondary liability’. This factor does not fall within the scope of *InfoSoc*.<sup>955</sup> If future similar cases are brought under DSMD, though, they are likely to be answered differently:

Article 17(1) of that directive now requires Member States to provide that an ‘online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users’.<sup>956</sup>

#### 5.2.4.1 Content-monitoring obligations

Article 17 provisions have clearly placed a positive obligation on UGC platforms to monitor content on its website or face primary liability for copyright infringing acts committed by its users. By virtue of Art. 17(1), the service provider ‘shall obtain an authorisation from the right-holders...by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter’. Although DSMD uses interpretable language, such as ‘shall’, platforms are left in no doubt of their obligations to comply. To avoid being liable ‘for unauthorised acts of communication...’<sup>957</sup> platforms must demonstrate that they carried out due diligence by making ‘best efforts to obtain authorisation...’<sup>958</sup> These must be ‘made in accordance with high industry standards of professional diligence...’<sup>959</sup> whilst acting ‘expeditiously...to disable access to, or to remove from their websites, the notified

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<sup>954</sup> *ibid* [98]-[99]

<sup>955</sup> *ibid* [103]

<sup>956</sup> *ibid* [247]

<sup>957</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17(4)

<sup>958</sup> *ibid*, Art 17(4)(a)

<sup>959</sup> *ibid*, Art 17(4)(b)



works...and ma[k]e best efforts to prevent future uploads...’<sup>960</sup> The onus shifts from the rightholder, as in the ‘take down’ procedure,<sup>961</sup> to the service provider.

DSMD explicitly states that ‘[t]he application of this Article shall not lead to any general monitoring obligation’.<sup>962</sup> However, it has been reported that *YouTube* users upload 400-500 hours of content per minute: 82.5 years’ worth of content in 24 hours.<sup>963</sup> As of April 2017, there was approximately 600 years’ worth of content uploaded to *YouTube*.<sup>964</sup> It is extremely difficult to see how platforms will fulfil obligations to undertake due diligence if they do not actively monitor UGC. It might be argued that DSMD is codifying an established CJEU ruling. The *SABAM* copyright infringement case required the defendant, Netlog (UGC platform), to ‘immediately cease unlawfully making available musical or audiovisual works from SABAM’s repertoire and to pay a penalty of EUR 1000 each day of delay in complying with that order.’<sup>965</sup> How could it do that if it did not actively monitor content even though the obligation had been expressly excluded in the *E-Commerce Directive*, under which this case was heard?<sup>966</sup> Clearly, under DSMD, providers must implement content identification filtering technology to screen for potentially infringing copyright content. They must also seek licence agreements with rightholders who have no obligation to contract.

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<sup>960</sup> *ibid.*, 17(4)(c)

<sup>961</sup> ‘[A] notice and take down mechanism is implied, but not directly provided, in Article 14 of the E Commerce Directive 2000/31/EC’ (Dr Aleksandra Kuczerawy, ‘From ‘Notice and Take Down’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression’ published in Giancarlo Frosio (Ed.), *The Oxford Handbook of Intermediary Liability Online* (OUP 2020) 528)

<sup>962</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17(8) thus incorporating “E-Commerce Directive” 2000/31/EC, Art 15

<sup>963</sup> ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute)

<sup>964</sup> *ibid*

<sup>965</sup> C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECLI 85 cited by Sophie Stalla-Bourdillon (University of Southampton). ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute)

<sup>966</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1, Art 15

There have been criticisms that such technology can produce false positives and may impose high costs on intermediaries.<sup>967</sup> This potentially impedes the right to conduct business<sup>968</sup> as it puts unimaginable strain, in terms of time and money, on UGC platforms to fulfil their obligations. This is notwithstanding that DSMD indicates that ‘the availability of suitable and effective means and their cost for service providers’<sup>969</sup> will be considered in their assessment of whether or not the platform has ‘done their best’<sup>970</sup> to avoid copyright infringement. And yet, ‘[h]ow can technology encoding a rule allow rights balancing?’<sup>971</sup> AI is not yet that advanced though, arguably, including this requirement means that DSMD may be future-proofed for a time when it is. Currently, the onus on UGC platforms to seek appropriate licences means, in practice, that they cannot evade active monitoring. It is a tall order to contract with all EU rightholders, especially as new music is released continually. Moreover, some artists may even struggle to get listed with a CMO for rights clearance, as identified at Chapter [5.1.1]. It may be argued that the inability to strike a ‘fair balance’ between rightholders, end-users and those conducting business may contravene other well-established CJEU legal principles of EU law:

Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order...and make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or...proportionality.<sup>972</sup>

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<sup>967</sup> Roberto Caso and Federica Giovanella (University of Trento), ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute)

<sup>968</sup> Charter of Fundamental Rights of the European Union, Art 16: ‘The freedom to conduct a business in accordance with Union law and national laws and practices is recognised’.

<sup>969</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L 130/92, Art 17(5)(b)

<sup>970</sup> *ibid*, Art 17(4)

<sup>971</sup> Caso and Giovanella (n 967)

<sup>972</sup> Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECLI 454, cited by Roberto Caso and Federica Giovanella (University of Trento), ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute)

Unworkable obligations, where all content is automatically withheld from publication until cleared, will not promote access to knowledge and cultural enhancement.

#### 5.2.4.2 Chilling Effect

There has been genuine concern that such monitoring may lead to a ‘chilling effect’ on the right of freedom of expression, under the EU Charter.<sup>973</sup> Google Copyright Counsel, Ana Ramalho, stated that the ‘chilling effect’ on such a fundamental freedom was not ‘proportionate’ to counteract the issues of online infringement of copyright protected content.<sup>974</sup> Valeria Falce argued that the ‘call for legal certainty [was at the] risk of over-protection’.<sup>975</sup> Furthermore, it was argued that Art. [17]

could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content with the result that its introduction could lead to the blocking of lawful communications.<sup>976</sup>

Article 17<sup>977</sup> may cause undesirable effects for access to digital content due to unfair, and unworkable, balancing acts between rightholders and end-users carried out by machines. Machines cannot yet distinguish between original content and transformative/derivative works that acquire their own copyright.<sup>978</sup> When Tumblr prohibited adult content on its platform in 2019, attempts to use content filters led to vast contraventions on freedom of expression. Numerous works, which did not defy the adult-content ban, were blocked because AI technology could not read and interpret the content accurately.<sup>979</sup> There may come a time when

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<sup>973</sup> Charter of Fundamental Rights of the European Union, Art 11

<sup>974</sup> ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute)

<sup>975</sup> Professor of Economic Law at the European University of Rome

<sup>976</sup> ‘European Copyright - Quo Vadis?’ Conference, 28-29 April 2017, the Florence School of Law (European University Institute)

<sup>977</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17

<sup>978</sup> Ana Mazgal, ‘EU copyright should protect users’ rights and prevent content filtering’ *Communia* (9 January 2017) <[www.communia-association.org/2017/01/09/eu-copyright-protect-users-rights-prevent-content-filtering/](http://www.communia-association.org/2017/01/09/eu-copyright-protect-users-rights-prevent-content-filtering/)>

<sup>979</sup> Stephen McLeod Blythe, ‘Copyright filters and AI fails: lessons from banning porn’ (2020) *EIPR* 42(2) 119

AI has evolved so that it can make the correct choices. But we are not there yet. Currently, content filtering is more likely to lead to a chilling effect on freedom of expression resulting in less works in the Union.

To avoid this, platforms must negotiate licences with rightholders to avoid copyright infringement. This creates a further problem as those works are generally audiovisual. As a reminder, no EU-wide harmonisation has yet been achieved for licensing AVWKs. Only the facilitation of licensing online music works has been harmonised, by minimum standards, in the CRMD.<sup>980</sup> Hence:

[a]n online content platform seeking to obtain a licence for UGC is thus confronted with an enormous licensing task. Even though it is unforeseeable what content users will upload, the licence should ideally encompass the whole spectrum of potential posts.<sup>981</sup>

How are content-providers supposed to do that in an expedient, cost-effective manner, and keep up with constant UGC uploaded at a rate of 400-500 hours per minute when they are faced with the momentous task of clearing licences in 27 different EUMS with multiple rightholders per work? Even with music works, not all are covered by CMOs. This could mean that CMOs would also have to clear the licences in all 27 MS for works of non-members as well.<sup>982</sup> Furthermore, licences are generally restricted to national territories; pan-European licences are a rarity.<sup>983</sup> The scope to obtain one is only just coming to fruition with the birth of the pan-European Hub.<sup>984</sup> And yet, unless geo-blocked,<sup>985</sup> UGC is viewable in all EUMS, regardless

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<sup>980</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72

<sup>981</sup> Martin Senftleben, 'Bermuda Triangle: licensing, filtering and privileging user-generated content under the new Directive on copyright in the digital single market' (2019) EIPR 41(8) 480, 481

<sup>982</sup> *ibid*

<sup>983</sup> *ibid*

<sup>984</sup> Armonia Online <[www.armoniaonline.com](http://www.armoniaonline.com)>

<sup>985</sup> Geo-blocking in EUMS where licensing rights have not been cleared does not breach Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of

of whether or not rights have been cleared. This places a huge strain on platforms. There is no option but to manage the content through filters, and risk chilling free speech and knowledge-based content.

#### 5.2.4.3 Risk of inadvertent discrimination contrary to TFEU, Article 167

Additionally, it has been argued that niche and minority groups and audiences are at risk of complete censorship of works if licences cannot be cleared. As before, this potential risk has already been identified in Chapter [5.1.1] and measures have been proposed in Chapter 5 to counteract potential discrimination in this area. Notwithstanding this, CMOs may need much stronger collaborative efforts to uphold UGC platform obligations to rightholders. This could mean a huge change in the current way in which most CMOs operate as they do so, generally, on a national basis.<sup>986</sup> Language restrictions are one such area where CMOs may face difficulties. This risks fostering of diversity, an EU-treaty objective under TFEU, Art 167(4), as it could be argued that only the platform ‘giants’ offering the most popular language content would be able to fulfil the momentous task of licence clearance. It could also place too high a burden on smaller platforms, thus risking diversity of smaller providers, possibly offering more diverse content from niche or minority groups. This could contravene EU competition law. Even though CMOs may not indulge in anti-competitive practices, the current model could act as a barrier to entry for start-ups. This is another disparity that DSMD seeks to eradicate, and yet, its effects are in conflict with its objectives.<sup>987</sup>

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establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L601/1

<sup>986</sup> Armonia Online <[www.armoniaonline.com](http://www.armoniaonline.com)>

<sup>987</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17(6); Recitals 3 and 67

#### 5.2.4.4 Lobbying Power

It might be argued that the clause was necessary to quell the lobbying power of ‘social media giants’ who were hiding under the ‘Hosting’ safe harbour clause.<sup>988</sup> Out of the 27 EU portfolios,<sup>989</sup> the Digital Economy ranks at number 1. Its lobby contacts/meetings amount to 2292: almost 10% of all portfolio meetings. DSM meetings rank at number 4 with 1564 meetings out of 24463. Of the almost 4,000 organisations lobbying overall, Google takes second place (just behind Deutsche Telekom), whilst Facebook (Ireland) is number 6 in the Digital Economy portfolio. It has been reported that since 2014, Google has taken part in 213 meetings with the European Commission. A third of those meetings (69) directly relate to the DSM or the Digital Economy. Out of those 69 lobbying meetings, almost 28% (19) directly related to copyright (or neighbouring rights).<sup>990</sup> In the hierarchy of lobbying, Digital Europe’s power (ranking in 3rd place) is worth around \$9.8T (US), taking into account the collective wealth of its 70 members (including Facebook, Google, Amazon and Microsoft, amongst others). Deutsche Telekom’s net worth is much lower: around \$80bn (US).<sup>991</sup> Even though Deutsche Telekom ranked first for lobbying, its competitors (who had the most to lose) had the most collective bargaining power and, thus, the most potential to influence legal policy. The 2017 EUI Conference, in Florence, suggests this.<sup>992</sup> There are clear changes from what was originally proposed by the EU Commission’s draft DSMD, which was discussed at the conference, and the final published version.<sup>993</sup> Hence, it may be argued that Art. 17 acts as a

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<sup>988</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1, Art 14(1)

<sup>989</sup> Portfolios are “Areas of Responsibility” such as agriculture, health, internal market and so forth. A portfolio is assigned to each of the 27 Commissioners for a period of 5 years.

<sup>990</sup> All statistics were obtained from the EU lobbying website: Transparency International EU, ‘Integrity Watch EU – Parliament meetings’ <<https://integritywatch.eu/>>

<sup>991</sup> Statistics (approximate) compiled from Forbes and MacroTrend.

<sup>992</sup> This author attended the Conference in person.

<sup>993</sup> Wherein the publisher’s neighbouring right, under Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L 130/92, Art 15, was originally proposed to last for 20 years. By the time of the Conference, it had been downgraded to 2 years.

check and balance on those powers that have the ability to harm the creative industries on a vast scale, in the name of profit, but at rightholders' expense. Equally, it may also be argued that lobbyists act as a check and balance on legislators to ensure that change which restricts their business is proportionate.<sup>994</sup>

Regardless of the intentions and motivations of lobbyists, a chilling effect on fundamental freedoms will not foster access to knowledge throughout the Union. Nor will it promote unity, free flowing trade or cultural diversity. A better option may have been to introduce mandatory harmonised maximum time limits for removing copyright infringing material across the EU, for example 48-72 hours from upload, and continued use of the copyright holder-led 'take down' clause.<sup>995</sup> However, this would still envisage some form of machine-based content filtering as there could not be sufficient human power to monitor the amount of uploads in 48-72 hours. Thus the 'chilling effect' remains. Notwithstanding this, it is unlikely that financial penalties, alone, are a sufficient deterrent against social media 'giants' who facilitate continual publication of copyright-infringing UGC. This is particularly so due to their combined wealth as outlined above. Only time will tell if Art. 17 proves to be the correct strategy to counteract these pressing issues. At the moment, it seems to cause more problems, than it solves.

#### 5.2.4.5 Concluding thoughts on DSMD, Article 17 measures to counteract UGC copyright infringement

Clearly, this Directive is a leap forward, in terms of mandatorily harmonising some exceptions that were only optional under *InfoSoc*.<sup>996</sup> Although Articles 15/17 remain unpopular, it can be argued that DSMD assists in drafting an EUCR regarding "exceptions" to copyright liability.

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<sup>994</sup> TFEU, Art 5

<sup>995</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L 178

<sup>996</sup> Educational establishments, cultural heritage institutions and research organisations

There are still grey areas, a lack of clarity in some respects and missed opportunities for further harmonisation in others that are considered in Chapter 7 (*Recommendations*). However, it has brought harmonisation one step closer in some respects, although still less in others such as CMO MT licensing issues. In the absence of any other proposed measure to counteract the swathes of blatant copyright infringing practices, facilitated by social media giant platforms, there is little else at the moment that could be as effective. Hence, no further changes to either of these two Articles are posited for the first draft EUCR, in terms of their obligations. However, it must be acknowledged that, given the obligation to make best efforts to licence works published on UGC platforms, an intermediary may be desirable to bring together, more easily, content providers and rightholders. Hence, this author suggests that a preferred way of achieving this is by the creation of an EU Central Processing Hub for Digital Rights Management. A full proposal for this will be posited in Chapter 7 (*Recommendations*) as a way of facilitating the licence requirement in DSMD.

### 5.2.5 Suggested reform to assist content-provider compliance with Article 17 in the “Digital Single Market Directive” (EU) 2019/790

By analysis of Directive (EU) 2019/790, a new Central Processing Hub for Digital Rights Management should be considered by the EU Commission, the Council and the European Parliament.

A Stakeholder Enquiry should be mandated to facilitate its creation.



## 5.3 Community Exhaustion: analogue v digital

It is a long-standing rule that

...once a copy of a work protected by copyright has been lawfully placed in circulation, the copyright holder can no longer object to that copy being resold by the person who has acquired it...<sup>997</sup>

It is also well documented in *GEMA*<sup>998</sup> that the CJEU held that ‘the right to control the distribution of copyright protected goods is exhausted following the initial putting on the market of these goods inside the Community with the consent of the right holder(s)’.<sup>999</sup>

Organisations/individuals purchasing tangibles such as CDs, physical books and DVDs, may do so from any EUMS as restrictions on parallel importing are prohibited.<sup>1000</sup> Although other Community policy issues are present, such as, promoting cultural diversity<sup>1001</sup> and development of the knowledge economy,<sup>1002</sup> this measure is predominantly anti-competitive by removing barriers to trade in the single market.

The problem for the 21<sup>st</sup> Century, is that there is no digital equivalent.

### 5.3.1 E-copies and digital software downloads

The difference between purchasing an intangible digital work and a tangible hard copy, is that the purchaser buys a tangible item that they can hold in their hands. They own that physical item. They can do with it what they will subject to the author’s moral/economic/copy rights. In contrast, ownership of intangible items (e.g. music downloads, digital AVWKs/e-books) does

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<sup>997</sup> C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet* [2019] ECLI 1111 [1]

<sup>998</sup> C-55/80 and C-57/80 *Musik-Vertrieb Membran v GEMA* [1981] ECR 147

<sup>999</sup> P Bernt Hugenholtz, *The dynamics of harmonization of copyright at the European level*, in Christophe Geiger, *Constructing European Intellectual Property* (Edward Elgar Publishing 2013) 279; later codified in InfoSoc, Art 4(2).

<sup>1000</sup> C-78/70 *Deutsche Grammophone v Metro* [1971] ECR I-487; C-62/79 *Coditel I* [1980] ECR I-881

<sup>1001</sup> TFEU, Art 167(4)

<sup>1002</sup> Commission, ‘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’ (Communication) COM (2011) 287 final ch1, 2, 13

not transfer to the purchaser on sale. This is because the purchaser has bought a licence to download and use the intangible item for their use only.<sup>1003</sup> The purchaser must not re-sell/share/publish/distribute the digital download. The rationale is that digital downloads do not wear out. The user will not replace it because it has deteriorated over time, unlike tangibles.<sup>1004</sup> Hence, authors are at a huge risk of massive revenue loss should infinite downloads be on-sold, freely, within a Union of 500+ million citizens. Hence, a hard copy book is exhausted once distributed; an e-book is not.<sup>1005</sup> Although this is contrary to *InfoSoc*, Art. 4(2),<sup>1006</sup> it has been justified because tangible books deteriorate over time; digital books do not. They are always new in the sense that a digital file does not alter. If exhausted, the rightholder would be denied appropriate continual remuneration for their work.<sup>1007</sup> As before, where differences arise, it is the impact on the single market that is most relevant here,<sup>1008</sup> particularly if that impact is detrimental to the digital single market of downloads.

The issue of software downloads and re-selling was considered in 2012 (*UsedSoft*).<sup>1009</sup> In this case, the Grand Chamber held that notwithstanding contractual obligations to the contrary, if the rightholder

accepts a user's download of a program and in this connection concludes a licence agreement granting the user a right of use for an unlimited period in return for payment of a fee of a certain size, then the user right may be resold freely.<sup>1010</sup>

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<sup>1003</sup> C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet* [2019] ECLI 1111 [71]

<sup>1004</sup> *ibid* [58]

<sup>1005</sup> *ibid* [48]

<sup>1006</sup> Directive 2001/29/EC 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 OJ L 167, Art 4(2)

<sup>1007</sup> EUIPO, 'Recent European case-law on the Infringement and Enforcement of Intellectual Property Rights' Mar-Apr 2020, 18 [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/New\\_Case\\_Law\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/New_Case_Law_en.pdf)

<sup>1008</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 7

<sup>1009</sup> C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] ECLI 407

<sup>1010</sup> Mette Lindskoug, 'The legal position of sellers and buyers of used licences' (2014) EIPR 36 289

Essentially, the rights to the downloaded software are exhausted when placed into the Community. However, this case was fact-specific relating to computer program licences. The CJEU applied the *Software Directive*<sup>1011</sup> which limited the ‘on-use’ to the same obligations that bound the original acquirer of the licence even though the subsequent acquirer had no contract with the rightholder.<sup>1012</sup> If the original acquirer is bound to 20 users, then the subsequent acquirer must also be bound to the same number of users and cannot freely disperse the content beyond the permitted terms of the licence.

Moreover, the CJEU in *Tom Kabinet*<sup>1013</sup> differentiated between computer software and other intangibles thus preventing the *UsedSoft* ruling being used as arguments for exhaustion of other intangibles. The crux lay with the fact that software programs have their own *sui generis* rules under the *Software Directive*, and, a software program is utility based. It serves a function to run hardware for a specific purpose. Even though it is a copyright-protected literary work, it is not a literary work to be enjoyed by a user in the normal meaning of word.<sup>1014</sup> It was irrelevant how the work was distributed, whether by a tangible form of a CD or an intangible form of a computer download. The end result is the same: only the machine can read and make sense of the program.<sup>1015</sup> Furthermore, the market for second-hand computer software is not as prolific as that for second-hand books.<sup>1016</sup> Once a book has been read, the reader moves on; hence, the likelihood of distribution. It was outlined in the A-G Opinion in *Tom Kabinet* that the same could not be said for computer software.<sup>1017</sup> However, this seems at odds with current data for

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<sup>1011</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Art 4(2)

<sup>1012</sup> Lindsoug, 290-1 (n 1010)

<sup>1013</sup> C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet* [2019] ECLI 1111 [55]-[58]

<sup>1014</sup> C-263/18 Opinion of the AG for *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet* [2019] ECLI 697 [57]

<sup>1015</sup> *ibid*

<sup>1016</sup> *ibid* [61]

<sup>1017</sup> *ibid*

second-hand market buying trends. A 2017-18 study reported that ‘[i]n the EU, counterfeit and pirated goods amount to up to 5% of imports or as much as EUR 85 billion’. Furthermore, ‘[t]he creative industries expressed grave concerns about the role of certain hosting providers, registries, registrars and ad networks in facilitating online piracy’.<sup>1018</sup> This is made possible by online marketplaces offering copyright-protected content, such as *Cyberlockers*, *Uploaded.net* and *ThePirateBay.org*, amongst many others. Moreover, it was noted that ‘according to the film, TV, music, software and book publishing industries, cyberlockers facilitate widespread access to a high volume of infringing content uploaded anonymously onto their servers’.<sup>1019</sup> Clearly, there is still a market for counterfeit software; why would there not be a legitimate market for second-hand software in the same way? Notwithstanding this, the CJEU have argued that due to the exclusivity of the software legal rules, the *UsedSoft*<sup>1020</sup> ruling is exclusive to software programmes and cannot apply to creative content such as e-books.<sup>1021</sup>

As a reminder, InfoSoc Recital 31 states

A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded.

With regards to the e-book/intangibles market, it must be argued that, in terms of a fair balance of such rights, this may be one of those circumstances where the economic interests of the rightholder probably outweigh the rights of the end-user to enjoy free, unbridled access to the online single market of books. The reason is because the end-user is not usually denied an opportunity to purchase the e-book et al in EUMS; they just cannot purchase a cheaper, second hand version like they could if it was in hard copy tangible form. Ultimately, there is a

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<sup>1018</sup> Commission, ‘Counterfeit and Piracy Watch List’ SWD(2018) 492 final, 7

<sup>1019</sup> *ibid*, 9

<sup>1020</sup> C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] ECLI 407

<sup>1021</sup> C-263/18 *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet* [2019] ECLI 1111 [67]

balancing test between ensuring dissemination of works and protecting the author's economic interests. Providing consumers are not prevented from purchasing e-goods from their chosen EUMS and that the e-goods are freely available, it is difficult to see how the current law is detrimental to the single market. Given the likelihood that the author would most likely suffer a disproportionate level of detriment in terms of their economic rights, it must be argued that, in this case, EU lawmakers have assessed the balance proportionately between endeavouring to guarantee a free flow of goods in the single market, both tangible exhausted books and the ability to purchase e-books if preferred, whilst safeguarding the author's economic rights. A problem, however, is where licensing restrictions arise preventing such purchase, and, as has already been identified, this is far more likely to arise with regards to a different intangible good/service: audiovisual works.

## 5.4 Audiovisual works: licensing complications within the digital single market

Much has already been discussed in terms of AVWKs. As previously identified with the CRMD in Chapter [5.1] and the *Education Exception* in DSMD, Art. 5 (Chapter [5.2]), the problem for AVWKs, is that there is no collective form of EU law regulating AVWK content licensing. Whilst online music works licensing is regulated, to minimum standards, by the CRMD, there is no equivalent, as yet, for AVWKs (Chapter [5.1.2]). Rightholders can lawfully prevent further dissemination of works in an equivalent digital format beyond the licence permission.<sup>1022</sup> This is so despite anti-blocking measures introduced by the Commission to prevent trade restriction and re-routing of digital content access.<sup>1023</sup> In contrast, parallel

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<sup>1022</sup> Hugenholtz, 279 (n 999)

<sup>1023</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L60I/1; Regulation (EU) 2017/1128 of the European Parliament

importing of SatCab broadcasts is permitted, provided a licence is acquired from the home country of signal origination.<sup>1024</sup> Users can lawfully receive SatCabs from any MS where the signal originates.<sup>1025</sup> There is no provision for comparable dissemination of digital equivalents. Users wishing to stream Video on Demand (“VoD”) cannot do so, lawfully, without obtaining single permissions from all rightholders located in all MS.<sup>1026</sup> The market remains fragmented between audiovisual tangibles and intangibles. This is unacceptable for a borderless internal market and an industry that is surpassing its SatCab equivalents.<sup>1027</sup>

#### 5.4.1 Commission response to licensing online AVWKs: Impact Assessment on the Modernisation of EU Copyright Rules (2016)

In 2016, the Commission published an ‘Impact Assessment on the modernisation of EU copyright rules’ (“IA”).<sup>1028</sup> Complex problems arising from MT licensing were identified as monumental barriers for viable accessibility reforms.<sup>1029</sup> Issues ranged from ‘contractual blockages’, ‘exclusive licensing’ where the licensee does not participate in VoD services, unwilling participants, difficulties locating rightholders, the number of rights in an AVWK, low remuneration revenue, ‘transactional and technical costs’, ‘price of works’ and piecemeal negotiation, often with only ‘blockbuster’ productions.<sup>1030</sup> The Commission acknowledged that VoD popularity increased year-on-year with anticipated significant growth by 2020-25.<sup>1031</sup>

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and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168/1. See also P Bernt Hugenholtz and Joost Poort, ‘Film financing in the digital single market: challenges to territoriality’ (2020) IIC 51(2) 167, 174

<sup>1024</sup> C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure Ltd* [2011] ECDR 11

<sup>1025</sup> Hugenholtz and Poort, 174 (n 1023)

<sup>1026</sup> However, this does not prevent users from illegally accessing subscription-based TV without remuneration. 13.7m users unlawfully streamed pirated content in EU28 – this equated to over €900m revenue from illegal streaming in 2018 –almost €6/month per illegal user being spent on pirated content (EUIPO, ‘Illegal PTV in the European Union’ *EUIPO Report* (November 2019) 9 <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2019\\_Illegal\\_IPTV\\_in\\_the\\_Europe\\_an\\_Union/2019\\_Illegal\\_IPTV\\_in\\_the\\_European\\_Union\\_Full\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2019_Illegal_IPTV_in_the_Europe_an_Union/2019_Illegal_IPTV_in_the_European_Union_Full_en.pdf)>

<sup>1027</sup> *ibid*, 168

<sup>1028</sup> Commission, ‘Impact Assessment on the modernisation of EU copyright rules’ SWD(2016) 301 final (“Impact Assessment (2016)”)

<sup>1029</sup> *ibid* [3.3] – [3.3.3]

<sup>1030</sup> *ibid* [3.3.1]

<sup>1031</sup> *ibid*

And yet, less than half of European films produced were available as VoD by 2016. Smaller operations were affected more than large productions.<sup>1032</sup> It can be argued that this impacted on cultural diversity as well as rightholders, who were blocked by other rightholders, and, ultimately, the consumers/end-users.

It has been reported that consumer spending for VoD AVWKs had increased from around €2bn in 2013<sup>1033</sup> to €7bn by the end of 2018.<sup>1034</sup> Key research findings suggest that ‘[s]ubscription video-on-demand (SVOD) is the driving force behind the growth of the pay-on-demand market, with 66% of total 2016 pay-on-demand service revenue, vs. only 11% in 2011’.<sup>1035</sup> This was notwithstanding that the S-VoD markets were purported to be the last to receive digital content in the hierarchy of distribution.<sup>1036</sup> Furthermore,

TVOD works on a revenue-sharing basis, with a portion of the revenues redistributed to the rightholder or rights distributor, and SVOD in principle on a flat fee basis, i.e. a one-off payment for the exploitation of the programme during a certain period of time in specific territories.<sup>1037</sup>

Also, European films were found to be rarely available outside the country of origin. Barely three EUMS were known to broadcast European films.<sup>1038</sup> This was purported to be because economies of scale were prevalent in American production companies, thus, they were better equipped to deal with VoD platforms than smaller companies.<sup>1039</sup> This environment does not foster cultural diversity within the EU, as required by TFEU, Art 167(1).

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<sup>1032</sup> *ibid*

<sup>1033</sup> *ibid*

<sup>1034</sup> Statista, ‘Consumer revenues for on-demand audiovisual services in the European Union (EU 28) from 2011 to 2018’ <[www.statista.com/statistics/431308/online-vod-film-consumer-spending-eu/](http://www.statista.com/statistics/431308/online-vod-film-consumer-spending-eu/)>

<sup>1035</sup> European Audiovisual Observatory (Council of Europe) Christian Grace, ‘Trends in the EU SVOD market’ (November 2017) 1

<sup>1036</sup> Commission, ‘Impact Assessment on the modernisation of EU copyright rules’ SWD(2016) 301 final [3.3.1]

<sup>1037</sup> European Audiovisual Observatory (Council of Europe) Christian Grace, ‘Trends in the EU SVOD market’ (November 2017) 3

<sup>1038</sup> Commission, ‘Impact Assessment on the modernisation of EU copyright rules’ SWD(2016) 301 final [3.3.1]

<sup>1039</sup> *ibid*

Proposals in the IA were suggested that were ultimately implemented in DSMD and the Online Broadcasting Directive 2019. For AVWKs, this was “Option 2: Stakeholders' dialogue (Option 1) + Obligation” for Member States to establish a negotiation mechanism to try and overcome obstacles to the availability of audiovisual works on VoD. ‘Options imposing obligations that would restrict the stakeholders' contractual freedom were discarded’.<sup>1040</sup> The reasons were threefold: loss of freedom to contract, loss of the right to conduct business caused by forced negotiation and potential loss of control of property rights granted under the EU Charter. Hence, the Commission opted for the approach that, arguably, was already present in most EUMS states anyway as identified at Chapter [5.2.1].

#### 5.4.2 Making the impossible...possible

The Commission, in the 2016 IA, commented that ‘[o]ptions imposing obligations that would restrict the stakeholders' contractual freedom were discarded’.<sup>1041</sup> This is because there were concerns that forced negotiation would not necessarily result in more VoD works and the proposal would mandate forced rights appropriation.<sup>1042</sup>

##### 5.4.2.1 Non-voluntary licensing

The discarded option of “rights-appropriation” may be argued to be contrary to the CFREU as it would deprive someone of their possessions: the proprietary right in the work to permit, or withhold, licensing for reproduction,<sup>1043</sup> communication<sup>1044</sup> and distribution<sup>1045</sup> of their work.<sup>1046</sup> But, this is an interesting juncture which reverts back to the point made in [1.1]: IPRs

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<sup>1040</sup> *ibid* [3.3.2]

<sup>1041</sup> *ibid*

<sup>1042</sup> *ibid*

<sup>1043</sup> Directive 2001/29/EC 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] OJ L167/10, Art 2

<sup>1044</sup> *ibid*, Art 3

<sup>1045</sup> *ibid*, Art 4

<sup>1046</sup> Charter of Fundamental Rights of the European Union, Art 17(1)



are intangible rights and those rights, generally, may be licensed, sold or transferred. Although it may be argued that a minority of rightholders could be deprived of their possessions (the proprietary right to license use of their property), it could be further argued that the majority could be deprived of their possessions: the choses in action (enforcement rights) giving those rightholders the right to enforce licensing of those rights. Should it be right that a small minority can prevent the larger majority from exercising that right? Moreover, a lack of sought-after AVWKs in the VoD market could create the perfect environment to facilitate piracy and illegal downloading. Consumers generally want something immediately; they do not want to wait for a DVD coming in the post in a few days' time.<sup>1047</sup> Should the law not step in to reduce this impact? Clearly, S-VoD figures suggest that the on-demand market is now out-stripping traditional media as the go-to place for audiovisual entertainment. The law, consumers, rightholders and stakeholders must work with this, not against it. Failure to do so could create the perfect breeding ground for piracy. Hence, we could consider the Charter's Art. 17 provision more carefully for a resolution:

No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by the law, *subject to fair compensation being paid in good time for their loss* (author's emphasis).<sup>1048</sup>

Article 17 CFREU contains a caveat that could potentially enable lawmakers to create legislation for compulsory licensing, providing the rightholder is recompensed in a timely manner. In view of this, it could be argued that the potential to use "fair remuneration" and "majority voting" (to contract), in the context of the continuing prolific rise in demand for VoD, were essentially ignored in the 2016 Commission IA. By virtue of Art. 17, it could be argued

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<sup>1047</sup> Mark Sweney, 'Film and TV streaming and downloads overtake DVD sales for first time' *The Guardian* (5 Jan 2017) <[www.theguardian.com/media/2017/jan/05/film-and-tv-streaming-and-downloads-overtake-dvd-sales-for-first-time-netflix-amazon-uk](http://www.theguardian.com/media/2017/jan/05/film-and-tv-streaming-and-downloads-overtake-dvd-sales-for-first-time-netflix-amazon-uk)>

<sup>1048</sup> *ibid*

that the Commission could have contemplated legislation which would have precluded minority rightholders (in terms of percentage/share-holding) from blocking AVWK licensing.

Notwithstanding this, it must be remembered that the DG of WIPO, at the WIPO International Forum on the *Collective Administration of Copyrights and Neighbouring Rights* in May 1986 cautioned that

*Guarantees should be worked out and applied for the correct functioning of collective administrative systems to make sure that they will not lead to a disguised version of non-voluntary licensing or to the unjustified collectivization of rights.*<sup>1049</sup>

As advised above, using the caveat in Art. 17 is essentially advocating compulsory licensing, a concept which this author, in Chapter [4.5.1] has already discounted use of for circumstances other than ‘in the interests of public safety or the economic well-being of the country, for...the protection of health or morals’.<sup>1050</sup>

#### 5.4.2.2 Agreements between Collective Management Organisations and Organisations of Producers

A less draconian way could be to explore the French approach, as adopted by SACD.<sup>1051</sup> It was reported in the 2016 IA that the logistical difficulties of licensing AVWKs could be reduced by tackling the problem at the outset:

In France, this situation has been addressed by the conclusion of an agreement...between the SACD and organisations of producers. This agreement was extended to the whole sector in 2007...[and] provides for a standard clause to be included in the contracts to allow VoD exploitation. This agreement also includes a presumption of licence for previous contracts. This aims at lifting obstacles at the very

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<sup>1049</sup> Mihály Ficsor, ‘Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU ‘Acquis’’ published in Daniel Gervais (Ed.), *Collective Management of Copyright and Related Rights* (3<sup>rd</sup> edn Kluwer Law International 2013) [2.2]

<sup>1050</sup> ECHR, Art 8(2)

<sup>1051</sup> SACD is ‘is a society of authors, a not-for-profit, non-trading company founded by authors, that united with Beaumarchais in 1777 to defend their rights.’ <https://www.sacd.fr/en/sacd%E2%80%99s-missions-and-values>

beginning of the chain of exploitation (initial authors) and at providing remuneration to initial authors.<sup>1052</sup>

Arguably, this could be much easier to achieve, EU-wide, had there been an equivalent directive to the CRMD which could have minimally harmonised standards for CMOs in the business of licensing AVWKs (see Chapter [5.1.2]). This could have been incorporated into a Directive to facilitate accessibility of works in a similar way that the DRMD has enforced UGC platforms to enter into licences with artists/copyright owners.<sup>1053</sup>

The potential problem though, is that, essentially this may become a non-voluntary agreement. This is because SACD work for the artists; CMOs work for themselves, as agents for the artists. Their goal is to negotiate royalties and mandatory remuneration for their members. Hence, there is always the risk that minority rightholders voices' in the work will be lost against the magnitude of producers and majority rightholders who, for example, may not be as concerned about asserting their moral, or other such, rights. Notwithstanding this, the French approach has been reproduced in a handbook to assist both French-speaking and non-French speaking African filmmakers in preparing such copyright contracts.<sup>1054</sup> Its purpose is to assist African filmmakers in preparing their copyright contracts for licensing by covering all the elements that should be included in a licensing agreement/copyright contract. Clearly, the French Approach is to facilitate agreements between the rightholders and potential licensees to complete copyright licensing agreements. Hence, it could be argued that this is similar to content providers having to negotiate licences with rightholders by virtue of Art. 17 DSMD.

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<sup>1052</sup> Commission, 'Impact Assessment on the modernisation of EU copyright rules' SWD(2016) 301 final [3.3.1] in Fn. 149

<sup>1053</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17

<sup>1054</sup> Ministère des Affaires étrangères et Européennes, 'Audiovisual and films contracts: A Practical Guide for use by African Professionals' Updated from 2008 contributors: Karine Riahi et al

#### 5.4.2.3 Concluding thoughts on audiovisual work harmonisation

After critically analysing the complexity surrounding AVWKs, it has become apparent that this particular area of law is both technical and complex. Thus, a doctoral thesis is not the best vehicle for suggesting workable reforms to balance the interests and rights of the rightholders of the work and the end-users because it has limited resources and time constraints. In view of the magnitude and potential globalised nature of those rights, it is suggested that further EU Commission Impact Assessments are required, in conjunction with various stakeholders across the AVWKs industry. The 2016 IA has brought small changes to counteract the most pressing issue: UGC on social media internet websites. This is clearly aimed at facilitating communication between the platforms and the rightholders, but it is not enough. On that basis, and in line with the suggestion made for compliance with Art. 17, it is suggested that the Commission should also mandate a Central Processing Hub for AVWK rights management. Additionally, the Commission should consider placing AVWK licensing near the top of its copyright harmonisation agenda.

#### 5.4.3 Suggested reform to facilitate creation of harmonised legal rules for audiovisual works in the EU

By analysis of Directive (EU) 2019/790, a new Central Processing Hub for Digital Rights Management should be considered by the EU Commission, the Council and the European Parliament.

A Stakeholder Enquiry should be mandated to facilitate its creation.

## 5.5 CONCLUSION

This chapter included a critical analysis of the differences and their impact on the functioning of the digital single market between EUMS in four key areas: Collective Rights Management Directive, Digital Single Market Directive, Community Exhaustion and Audiovisual Works. It has been argued in Chapter [5.1.1] that governance and transparency in terms of CMOs giving ‘objectively justified reasons’ for refusing an artist representation could be much improved if the CMO was required to include such reasoning in their annual transparency report. Moreover, it was considered why AVWKs were not included in the CRMD. The author concluded that, due to the complexity of licensing these works, this would have caused unjustified delays in terms of harmonising the online music single market. Chapter [5.2] considered three key areas in the DSMD: the education exception [5.2.1] which is now mandatory, and a vast improvement on the same optional exceptions in *InfoSoc*; and the heavily criticised Articles 15 [5.2.2] and 17 [5.2.3]. After detailed analysis, the author conceded that whilst the newly created press publishers’ neighbouring right and, essentially, the necessity for content management will undoubtedly create the environment for potentially fewer works in the digital single market, in the absence of any other mechanisms, these would act as effective tools against prolific copyright infringement. A minor recommendation was suggested to the *Rental and Lending Directive* 2006/115/EU in relation to performers rights, to mandate ‘use solely for the purposes of teaching or scientific research’ thus aligning it with the DSMD, Art. 5 exception. In addition, the author has suggested that, the potential for UGC platforms to negotiate licences with rightholders could be much improved with the assistance of a newly created Central Processing Hub. Chapter [5.3] discussed the problems arising from community exhaustion in the context of tangible goods and intangible goods. It was conceded that, in terms of e-books and so forth, the balance of rights correctly swung in favour of the rightholder so no changes were proposed. This was because the consumer was not prevented from purchasing an e-book

but, prevention of on-selling meant that the authors' economic rights would be protected. Chapter [5.4] returned to the discussion regarding AVWKs. It is noted that AVWK issues were discussed across the majority of the chapter and the reason for this is because AVWKs are so prolific in their reach: as a means of conveying music (e.g. music videos), as teaching aids (education exception) and, of course, for actually downloading and watching (Art, 17 DSMD). Hence, it was inevitable that discussion of some kind would permeate throughout the chapter. Notwithstanding this, Chapter [5.4] explored the logistics and possibilities of EU-wide licensing of AVWKs. Two methods for achieving this were explored: a non-voluntary route which would have enforced minority shareholders to agree to license the work; and the "gentler" French approach of a "CMO-organisation and producers agreement" in a copyright contract. Again, it was conceded that this could still leave minority shareholders vulnerable to coercion. The author conceded that licensing of AVWKs is logistically complex for resolving in a doctoral thesis that covers numerous others areas of copyright harmonisation. Suggestions were made for the creation of a Central Processing Hub to endeavour facilitation of current licensing and that the Commission ought to place this outstanding licensing issue at the top of its agenda.

Hence, it can be argued that the following issues have the potential to cause detriment in the digital single market: CMOs opportunity to refuse representation without having to publish their research, lack of EU-facilitated licensing of AVWKs and enforced content management impacting on the number of works available. The author conceded that, out of all the issues discussed, two were not resolvable in this doctoral research thesis: enforced content management and AVWKs. The author has made suggestions in both of these areas for some form of solution by way of CPHs. However, intervention by the Commission is still necessary. As such, it can be argued that the impact of these findings on the overall proposal for a unitary

copyright regulation is that, with the exception of AVWKS, the majority of areas covered in this chapter can be resolved to a workable extent and the suggestions outlined in this chapter will be incorporated into the proposed EUCR.

# CHAPTER SIX

## **A critical analysis of the EU-UK Trade Deal: should the proposed unitary EUCR annex to the EU-UK TCA?**

*There has been a lot of attention on how government should approach the next phase of the Brexit negotiations but very little public debate on how or why the UK should engage the EU once their new partnership is in place. Ignoring this is a mistake that could damage the UK's long-term interests.*<sup>1055</sup>

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<sup>1055</sup> Georgina Wright, Alex Stojanovic and David Klemperer, 'Influencing the EU after Brexit' *Institute for Government* (January 2020) 5 <[www.instituteforgovernment.org.uk/sites/default/files/publications/influencing-EU-after-brexid\\_6.pdf](http://www.instituteforgovernment.org.uk/sites/default/files/publications/influencing-EU-after-brexid_6.pdf)>



## 6. INTRODUCTION

This chapter critically analyses the intellectual property section of the post-Brexit EU-UK Trade and Cooperation Agreement (“TCA”) in relation to copyright law.<sup>1056</sup> The purpose is to determine if the proposed EUCR could, and should, annex to the TCA to facilitate trading relations between the EU-UK in terms of copyright-protected goods and services. In doing so, the author critically analyses what options were available for Third Country trading, what was actually negotiated, a comparison and contrast between the EU-UK TCA and EU directives and, crucially, the final court of adjudication should the proposed EUCR annex to the TCA. The effect of annexation in the context of adjudication is also be analysed to determine the best outcome for EU-UK trading relations within the ambit of the TCA.

This chapter seeks to answer research question 10 as follows:

Could the proposed EUCR annex to the EU-UK Trade and Cooperation Agreement 2021 and, if so, should it?

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<sup>1056</sup> Available here: [https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement\\_en](https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en)

## 6.1 What trading options were available post-Brexit?

The UK withdrew from the EU on the 31 January 2020 and its transition period for trade-deal negotiation ended at 11:00pm 31 December 2020.<sup>1057</sup> From then, the UK was a Third Country. Trade relations between the EU-UK would have existed only under WTO rules, unless an agreement was made. Copyright disputes would have been heard within the ambit of the Berne Convention and other such copyright treaties, supported by TRIPS and its dispute resolution mechanism, or by litigation in the country of breach. For the UK, EU law would not apply unless retained,<sup>1058</sup> but without the CJEU as the final arbiter of law.<sup>1059</sup> The UK found itself in a unique position. It was now a Third Country, but with former long-standing EU membership. Unlike other Third Countries trading with Free Trade Agreements (“FTAs”), its copyright laws encompassed almost 30 years of harmonisation, as previously discussed. The dominant issue, during the “Brexit” period, was whether or not the EU-UK would agree to a trade deal. Presented below are some options that could have been negotiated, to provide context for critical analysis of the actual deal that was agreed: the EU-UK Trade and Cooperation Agreement.

### 6.1.1 Trade Deal Options for the EU-UK

The strongest option to retain continuing EU copyright harmonisation for the UK and access to the copyright single market, post-Brexit, was negotiation of EEA membership. EEA membership would have given considerable access to the single market enabling the UK to supply copyright goods/services within the EEA. However, a major stumbling block for negotiation of EEA membership would have been the mandatory requirement of free movement of people.<sup>1060</sup> It has been reported that this issue was a key factor for the electorate

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<sup>1057</sup> European Union (Withdrawal Agreement) Act 2020, §39

<sup>1058</sup> European Union (Withdrawal) Act 2018

<sup>1059</sup> European Union (Withdrawal Agreement) Act 2020, §1A(5)

<sup>1060</sup> *ibid*

majority voting to leave.<sup>1061</sup> To satisfy its electorate, free movement of people would have been a concession that the Johnson government could not have made and, from which, EU governance could not have departed. Moreover, Westminster Parliament would still have had to accept EU supremacy for the EEA's final arbiter, the EFTA court. Given that another major reason reported for Brexit was to 'take back control of its laws',<sup>1062</sup> this would also have been the death knell in negotiations for EEA membership. Hence, an alternative where a middle way may have been found was in an 'EFTA plus bilateral agreement'.<sup>1063</sup> This could have provided essential access to the copyright single market for goods, and possibly some services, under Annex XVII and protocol 8 of the EEA Agreement.<sup>1064</sup> Moreover, free movement was not mandatory, which was preferable to full EEA membership given that this was an area within which the Johnson administration could not have capitulated. Notwithstanding this, full service access was not guaranteed.

Failure to secure an EEA or EFTA membership would have left the UK with three further options: an FTA, access to the single market via the EU Customs Union ("EUCU") like Turkey, or by relying on WTO rules alone.<sup>1065</sup> The EUCU could have given access to the EU market but this would have been limited. Turkey, for example, has access to the EU market in industrial goods wherein there are no tariffs, quotas or duties on goods traded between itself and the EU.<sup>1066</sup> However, this, alone, would have been an inferior deal for the UK as it would not have

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<sup>1061</sup> Matthew Goodwin and Oliver Heath, 'Brexit vote explained: poverty, low skills and lack of opportunities' *Joseph Rowntree Foundation* (31 August 2016) <[www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities?gclid=EAIaIqobChMIjZOczN2h6wIVnIBQBh1PagxNEAAAYAiAAEgKIIPD\\_BwE](http://www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities?gclid=EAIaIqobChMIjZOczN2h6wIVnIBQBh1PagxNEAAAYAiAAEgKIIPD_BwE)

<sup>1062</sup> HM Government, 'EU Exit: Taking back control of our borders, money and laws while protecting our economy, security and Union' Cm 9741 November 2018

<sup>1063</sup> Robyn Munro and Hannah White, 'Brexit Brief: Options for the UK's future trade relationship with the EU' *Institute for Government* (6 July 2016) <[www.instituteforgovernment.org.uk/publications/brexit-brief-options-uk%E2%80%99s-future-trade-relationship-eu](http://www.instituteforgovernment.org.uk/publications/brexit-brief-options-uk%E2%80%99s-future-trade-relationship-eu)

<sup>1064</sup> Silje Thorstensen, 'Intellectual Property Rights' <[www.efta.int/eea/policy-areas/goods/competition-aid-procurement-ipr/ipr](http://www.efta.int/eea/policy-areas/goods/competition-aid-procurement-ipr/ipr)>

<sup>1065</sup> *ibid*

<sup>1066</sup> *ibid*

given unlimited access to all goods markets; nor would it have granted access to the essential services market. This, itself, would have been a non-starter, in terms of negotiation, given that the UK's industry is service-dominated by an 80% majority worth in excess of £1.5trillion.<sup>1067</sup> Preferably, the UK needed both. It would have eliminated the potential issue of free movement of people; nor would there have been any requisite financial contribution. However, the UK would have been bound by EU law in 'goods' areas covered by the agreement which would not necessarily have encompassed copyright. On balance, this would not have been the best trade deal for a service-industry like the UK.

The EU-UK could have considered a "standard" Free Trade Agreement ("FTA") to trade under, rather than sole reliance on the WTO, to set preferential terms in tariffs and import quotas. This would have enabled the UK to trade within the EU, in agreed areas (e.g. goods and services) but still negotiate its own trade deals with other countries. This was a key focus for UK governance.<sup>1068</sup> The EU itself has at least 45 FTAs<sup>1069</sup> and, within these states, has negotiated a variety of agreements: Comprehensive Agreement on Investment, Global Agreements, Economic Partnership Agreements, Comprehensive Economic and Trade Agreement and numerous FTAs. As the largest Regional Economic Trade Organisation in the world, it was well-versed in securing international trade deals. Given the UK's determination to operate independently from EU governance, yet retain the EU as a key trading partner, an FTA of some description was really the best option. Moreover, the majority of EU-Third Country FTAs negotiated, do cover intellectual property. By evaluation of EU-Third Country FTAs, it can be stated that the majority of such agreements cover a wide range of copyright areas: Authors;

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<sup>1067</sup> Chris Rhodes and Niamh Foley, 'Industries in the UK' *House of Commons (Library)* (30 December 2019) <<https://commonslibrary.parliament.uk/research-briefings/cbp-8353/>>

<sup>1068</sup> HM Government, 'EU Exit: Taking back control of our borders, money and laws while protecting our economy, security and Union' Cm 9741 November 2018

<sup>1069</sup> Commission, 'EU trade agreements: delivering for Europe's businesses' *Press Corner* (12 November 2020) [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2091](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2091)

Performers; Producers of Phonograms; Broadcasting Organisations; Broadcasting and Communication to the Public; Term of Protection; Protection of Technological Measures; Protection of Rights Management Information; Limitations and Exceptions; Artists' Resale Rights; Cooperation on Collective Management of Rights; Exhaustion, though this seems to be left to parties' own means of implementation; Rights Management, but not all do; Liability of Intermediary Service Providers ("ISP"), only Canada currently;<sup>1070</sup> and adherence to the international conventions/treaties.

Ultimately, a one-of-its-kind EU-UK agreement was negotiated and drafted: the EU-UK Trade and Cooperation Agreement, which encompasses all the areas of copyright law outlined above except for ISP liability.

## 6.2 Critical analysis of the Negotiated Agreement: the Trade and Cooperation Agreement

Negotiations recommenced between EU and UK governance during the transition period in 2020, resulting in the EU-UK TCA.<sup>1071</sup> It 'consists of a Free Trade Agreement...a close partnership on citizens' security [and] an overarching governance framework'.<sup>1072</sup> The rules governing intellectual property are contained in TITLE V, with copyright specifically included in Articles 219-235. It largely follows the basis of the other FTAs as outlined above. The TCA does not cover copyright subsistence, hence, national rules will apply under this agreement. For EUMS-UK copyright disputes, the rules will be EU-wide where harmonised for EUMS, EUMS' national rules only where unharmonised, and the UK's national copyright laws. On

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<sup>1070</sup> Commission, 'Negotiations and Agreements' [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en)

<sup>1071</sup> Commission, 'Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland' COM(2020) 35 final

<sup>1072</sup> Commission, 'The EU-UK Trade and Cooperation Agreement' [https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement\\_en](https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en)

that basis, it can be argued that the EUCR could add further clarity to copyright subsistence in terms of legal certainty for trading and in litigation.

### 6.2.1 A comparative analysis of the EU-UK TCA, Articles 219-235 compared to current EU Directives and Regulations: could the proposed EUCR annex to the TCA?

It can be argued that the UK's trading status is different and, thus, set apart, from other Third Countries, because it is a former long-standing EU member. In terms of copyright law, the UK has encompassed copyright harmonisation in its laws since its accession in 1973.<sup>1073</sup> However, it can be argued that it has derived most benefit during the last 30 years in terms of CJEU interpretation of the numerous harmonising copyright directives passed. For example, the definition of “originality” is not included in the UK CDPA; nor is it outlined in the TCA. However, in absence of any formal repeal,<sup>1074</sup> it has been argued at Chapter [4.1.2] that the standard of originality for the UK is now the same as the EU. Works are original if they amount to the author's own intellectual creation, as set down in *Meltwater*<sup>1075</sup> whose ruling was affirmed and applied in numerous subsequent UK cases thereafter.<sup>1076</sup> Moreover, as identified at Chapter [4.1.4], it can be argued that this standard is now required for all works, not just the UK's authorial works, because of subsequent EU rulings.<sup>1077</sup> Unless this standard is formally

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<sup>1073</sup> C-78/70 *Deutsche Grammophon v Metro* [1971] ECR I-487; C-62/79 *Coditel I* [1980] ECR I-881; C-55/80 and 57/80 *Musik-Vertrieb Membran v GEMA* [1981] ECR 147; C- 58/80 *Dansk Supermarked A/S v A/S Imerco* [1981] ECR 181; C-62/81 *Coditel v SA Cine Vog Films* [1982] ECR 3381 (“Coditel II”)

<sup>1074</sup> Nicola Newson, ‘Queen’s Speech 2022: Brexit—Retained EU law and the Protocol on Ireland/Northern Ireland’ *UK Parliament House of Lords Library* (5 May 2022) <https://lordslibrary.parliament.uk/queens-speech-2022-brexite-retained-eu-law-and-the-protocol-on-ireland-northern-ireland/>

<sup>1075</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10

<sup>1076</sup> *Mitchell v British Broadcasting Corporation (BBC)* [2011] EWPC 42 [28]-[29] (Birss J); *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPC 37 [56] (Birss J); *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482 [38] (Birss J); *Sheeran & Ors v Chokri & Ors* [2022] EWHC 827 (Ch) [21] (Zacaroli J); *Shazam v Only Fools The Dining Experience and Others* [2022] EWHC 1379 IPEC [95] and [125] (John Kimbell QC sitting as a Deputy High Court Judge)

<sup>1077</sup> C-393/09 *Bepečnosť softwarová asociace v Ministerstvo Kultury* [2011] E.C.D.R. 3; C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and (C-429/08) *Karen Murphy v Media Protection Services Ltd* [2011] E.C.D.R. 11 [96]-[98]

repealed, and a clear demonstration that the former common law standard is to apply,<sup>1078</sup> these standards should continue.

Similarly, in terms of notions of works, it was argued at Chapter [4.2.3] that, due to the CJEU's interpretation of *InfoSoc* in subsequent rulings post-*Infopaq*, the UK's copyright works, regardless of closed categories in the CDPA, have already been harmonised to an EU-wide standard. This is because the CJEU ruling in *Levola Hengelo*,<sup>1079</sup> as discussed at [4.2.3], affirmed that *InfoSoc*, by direct wording in Recital 15, implemented the WCT necessitating adherence to the Berne Convention. As the originality standard in Berne applies to all works in the field of art, literature and science, it was argued that this meant that all works that fell within that broad field were also caught. As the UK was an EUMS, this ruling had to apply. Hence, as argued at [4.2.3], categories of works have already been harmonised in line with the Berne Convention. The ruling in *Levola Hengelo* has already been applied to UK case law.<sup>1080</sup> Unless the application of this ruling is formally repealed, there is no reason to suggest that UK courts will not continue to apply *Levola Hengelo*.

In terms of “authorship”, the TCA refers to “authors” at Art. 225. However, it does not go beyond re-stating the exclusive economic rights protection for distribution, communication and rental. There is nothing in relation to authorship in terms of subsistence. As a reminder, EUMS require a human author whereas the UK CDPA makes provision for machine-generated works, albeit where there is a ‘...person by whom the arrangements necessary for the creation of the work’ is identified. However, it was argued at Chapter [4.3] that, due to the CJEU's

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<sup>1078</sup> Prime Minister's Office Press Release, 'Prime Minister pledges Brexit Freedoms Bill to cut EU red tape' (31 January 2022, London) <https://www.gov.uk/government/news/prime-minister-pledges-brexit-freedoms-bill-to-cut-eu-red-tape>

<sup>1079</sup> C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899

<sup>1080</sup> *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd (Rev 1)* [2020] EWHC 148 (IPEC); [2020] WLR(D) 88

interpretation of *InfoSoc*, in the context of the *Software Directive*,<sup>1081</sup> machine-generated works may be copyright-protected if they are the author's own intellectual creation. This was because the machine generating the work was only doing so because of the software created by the human author. Hence, as the UK already makes provision to copyright protect machine-generated works, there is no reason why the proposed EUCR could not be used to resolve disputes in this area. There is an outstanding issue here though, as identified at Chapter [4.3], in terms of copyright duration. In the UK CDPA, machine-generated works are protected for a fixed term of 50 years. In EUMS, however, because they would be considered an authorial work, duration will last for 70 years post-mortem. Hence, there is potential disparity here between the two laws that may render adherence to the proposed EUCR in this respect problematic. Notwithstanding this, it can also be argued that as the *Software Directive* was incorporated into the CDPA, then this analysis also extends to the UK, by virtue of its inclusion in the CDPA. Moreover, the principle CJEU case, *UsedSoft GmbH v Oracle International Corp*,<sup>1082</sup> has been applied in a UKSC case, albeit in a different licensing context than copyright.<sup>1083</sup> Moreover, the principle, in relation to the *Software Directive*, interpreted within the ambit of *InfoSoc*, Art. 2, was also applied by the CJEU in *FAPL*.<sup>1084</sup> The referral originated from the UK court, to the CJEU, and was subsequently applied in the UK. On that basis, it can be argued that the principle in *UsedSoft* in terms of authorship, within the ambit of *InfoSoc*, is good law that had been applied in the UK before exit day. Thus, it is argued that computer-generated works in the CDPA should be amended to reflect this, providing the law survives its current retained status. Hence, unless The Copyright (Computer Programs) Regulations

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<sup>1081</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs OJ L 111

<sup>1082</sup> *C-128/11 UsedSoft GmbH v Oracle International Corp* [2012] ECLI 407

<sup>1083</sup> *Regina (Hemming (t/a Simply Pleasure Ltd) and others) v Westminster City Council* [2015] UKSC 25; [2015] AC 1600

<sup>1084</sup> *Football Association Premier League Ltd v QC Leisure* [2012] EWCA Civ 1708; [2013] Bus. LR 866



1992<sup>1085</sup> that incorporated the *Software Directive* into UK law, were repealed, there is no reason why the proposed EUCR should not apply, and for the same duration: the life of the author plus 70 years. Moreover, the *InfoSoc*, Article 2 protection prohibiting ‘direct, indirect, temporary or permanent, reproduction by any means and in any form, in whole or in part, of their phonograms’ is also included.

In the TCA, Articles 226-229 include performers, producers of phonograms, broadcasting organisations and broadcasting/communication in terms of ensuring that “equitable remuneration” is paid to the performers/producers of phonograms where the use is commercial or communicated to the public. It can be argued that these legal provisions encompass the WPPT,<sup>1086</sup> and Directive (EU) 2019/789 (Audiovisual Services Directive)<sup>1087</sup>. Moreover, Art. 229 (broadcasting/communication) requires performers to be paid a ‘single equitable remuneration’, as encompassed in the SatCab Directive, Recitals 5 and 25.<sup>1088</sup> The terminology has been updated from ‘adequate’, as in the SatCab Directive, to ‘equitable’ to better reflect the vernacular. As above, the *InfoSoc* Article 2 reproduction protection is also included in Articles 226-228. Taken and read together, it can be argued that these legal provisions reflect current EU laws in this area. Hence, as these laws were already transposed into UK law, previous judgments arising from them should also apply, unless formally repealed.

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<sup>1085</sup> The Copyright (Computer Programs) Regulations 1992 (S.I. 1992/3233) reg. 5(b)

<sup>1086</sup> In terms of performers, WPPT Articles 6-10 (fixation, reproduction, distribution, rental and fixation of performance by wire/wireless means) and for producers of phonograms, WPPT Articles 12-14 (distribution, rental and making available by wire/wireless means)

<sup>1087</sup> Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC [2019] OJ L130/82

<sup>1088</sup> 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, Recitals (5) and (25)

It can be argued that copyright duration in the TCA is also aligned with the Term Directives for ‘a literary or artistic work within the meaning of Article 2 of the Berne Convention’, audiovisual works, related rights and broadcasts.<sup>1089</sup> Moreover, the terminology is linguistically rooted in civil law. For example, Art. 230 “Term of Protection” utilises the wording ‘The rights of the author of a work...’<sup>1090</sup> opposed to ‘Duration of copyright in literary, dramatic, musical or artistic works’ as in the UK CDPA.<sup>1091</sup> Elements covered in the *Term Directive*, such as protection of previously unpublished works, critical and scientific publications and photographs specifically are not included. Notwithstanding this, it can be argued that pre-1989 unpublished works are protected in the UK until 2039,<sup>1092</sup> photographs are deemed authorial works in the UK and fall within the ambit of *InfoSoc*, Art. 2, whilst the duration for critical/scientific publications in the *Term Directive* is not mandatory.<sup>1093</sup> Crucially, Art. 230 does not refer to any particular categories of works; it encompasses all works of an author. Moreover, the TCA makes provision for each party to set their own rules regarding orphan works. This clearly takes account of the UK’s repeal of the *Orphan Works Directive* (“OWD”)<sup>1094</sup> that occurred on exit day. A departure from the *Term Directive* is in Art. 230(8) wherein ‘[e]ach party may provide for longer terms of protection than those provided for in this Article’. Hence, should either party extend terms, the other does not need to provide equal protection. This is a potential disparity should either party extend the term of copyright for any work. Currently, there are no legislative plans to do so. On balance, this is

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<sup>1089</sup> 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 OJ L 372/12, Arts 1-3; 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 [2006] OJ L 265/2, Art 1

<sup>1090</sup> EU-UK Trading and Cooperation Agreement 2021, Art 230(1)

<sup>1091</sup> Copyright, Designs and Patents Act 1988, §12

<sup>1092</sup> UKIPO, ‘Consultation on reducing the duration of copyright in unpublished (“2039”) works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988’ (2014)

<sup>1093</sup> 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 [2006] OJ L 372/12, Art 5

<sup>1094</sup> 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 L299/5

not an impediment should EU-UK legislators wish to annex the proposed EUCR to the EU-UK TCA.

In terms of artists' Resale Rights, this is incorporated into the TCA at Art. 231. The clause includes a mandatory resale right 'to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author'.<sup>1095</sup> The right must be inalienable and not capable of being waived and also references those caught by the Article, such as, sellers, buyers, intermediaries e.g. salesrooms, art galleries and so forth but not where the seller 'acquired the work directly from the author less than three years before that resale and where the resale price does not exceed a certain minimum amount'.<sup>1096</sup> Article 231 essentially reproduces the rights encompassed in the EU *Resale Rights Directive*, Art. 1.<sup>1097</sup> In terms of remuneration in the TCA, this is left to the parties to determine by virtue of national law. This is a departure away from the *Resale Rights Directive* wherein Article 4 determines royalty rates for EUMS. Hence, it is possible that different rates could be calculated between EUMS and the UK. Notwithstanding this, it can be argued that "DACs", the UK's visual artists' rights management organisation, and "Resale-Right.org", the international organisation promoting the necessity for resale rights, both seem largely unconcerned about this.<sup>1098</sup> Hence, it could be argued that this may not pose too much disparity should the proposed EUCR be annexed to the TCA. Arguably, the term "equitable" would be left to MS/UK courts to determine who are likely to be guided by previous case law decisions.

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<sup>1095</sup> EU-UK Trade and Cooperation Agreement 2021, Art 231(1)

<sup>1096</sup> EU-UK Trade and Cooperation Agreement 2021, Art 231(3)

<sup>1097</sup> 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 L272/32

<sup>1098</sup> European Visual Artists, 'BREXIT: The Artist's Resale Right maintained in the UK' <[www.resale-right.org/brexit-the-artists-resale-right-maintained-in-the-uk/](http://www.resale-right.org/brexit-the-artists-resale-right-maintained-in-the-uk/)>; DACs, 'The Artist's Resale Right will continue to benefit artists and estates post-Brexit' <[www.dacs.org.uk/latest-news/artists-resale-right-post-brexit?category=For+Artists&title=N](http://www.dacs.org.uk/latest-news/artists-resale-right-post-brexit?category=For+Artists&title=N)>

In terms of the CRMD, it can be argued that this was incorporated into UK law in 2016<sup>1099</sup> and has not yet been formally repealed, unlike the OWD. Hence, Art. 232 in the TCA encourages collaborative measures for cross-border trading ‘between their respective collective management organisations’<sup>1100</sup> and ‘shall promote transparency of collective management organisations’.<sup>1101</sup> It can be argued that, in this Agreement, there is no requirement for EU-based CMOs to represent UK rightholders, and vice versa, unlike the CRMD. However, this author has already exposed the deficiency in the current CRMD, in this regard. Currently, there is no requirement to include in the Annual Transparency Report the ‘objectively justified reasons’ for refusal to represent artists, thus potentially harbouring an environment for discrimination. This author has proposed amendments to the CRMD to address this. However, if these amendments are adopted, there is no requirement for the UK to do the same. Whether or not this will have a detrimental effect on trading relations and collaboration between CMOs remains to be seen. It is probable that it will not, given that, prior to the 2014 Directive, the industry relied on such collaboration. Clause (4) in the TCA seems to reflect this:

The Parties shall cooperate to support the collective management organisations established in their territory and representing another collective management organisation established in the territory of the other Party by way of a representation agreement...<sup>1102</sup>

Moreover, Chapter [5.1.1] has shown that multiple CMOs (UK and EU) have already entered into a European joint venture, with the formation of “ICE”, to facilitate cross-border licensing of music works. Hence, it can be argued that, unless there is a repeal of the CRMD by the UK government of the day, this provision is not likely to cause serious detriment in cross-border trading in the area of CMOs.

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<sup>1099</sup> The Collective Management of Copyright (EU Directive) Regulations 2016 (S.I. 2014/221)

<sup>1100</sup> EU-UK Trade and Cooperation Agreement 2021, Art 232(1)

<sup>1101</sup> *ibid*, Art, 232(2)

<sup>1102</sup> EU-UK Trade and Cooperation Agreement 2021, Art 232(4)

The TCA, Art. 233 relates to “exceptions and limitations”. Essentially, it incorporates the Berne Convention Three-Step-Test<sup>1103</sup> in that

Each party shall confine limitations or exceptions to the rights set out in Articles 225 to 229 to certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holders.<sup>1104</sup>

There is no reference to the 20 optional exceptions contained in *InfoSoc*, Art 3 or the mandatory text/data mining, education and CHI exceptions in the DSMD, Arts. 3-6. Hence, it must be concluded that the parties did not intend to expand beyond the minimum protection in Berne. Notwithstanding this, it can be argued that, as identified at Chapter [4.6.1], the UK has already incorporated into law the majority of what can be argued as the exceptions that have the most impact: archiving,<sup>1105</sup> illustration of teaching,<sup>1106</sup> criticism, review, quotation and news reporting,<sup>1107</sup> caricature, parody or pastiche,<sup>1108</sup> incidental inclusion<sup>1109</sup> and private study and research.<sup>1110</sup> Moreover, it can be argued that, due to the generously worded text of the CDPA 1988, §29A, the text and data analysis exceptions, as included in DSMD Arts. 3 and 4, have also been included though they are limited for non-commercial uses.<sup>1111</sup> Hence, due to the UK’s obligations from the Berne Convention, contained within this agreement, the rights permitted by the exceptions in the CDPA must also be afforded to others under the principle of national

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<sup>1103</sup> Berne Convention, Art 9(2)

<sup>1104</sup> EU-UK Trade and Cooperation Agreement 2021, Art 233

<sup>1105</sup> The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (S.I. 2014/1372), reg. 1, Sch. para. 14 amending the Copyright, Designs and Patents Act 1988, §37-§44A transposing 2001/29/EC, Art 5(2)(c)

<sup>1106</sup> The Copyright and Related Rights Regulations 2003 (S.I.2003/2498) reg. 9(a) amending the Copyright, Designs and Patents Act 1988, §29 transposing 2001/29/EC, Art 5(3)(a)

<sup>1107</sup> The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356) regs. 1, 3(3) amending the Copyright, Designs and Patents Act 1988, §30(1) transposing 2001/29/EC, Art 5(3)(c) and (d)

<sup>1108</sup> The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356) regs. 1, 5(1) amending the Copyright, Designs and Patents Act 1988, §30A transposing 2001/29/EC, Art 5(3)(k)

<sup>1109</sup> The Copyright and Related Rights Regulations 2003 (S.I.2003/2498) reg. 2(1), Sch. 1 para. 3(1)(d)(e) amending the Copyright, Designs and Patents Act 1988, §31 ) transposing 2001/29/EC, Art 5(3)(i)

<sup>1110</sup> The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (S.I. 2014/1372), regs. 1, 4(1) 14 amending the Copyright, Designs and Patents Act 1988, §32-§36A transposing 2001/29/EC, Art 5(3)(n)

<sup>1111</sup> The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (S.I. 2014/1372), regs. 1, 3(2) 14 amending the Copyright, Designs and Patents Act 1988, §29A

treatment.<sup>1112</sup> On that basis, it can be argued that, unless the government of the day removes these exceptions from the CDPA, there should be little disparity in terms of trading, in this respect.

Article 234 relates to the “protection of technological measures” encompassed in *InfoSoc*, Art. 6 to protect against circumvention of effective technological measures which may also extend to computer programs.<sup>1113</sup> The TCA also extends to protecting against the manufacture, importation, distribution, sale and rental (and advertisements for such) or possession for commercial purposes of devices et al.<sup>1114</sup> Moreover, this clause also complies with the then binding CJEU decision in *Nintendo v PC Box* wherein

The concept of an “effective technological measure” for the purposes of Art 6(3) of that directive [InfoSoc], is capable of covering technological measures comprising, principally, equipping not only the housing system containing the protected work, such as the videogame, with a recognition device in order to protect it against acts which are not authorized by the holder of any copyright, but also portable equipment or consoles intended to ensure access to those grades and their use.<sup>1115</sup>

Again, as this was a pre-Brexit CJEU case, it would have been binding on the UK. Thus, there are no reasons why there should be any differences in interpretation of this clause.

The final copyright-specific section relates to digital rights management in Art. 235. The TCA requires each party to provide ‘adequate protection’ against the ‘distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected...from which electronic rights-management information has been removed or altered without authority’.<sup>1116</sup> This clause essentially incorporates *InfoSoc*, Art. 7 into the obligations to be performed by both parties (EU/UK).

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<sup>1112</sup> EU-UK Trade and Cooperation Agreement 2021, Art 224 Berne Convention, Art 5(1)

<sup>1113</sup> EU-UK Trade and Cooperation Agreement 2021, Art 234(1)

<sup>1114</sup> *ibid*, Art 234(2)

<sup>1115</sup> C-355/12 *Nintendo Co Ltd v PC Box SRL* [2014] ECLI 25 [37]

<sup>1116</sup> EU-UK Trade and Cooperation Agreement 2021, Art 235(1)(a) and (b)

The UK has not yet transposed the DRMD<sup>1117</sup> into UK law, thus avoiding compliance with Arts. 15 and 17 of the Directive; nor are there are no plans to do so. This is a deficiency in this TCA, in terms of the monumental copyright infringing capabilities of social media platforms and UGC. Under UK law, content providers have no necessity to seek licences with rightholders, unlike EUMS caught by Article 17, DSMD, to avoid liability. Instead, such entities could seek protection in the UK by exercising their rights to deny such liability for infringing copyright content on their platforms because of the “hosting” clause in the E-Commerce Directive<sup>1118</sup> transposed into the CDPA.<sup>1119</sup> This could be a stumbling block should it transpire that mass copyright infringing content of EUMS rightholders is being facilitated in the UK by non-liability “hosting” safeguards. Moreover, the CJEU has recently upheld the validity of Art. 17 wherein it was

apparent in particular from recitals 61 and 66 of Directive 2019/790, the EU legislature considered that, in view of the fact that in recent years the functioning of the online content market has gained in complexity and that content-sharing services providing access to a large amount of copyright-protected content have become a main source of access to content online, it was necessary to provide for a specific liability mechanism in respect of the providers of those services in order to foster the development of the fair licensing market between rightholders and those service providers.<sup>1120</sup>

Hence, former reluctance from EUMS to transpose DSMD must now give way to compliance. Notwithstanding this, it can be further argued that time is a great indicator. Should the UK be shown, in time, to be the harbinger of digital copyright infringement via content provider platforms, it is possible that the government of the day may consider adopting such measures

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<sup>1117</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

<sup>1118</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ 2000 L 178, Art 14(1)

<sup>1119</sup> The Electronic Commerce (EC Directive) Regulations 2002 (S.I. 2002/2013), §S 19; as seen in C-682/18 and C- 683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando* [2021] AG ECLI 503

<sup>1120</sup> C-401/19 *Republic of Poland v European Parliament and Council of the European Union* [2022] ECLI 297 [29]

to counteract infringements. Until then, DRM beyond the previous protection encompassed in *InfoSoc*, Art 7, will not feature directly in joint EU-UK copyright legal relations.

By critical comparative analysis of the EU-UK Trading and Cooperation Agreement 2021, in relation to copyright infringement, it can be argued that the majority of key copyright protections have been incorporated into the joint agreement. Hence, annexation of the proposed EUCR to the TCA is possible. There are areas outstanding, such as the DSMD, orphan works, fixation and moral rights. Notwithstanding this, it can be argued that, under EU copyright law as it currently stands, fixation and moral rights are not yet harmonised, though proposals to do so have been recommended in this thesis. Moreover, in terms of orphan works, it can be argued that this could be covered by the “2039 rule” as an unpublished work. With regards to the outstanding issue of cross-collaboration between CHIs, it could be argued that this element is not likely to impede EU-UK trading relation in copyright-protected goods and services. This is ultimately the main focus of the TCA. The largest area of contention, admittedly, is the refusal, so far, of the UK government to implement protections contained in the DSMD. Notwithstanding this, it is possible this could alter should the UK find itself as a European litigation hot spot in this field.

In terms of annexing the proposed EUCR to the EU-UK TCA 2021, it can be argued that, on analysis of the TCA as compared to the EU directives/regulations, there is nothing preventing annexation. Additional caveats/exclusions would have to be inserted into the TCA where harmonisation/consensus has not yet been achieved in the areas noted above. However, there is nothing preventing future negotiation/implementation of those currently unharmonised areas, should the parties reach agreement on these. For the majority of copyright subsistence areas of law covered in this thesis, there is unity between EUMS and the UK, essentially due



to its prior long-standing membership. Could it really be argued that the proposed EUCR should not be annexed to the TCA, based on the UK's lack of implementation of the DRMD, when rightholders, end-users and litigants in so many other areas of copyright law could benefit from this? On that basis, it can be argued that the EU-UK's trading relationship under the TCA could be strengthened, in terms of copyright legal disputes, should the proposed EUCR annex to the TCA.

### 6.3 Should the proposed EUCR annex to the EU-UK TCA?

On the basis that the proposed EUCR could annex to the TCA, this invariably leads to the question of whether it should annex to what is essentially an FTA between the EU and the UK now trading as a Third Country. With regards to the EU-UK TCA and the proposed unitary EUCR, a fundamental point to consider, as to whether the proposed EUCR should annex to the TCA, is the determination of the final adjudicator of law where copyright disputes arise, and the legal process for resolving such disputes, within the ambit of the TCA, where such final arbiter does not exist. If disputes cannot be resolved satisfactorily within the ambit of the proposed EUCR, it will be difficult to posit that it should annex to the TCA. As a reminder, the proposed unitary EUCR is intended to harmonise EUMS' national laws.

#### 6.3.1 Enforcement of IP Rights in the Trade and Cooperation Agreement and the implication of not having a central judicial mechanism

IPR enforcement is included in Chapter 3 of the TCA, *Enforcement of Intellectual Property Rights*, and covers the following civil and administrative enforcement areas of IPR infringement: measures for preserving evidence, evidence, right of information, provisional and precautionary measures, corrective measures, injunctions, alternative measures, damages,

legal costs, publication of judicial decisions, presumption of authorship or ownership and administrative procedures.<sup>1121</sup> The general obligation is that:

Each Party shall provide under its respective law for the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights.<sup>1122</sup>

The Trade Specialised Committee on Customs Cooperation and Rules of Origin monitors ‘matters covered by Chapters 2 and 5 of Title I of Heading One of Part Two’ and specifically addresses ‘customs enforcement of intellectual property rights’.<sup>1123</sup> However, there is no mention of the Trade Specialised Committee monitoring intellectual property legal disputes to enforce IP rights in line with the above legal provision. The focus is ‘on the customs enforcement of intellectual property rights under the EU-UK TCA at their respective external borders’.<sup>1124</sup> Thus, this Committee will not assist in the resolution of copyright disputes between EUMS and the UK as set out in Chapter 3 of the TCA. Instead, resolution of IP disputes is outlined essentially in Section 2 of Chapter 3. Under Section 2, Article 261, a recurring penalty payment may be issued against the infringer where the law of the parties provides. In addition,

if the applicant demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of their bank accounts and other assets.<sup>1125</sup>

The award of damages may also be made by the parties judicial authorities.<sup>1126</sup>

Notwithstanding the above measures in the TCA, the UK is not bound by the CJEU when considering copyright law infringements/disputes. Although Article 219 states that the

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<sup>1121</sup> *ibid*, Arts. 258-269

<sup>1122</sup> EU-UK Trade and Cooperation Agreement 2021, Art 256(1)

<sup>1123</sup> *ibid*, Art 8(c)

<sup>1124</sup> European Commission, ‘Second Trade Specialised Committee on Customs Cooperation and Rules of Origin’, [https://commission.europa.eu/system/files/2022-10/agenda\\_-\\_second\\_meeting\\_of\\_the\\_tsc\\_on\\_customs\\_cooperation\\_and\\_rules\\_of\\_origin.pdf](https://commission.europa.eu/system/files/2022-10/agenda_-_second_meeting_of_the_tsc_on_customs_cooperation_and_rules_of_origin.pdf) [9]

<sup>1125</sup> EU-UK Trade and Cooperation Agreement 2021, Art 261(3)

<sup>1126</sup> EU-UK Trade and Cooperation Agreement 2021, Art 265

objective is to ‘ensure an adequate and effective level of protection and enforcement of intellectual property rights’,<sup>1127</sup> it is clear that this is based on the national legal rules of each party, as outlined above in Section 2. Hence, it must be argued that the final adjudicator of law will be the most senior court in the state in which the claim is brought. When considering whether or not to annex the proposed EUCR, adjudication must be considered in respect of future disputes. In support of this, the more closely aligned the legal rules are, the less tension there is likely to be, in terms of dispute resolution, where there is no overarching EU final arbiter of law. As can be argued from above, the majority of key areas of copyright subsistence have already been harmonised. Hence, there is a nexus between the laws of EUMS and the UK whose trading relations may be better supported by use and application of the proposed EUCR. This is because, as discussed at [6.1], although the majority of key copyright protections have been incorporated into the joint agreement, the EU-UK’s trading relationship under the TCA could be strengthened, in terms of copyright legal disputes, should the proposed EUCR annex to the TCA. On that basis, it could be argued that the proposed EUCR should annex to the TCA.

A secondary measure to resolving a dispute arising between EUMS and the UK lies in Point (5) of the Preamble of the TCA. This emphasises the necessity for dispute resolution mechanisms:

...it is essential to establish provisions ensuring overall governance, in particular dispute settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom...

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<sup>1127</sup> EU-UK Trade and Cooperation Agreement 2021, Art 219(b)

Moreover, the scope of the TCA demonstrates the parties' 'commitment to comply with international agreements to which they are party'.<sup>1128</sup> This includes the WTO TRIPS agreement, as well as others such as the Berne Convention and the WIPO treaties. Hence, where disputes arise, parties can use the WTO dispute settlement mechanism. However, as discussed previously at [1.3], private entities cannot initiate resolution between themselves using the WTO dispute resolution mechanism.<sup>1129</sup> It is the CP's government who 'decide which disputes to bring to the WTO'.<sup>1130</sup> Hence, 'private parties... must rely on their government to bring or defend an action, or to intervene as a so-called third party'.<sup>1131</sup> The Member must 'enter into negotiations with the complaining party with a view to agreeing a mutually acceptable compensation'<sup>1132</sup> but the WTO will not order monetary compensation. On that basis, it must be argued that this would not be a tenable route for parties suing for copyright infringement. The most likely route is for parties to seek a remedy via Chapter 3 of the TCA, or, for parties to sue unilaterally in the country in which the breach occurred, or in the jurisdiction pre-agreed in a copyright contract, where applicable.

It can be argued that there is nothing within the ambit of the TCA to assist litigants suing for copyright infringement, beyond the substantive areas included as discussed above. EUMS would not have the benefit of a unified decision binding on all EUMS when suing UK-based litigants under UK law, or when using the enforcement procedure contained in Chapter 3 of the TCA. However, it can be argued that inclusion of the EUCR, which contains far more harmonised national copyright laws than the TCA, would mean that disputes are more easily

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<sup>1128</sup> EU-UK Trade and Cooperation Agreement 2021, Art 220(1)

<sup>1129</sup> WTO, 'Module VIII Dispute Prevention and Settlement', 3,  
<[www.wto.org/english/tratop\\_e/trips\\_e/ta\\_docs\\_e/modules8\\_e.pdf](http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules8_e.pdf)>

<sup>1130</sup> *ibid*

<sup>1131</sup> *ibid*

<sup>1132</sup> WTO, 'The process — Stages in a typical WTO dispute settlement case'  
<[www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s9p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm)>

resolvable than perhaps they would be without the support of the EUCR. Currently, parties would have to consult their respective national laws on which to found a claim or a defence. In contrast, if the proposed EUCR was annexed to the TCA, parties could consult the majority harmonised laws in a single document. Moreover, it gives a much clearer indication from the outset of what elements, of their copyright-protected works, rightholders could enforce, and what end-users could do, or not do, with the copyright-protected works. This is because the proposed EUCR is intended to harmonise national copyright laws. Its inclusion, in the TCA, would thus harmonise copyright laws in the trade agreement itself. Clearly, adjudicators hearing the case within the ambit of the TCA could more easily reach a decision where there is a fully functioning copyright regulation harmonising the laws of the parties that are enforceable in the EUMS in question and the UK. Moreover, the UK has binding precedents. Hence, judgments handed down in senior courts, made within the ambit of the EUCR, by virtue of the TCA, would bind future UK courts where sufficiently similar.

On balance, it can be argued that, court decisions ruling on EU-UK disputes would not be binding EU-wide. However, annexing the EUCR to the TCA could create more legal certainty giving more scope for remedies than entering the WTO, or some other, dispute resolution mechanism. It does not provide binding decisions EU-wide. For that, we would have to re-join the EU or the EEA, in which the proposed EUCR would be directly enforceable. However, in that unlikely event in the foreseeable future, it could be argued that the TCA, with the proposed EUCR annexed, would be the next best thing for strengthening copyright protection between the EU and the UK. This is because the majority of the laws in the EUCR annexed to the TCA would be harmonised between the EU and the UK, due to the UK's prior EU membership and previous judicial interpretation of EU case law in UK courts.

On the basis of the above analysis, we must conclude as to whether the EU and the UK should annex the proposed EUCR to the TCA. The starting point for this must be the past and current trading relations between the two entities. As a reminder, in 2018, the UK's e-marketplace, worth \$99bn, outstripped that of both France and Germany at \$43bn and \$73bn respectively.<sup>1133</sup> Moreover, and as aforementioned at [1.4], the EU remains the single largest trading bloc, to which the UK exports, currently standing at over 42% of all UK exports and potentially rising.<sup>1134</sup> Additionally, a sizeable majority of EU and UK copyright law has already been harmonised by EU directives and is still in force in the UK. Crucially, the EU-UK TCA contains mechanisms to safeguard compliance which include financial penalties for the breaching party even where there is no central adjudicator.<sup>1135</sup> Aside from the issue surrounding the DSMD, there is no obvious reason why UK governance would wish to curtail adherence to the majority agreed parts of the proposed EUCR if it strengthens EU-UK copyright trading relations and better protects UK citizens' copyrights, related rights and end-user accessibility to many more works than would potentially be available without the safeguards in the proposed EUCR. Given that there are 27 EUMS against the UK's four sovereign states, it must be argued that having potentially easier access to those 27 MS' copyright works via the EUCR, than just the TCA alone, justifies, to a large extent, its inclusion in the TCA. In conclusion, this thesis posits for an EUCR that harmonises national laws which, due to the special nature of the UK's previous and present trading relations with the EU, should be annexed to the TCA to better protect each member's copyright holders, related rights holders and end-users.

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<sup>1133</sup> Business Europe, 'Intellectual property - Priorities for the next institutional cycle' *Intellectual Property Report* (Sep 2019) 6 <[www.bussinesseurope.eu/sites/buseur/files/media/reports\\_and\\_studies/september\\_2019\\_-\\_intellectual\\_property\\_priorities.pdf](http://www.bussinesseurope.eu/sites/buseur/files/media/reports_and_studies/september_2019_-_intellectual_property_priorities.pdf)>, 15

<sup>1134</sup> House of Commons, 'Statistics on UK-EU trade' (Dec 2021) CBP 7851  
<https://researchbriefings.files.parliament.uk/documents/CBP-7851/CBP-7851.pdf>

<sup>1135</sup> EU-UK Trade and Cooperation Agreement 2021, Art 261

## 6.4 Suggested reform for utilising the EUCR within the ambit of the EU-UK Trade and Cooperation Agreement 2021

A new “Annex 50” with the title “COPYRIGHT PROTECTED GOODS AND SERVICES” should be created in the EU-UK Trade and Cooperation Agreement 2021

This will directly annex the proposed Copyright Regulation (EU) 20xx/xxxx of the European Parliament and of the Council of [date] on European Union copyright [citation] to the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part OJ L149/10

It should include a list of exclusions where certain Articles in the Copyright Regulation do not apply to Annex 50.

## 6.5 CONCLUSION

Chapter 6 has endeavoured to advance a once unimaginable picture: the possibility of (a) creating a unitary EUCR for all EUMS and, (b) using it as a precedent to annex to the current EU-UK TCA to assist litigating copyright disputes between EUMS and the UK, post-Brexit, and improve access to works between the two trading partners. Whilst it is by no means a perfect solution, it has been argued that its use, for cases heard within the ambit of the TCA, would be better supported by annexation. In making this argument, the author has briefly discussed the trading agreements that could have been negotiated based on prior precedent ([6.1.1]). Moreover, Chapter [6.2.1] has critically analysed the subject-matter, contained within the EU-UK TCA, in the context of the similarities and differences between UK and EU harmonised law to consider if the proposed EUCR could annex to the TCA. It was argued that, due to the UK’s previous long-standing EU membership, the majority of copyright laws covered by the TCA, have already been harmonised. Chapter [6.2.2] discussed the shortfall in the TCA, in terms of the DSMD and current unharmonised areas of law, Notwithstanding this, it was argued that, as so much copyright content had already been harmonised between the two partners, that was also covered by the TCA, there was no justifiable reason to disregard it.

Thus, the author argued that the proposed EUCR could annex to the TCA. The question of whether the proposed EUCR should annex to the TCA was considered at [6.3]. Moreover, the final court of adjudication was discussed where it was concluded that, whilst the CJEU would have no jurisdiction in hearing cases between the UK-EUMS within the ambit of the TCA, unlike those heard between EUMS, UK courts create binding precedents in senior courts. Hence, once concluded, a judgment could be binding on future cases heard in UK courts if materially similar. An alternative was to rely on an unreliable dispute settlement mechanism for which financial remedies were not even available. Moreover, the IP Enforcement section of the TCA makes provision for a variety of remedies, including penalties for breaches of the TCA. A solution was proposed at [6.4] to create a new Annex in the EU-UK TCA. To conclude, it has been argued that the EU-UK should annex the proposed EUCR to the TCA to strengthen the UK's access to EU27 copyright works, and vice versa, and to assist with settling future copyright disputes, albeit, with amendments to suit current joint harmonised EU-UK laws.



# **CHAPTER SEVEN**

## **Recommendations for the proposed unitary EU Copyright Regulation**

## 7. Recommendations for the creation of a unitary EU Copyright Regulation

This chapter collates the recommendations that have been posited in Chapters 4 , 5 and 6 for inclusion in a unitary Copyright Regulation. The chapter restates the reasoning and competence for action as well as specific focus on certain areas of copyright law, to the exclusion of others.

It seeks to answer research Question 11:

What recommendations could be posited to harmonise key areas of copyright, left unharmonised by EU directives/regulations, that should be contained in the draft Regulation?

## 7.1 Why the Commission should act to harmonise the selected areas of copyright law across the European Union to consolidate into a unitary Regulation

### *Necessity for the single market to function*

As evaluated in Chapters 4-5, copyright law within the EU, in certain unharmonised aspects, detrimentally affects the single market. Research analysis in Chapter 2 revealed that other areas of IPRs have been harmonised, to varying extents, in the EU/Europe. Only copyright law remains unharmonised in key areas and, where harmonised, only piecemeal. This was shown to detrimentally affect the 500+ million potential users and corresponding rightholders.<sup>1136</sup>

### *Legal Competence*

The Commission is mandated by the Treaty of Lisbon to take steps necessary to realise the single market and foster cultural diversity. TFEU, Art. 114 permits measures to facilitate internal market functioning. TFEU, Art. 118 specifically mandates measures for the unification of IPRs where fragmentation affects the Union. TFEU, Art. 167 obliges the Commission to foster cultural diversity. In addition to the various copyright directives, these legal sources enable the Commission to harmonise copyright law within the EU.

### *Adherence to EU principles*

The Commission must heed EU principles of proportionality and subsidiarity. As stated in Council Directive 2001/29, Recital 48, EU law must not go beyond what is necessary to achieve the outcome. Where the desired effect can be achieved using national laws, these should prevail. Regarding copyright law harmonisation, research analysis in Chapters 4-5 revealed that national laws are detrimentally affecting the single market. Hence, it is necessary for the EU to legislate to achieve a unified single market for copyright-protected works and subsequent rights.

### *Stakeholders' Dialogue*

Where possible, stakeholders' dialogue should be initiated to facilitate reform through cooperation. This would assist in acquiring industry expertise, cross-sectoral representation, user input and rights management. Reforms through this process should garner solid, feasible and sustainable change to find solutions for complex copyright harmonisation issues.

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<sup>1136</sup> Europa, 'Living in the EU' (6 August 2020) <[https://europa.eu/european-union/about-eu/figures/living\\_en](https://europa.eu/european-union/about-eu/figures/living_en) >

## 7.2 Recommendation for creating a unitary EU Copyright Regulation

The author's research in this thesis has shown that a unitary EU Copyright Regulation should be drafted to (A) consolidate existing directives and regulations into a single document Regulation, (B) amend existing legislation to reflect changes in the law and, (C) enact new legislation to harmonise the areas, critically analysed in this thesis, that have not yet been formally harmonised in a copyright directive/regulation.

### 7.2.1 Directives and regulations for consolidation into the proposed EUCR without amendment

A. The directives and regulations to be consolidated and drafted into the new unitary Regulation **WITHOUT FURTHER AMENDMENTS** are as follows:

1. **Computer Software:** Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16
2. **Satellite broadcasting and cable retransmission:** 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 L248/15
3. **Database:** Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20
4. **Conditional Access:** Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [1998] OJ L320/54
5. **E-Commerce:** Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1
6. **Artwork Resale:** 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 L272/32

7. **Enforcement:** Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004) [2004] OJ L195/16
8. **Audiovisual Media Services:** Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1
9. **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 Text [2012] OJ L299/5
10. **Portability:** Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168/1
11. **Accessibility:** Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L242/1
12. **Accessibility:** Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L242/6
13. **Audiovisual Media Services:** Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69
14. **Online Broadcasting:** Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC [2019] OJ L130/82

## 7.2.2 Directives for consolidation into the proposed EUCR with amendments

B. The Directives to be consolidated and drafted into the new unitary Regulation **WITH FURTHER AMENDMENTS** are as follows:

1. **Information Society:** Directive 2001/29/EC 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] OJ L167/10
2. **Rental and Lending and Related Rights:** 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 [2006] OJ L376/28
3. **Term:** 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 [2006] OJ L372/12
4. **Collective Rights Management:** Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance [2014] OJ L84/72
5. **Digital Single Market:** Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

## 7.2.3 New legislation to be drafted and incorporated into the proposed EUCR

C. New legislation to be drafted into the new unitary Regulation to complete unitary EU harmonisation in these areas of copyright law is as follows:

1. Originality standard of copyright subsistence
2. Notions of a work to remove closed categories
3. Authorship, in the context of computer-generated creations, collaborative, commissioned works and works made in the course of employment
4. Fixation of works
5. Moral Rights

## 7.2.4 Copyright legal issues not selected for inclusion in the first draft of the proposed EUCR

As a reminder the following non-exhaustive areas were not selected for consideration of harmonisation and inclusion into the EUCR, at this initial drafting stage, due to the complexity of national laws and the word limit of this thesis:

- Collective works
- General licensing
- Evidence
- Remedies
- Copyright Contracts

## 7.3 Recommendations for harmonising “Originality” and “Notion of Works”

### 7.3.1 Originality

In terms of the “originality” standards and “works” in copyright subsistence, critical analysis of relevant case law and directives, in Chapter 4, revealed that these two areas of copyright law have already been harmonised by the CJEU, which was binding for all EUMS, including the UK. As has been shown at Chapter [4.1], works are original if they reflect the author’s free and creative choices through the choice, sequence and combination of the content, with the additional element of reflecting the author’s personality in photographic works.

### 7.3.2 Notion of Works

Moreover, by interpretation of the WCT, Art. 1(4), InfoSoc, Art. 2(1) and Berne, Art. 2(1), a work is protected by copyright if it is expressed in a sufficiently certain and identifiable manner, whatever the mode or form of expression. Post-*Levola*, there is no requirement to fit *prima facie* copyright-protected works into closed categories, providing they are original in the sense that they are the expression of the author’s own intellectual creation.

This recommendation will remove the detrimental impact on the functioning of the EU single market for originality standards and notions of works in copyright subsistence. The CJEU rulings, codified into the EUCR, will mean that rightholders can distribute their works in the EU, providing they attain the EU standard of originality as outlined in *Infopaq* and/or *Painer*. *Prima facie* copyright in this respect should be recognised and upheld EU-wide.

### 7.3.3 Recommendation 1: Originality and Notions of a Work

#### Article 1

##### Subject matter and scope

- (1) Copyright subsists in a work for any expression within the field of literature, art or science if it is the author's own intellectual creation.
- (2) Works are original if they reflect the author's free and creative expression through the choice, sequence and combination of the content.
- (3) Photographic works must demonstrate the author's free and creative expression through the choice, sequence and combination of the content reflecting the author's personality in photographic work.



## 7.4 Recommendations for harmonising Authorship

As evaluated at Chapter [4.3], authorial standards for copyright-protected works are not yet harmonised across the EU. Legislative/judicial disharmony has the potential to cause detriment to the functioning of the single market.<sup>1137</sup> The reason is because Irish (and UK) law makes provision for a machine to create a work, albeit under the control of a human being who has made the arrangements for the creation of the work.<sup>1138</sup> In the remaining EUMS, though, the author must be a “flesh and blood” human notwithstanding the scope for future original machine-produced authorial work by AI advancement.

As discussed at Chapter [4.3], the first step to harmonising “authorship” between the civil law AR and the common law MS, was to identify, legally, that a machine was capable of producing work, albeit under the control of a human who made the creation possible. Moreover, it was necessary the work produced was the expression of the (human) author’s own intellectual creation.

This was satisfied by critical analysis of the *Software Directive* wherein

A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.<sup>1139</sup>

On that basis, evaluation of this requirement meant that the computer software powering an AI robot (or some other machine) was copyright-protected if the programmes amounted to the ‘author’s own intellectual creation’. Hence, it was argued that as the human was the author of

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<sup>1137</sup> Directive 2001/29/EC 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] OJ L167/10, Recital 6

<sup>1138</sup> (Irish) Copyright and Related Rights Act 2000, §21(f); Copyright, Designs and Patents Act 1988, §9(3)

<sup>1139</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16, Art 1(3)

the software running the machine, works created by that machine amounted to an expression of the author's own intellectual creation. This recommendation will remove the detrimental impact on the functioning of the EU single market in this area. The CJEU rulings, codified into the EUCR, could mean that rightholders can distribute their computer-generated works in the EU, providing the author(s) of the software attains the EU standard of originality as outlined in *Recommendation 1*.

#### 7.4.1 Recommendation 2: Authorship

##### Article 2

##### Authorship

- (1) The author of a work is the natural person or group of natural persons who created it.
- (2) A computer-generated work is protected by copyright if the work is an expression which encompasses the author's own intellectual creation
  - a. The rights in a computer-generated work shall run for the life of the author and for 70 years after their death, irrespective of the date when the work is lawfully made available to the public.

##### Collaborative Works

- (3) Authorship of a collaborative work means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author(s).
  - a. Each joint author shall be separately entitled to institute proceedings for infringement of copyright.
  - b. Any alteration or exploitation of the work shall require the consent of all joint authors. Where a joint author refuses their authorisation without sufficient reason, any other joint author may institute proceedings to obtain such authorisation.
  - c. The terms measured from the death of the author shall be calculated from the death of the last surviving author.

##### Commissioned Works

- (4) The economic rights of a commissioned work transfer automatically to the commissioner upon completion of the work.
- (5) Authorship of the commissioned work remains with the creator of the work.
- (6) The author's moral rights in the work shall not interfere with the commissioner's economic rights in the work.

#### Works created in the course of employment

- (7) Unless otherwise agreed, the economic rights in a work created by the author in the execution of their duties or following instructions given by the employer are deemed to be assigned to the employer.
- (8) The author's moral rights in the work shall not interfere with the employer's economic rights in the work.

## 7.5 Recommendation for harmonising “Fixation”

With regards to fixation, it can be argued that there is no EU directive or regulation harmonising this element specifically for EUMS. However, research at Chapter [4.4] revealed that the CJEU has harmonised this element through their interpretation of InfoSoc, Art 2(1)<sup>1140</sup> in the case *Levola Hengelo v Smilde Foods*.<sup>1141</sup> As the research showed, works are original if they are the expression of the author's own intellectual creation.<sup>1142</sup> That expression must be communicated 'in a manner which makes it identifiable with sufficient precision and objectivity, even if not in permanent form'.<sup>1143</sup> As this was a CJEU case, it was binding on all EUMS. This included the UK, at that time and, moreover, as shown in Chapter [6.2.1], the UK has applied this ruling in a recent case in 2020.<sup>1144</sup> Hence, there should be no detrimental impact on the functioning of the EU single market in this area. The CJEU ruling, codified into the proposed EUCR, will mean that rightholders can distribute their works in the EU, which will be recognised as copyright-protected throughout the Union, providing that the works are identifiable with sufficient precision and uncertainty.

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<sup>1140</sup> Directive 2001/29/EC 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] OJ L167/10, Art 2(1)

<sup>1141</sup> C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899

<sup>1142</sup> C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569

<sup>1143</sup> C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2017] ECLI 899 [40]

<sup>1144</sup> *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd (Rev 1)* [2020] EWHC 148 (IPEC); [2020] WLR(D) 88

### 7.5.1 Recommendation 3: Fixation

#### Article 3

#### Fixation

- (1) An expression of a work must be communicated in a manner which makes it identifiable with sufficient precision and objectivity.
- (2) The work need not be in permanent form.

## 7.6 Recommendation for harmonising Moral Rights

Chapter [4.5] critically analysed the possibility of harmonising moral rights within the EU. Currently, this is an area of law that remains unharmonised. Hence, it would be new, not only in terms of drafting, but also for MS. There are margins of appreciation as to how entrenched moral rights are in domestic law. Chapter [4.5] identified differences between alienability and term duration of moral rights. As a reminder, in France, moral rights cannot be waived and last indeterminably. In Ireland/UK, they can be waived in contract and last for the duration of copyright (life + 70 years). Again, it is more harmonious to consider the consequences of these differences, on the functioning of the single market, and its rightholders and end-users, rather than trying to enforce conformity for the sake of defining a fixed set of legal, uniform rules. If desired harmonious effects can be achieved through margins of appreciation, this ought to be the way forward to uphold principles of proportionality, subsidiarity and sovereignty.

### 7.6.1 No Authorial Right to Waiver with Fair Remuneration

This recommendation seeks a middle way to harmonisation: to retain the option to waive moral rights, whilst keeping the option to refuse waiving, thus satisfying MS who already give effect

to this. The difference would be to include a mandatory ‘Fair Remuneration’ guarantee and an optional shared compensation scheme. A Fair Remuneration requirement can already be found in the DSMD Art 18:

Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.<sup>1145</sup>

This is notwithstanding the right of EUMS to permit ‘contractual freedom and a fair balance of rights and interests’.<sup>1146</sup> It can be argued that this umbrella provision sweeps in all the rights encompassed in copyright including, moral, economic, performance and related rights. By virtue of this legal rule, all EUMS must incorporate Fair Remuneration into national law. However, this option goes further than DSMD in two ways:

1. It posits Fair Remuneration when waiving moral rights in all copyright-protected works; not just those covered by DSMD; and
2. It posits for an additional, optional shared compensation scheme, in the proposed EUCR, for authors who are not permitted to waive their moral rights.

This is where the rightholder has transferred all of their rights to a third party, rather than just licensed use of their work, but has retained their moral rights due to sovereign restrictions (such as in France). This is because it is possible that Fair Remuneration for authors who cannot waive their moral rights may, potentially, be considerably less than those who can, and do, waive their moral rights in contract. The consequences of a reduction of Fair Remuneration, in these circumstances, could be discriminatory to authors prevented from waiving moral rights. Furthermore, if authors do not contract with third parties on the basis of remuneration

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<sup>1145</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Arts 18-23 (Fair remuneration in exploitation contracts of authors and performers) and Recitals 72-81; Art 16 (Claims to fair compensation) and Recitals 59-60.

<sup>1146</sup> *ibid*, Art 18(2)

discrimination, there may be fewer works available in the EU. This would be an undesirable effect of the TFEU's aims. To counteract this, an optional shared compensation scheme could balance out this financial discrimination whilst upholding the principle of proportionality. As in DSMD, though, it should not oblige MS to include the 'shared compensation' option as it should 'respect the traditions in this area and not oblige Member States...to introduce them'.<sup>1147</sup>

## 7.6.2 Recommendation 4: Moral Rights: authorial right to waiver or receive fair remuneration

### Article 5

#### Moral Rights

- (1) Independently of the author's economic rights, and even after the transfer of those rights, the author shall have the following rights:
  - (a) to claim authorship of the work;
  - (b) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation otherwise referred to as the right of integrity;
  - (c) The right of attribution which comprises:
    - (i) the right to be identified as the author, including the right to choose the manner of identification, and the right, if the author so decides, to remain unidentified;
    - (ii) the right to require that the name or title which the author has given to the work be indicated.
- (2) Independently of the author's economic rights, and even after the transfer of those rights, the author may permit the right of divulgation which is the right to decide whether, and how, the work is disclosed for the first time;
- (3) The rights granted to the author in accordance with paragraphs (1) and (2) shall, after death, be maintained in the manner set down in the legislation of the Member State.
- (4) Moral rights shall not be assigned.
- (5) Moral rights may be waived in accordance with the legislation of the Member State.
- (6) Member States that determine moral rights are inalienable must include a fair remuneration provision in such circumstances and are encouraged to mandate a shared compensation scheme for rightholders who contract to transfer or license their copyright, author's rights, related rights and/or economic rights in a work.

<sup>1147</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Recital 60

- (7) Moral rights inalienability is subject to receipt of fair remuneration
- (8) Moral rights may be subject to assertion in accordance with the legislation of the Member State
- (9) Nothing in this provision prevents Member States giving effect to further moral rights not encompassed in this clause.

## 7.7 Recommendation for harmonising “permitted exceptions” in the Information Society Directive 2001

Chapter [4.6] critically analysed the range of “permitted exceptions” to copyright infringement, in terms of the harmonising issues arising out of “optionality”. The author concluded that, in view of changing standards in educational delivery across the EU, particularly for students studying online in geographic locations different to that of their educational establishment, the optional exceptions in Directive 2001/29, Article 5(2)(c), Article 5(3)(a) and Article 5(3)(n) should be mandated and moved to Article 5(1).

### 7.7.1 Recommendation 5: New Mandatory Permitted Exceptions in Directive 2001/29, Art. 5(1)

**It is suggested that the following amendments be made to Directive 2001/29 to reflect the mandatory status proposed in this thesis to the following optional exceptions:**

**Creation of new mandatory permitted exceptions to be moved from Art. 5(2) and Art 5(3) to Art 5(1)**

the “archiving” exception, currently drafted in Directive 2001/29 as Article 5(2)(c), should be mandatory and moved from its current location in Article 2, to Article 1, to create a new ‘Article 5(1)(c)’ mandatory exception.

Article 5(3)(a) and Article 5(3)(n) should both be mandatory to transpose in each EUMS. On this basis, they should be moved to create a new Article 5(1)(d) and a new Article 5(1)(e) respectively.

### 7.7.2 Recommendation 6: New Mandatory Permitted Exception in Directive 2006/115, Art. 10

**It is suggested that the following amendments be made to Council Directive 2006/115 to reflect the changes recommended to Council Directive 2001/29 and Council Directive 2019/790 as this change also extends to performers' rights:**

**Creation of new mandatory permitted exception Art. 10(1) and optional Art. 10(2)**

Article 10 Member States shall provide for a limitation to the rights referred to in this Chapter in respect of:

- (1) use solely for the purposes of teaching or scientific research.

*[Note for drafters, the current 10(1)(d) clause should be re-drafted as 10(1) and the word "may" replaced with "shall" (as indicated above). The current 10(1)(a)-(c) should be re-drafted into 10(2) with the word "may" retained. Current Articles 2 and 3 will become 3 and 4 respectively]*



## 7.8 Recommendation for facilitating UGC platform compliance with the Digital Single Market Directive 2019 for online music and audiovisual works

DSMD mandates that UGC platforms must take steps to prevent publication of unauthorised copyright infringing content on their platforms, either by licensing the content, preventing infringing content or removing such content expeditiously.<sup>1148</sup> However, no solutions were proposed by the DSMD as to how such obligations would be met. DSMD expressly states that the obligation does not mandate content filtering. In practice, without a harmonised solution, this is exactly what platforms will have to do to meet their Art. 17 obligations. To avoid this, UGC platforms must try and seek digital rights management (“DRM”) authorisation prior to publication, or risk having to filter all content. This proposal offers a solution for facilitating DRM which could be drafted into an EUCR.

### 7.8.1. Provision in the EU Copyright Regulation to mandate an EU Central Processing Hub for Digital Rights Management

A potential solution for harmonising methods that enable UGC platforms to satisfy their DSMD, Art. 17 obligations, can be found by expanding on current collaborative efforts between CMOs. The Commission could mandate development of a Central Processing Hub (“CPH”) which could be called the Digital Rights of Artists Management Hub (“DRAMH”). This could be formed under the current Commission Portfolio, *A Europe Fit for the Digital Age*, headed by commissioner, Margrethe Vestager.<sup>1149</sup> Artists who wish to be paid fair

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<sup>1148</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 17

<sup>1149</sup> The Commissioners, 2019-2024 <[https://ec.europa.eu/commission/commissioners/2019-2024\\_en](https://ec.europa.eu/commission/commissioners/2019-2024_en)>

remuneration for use of their work online, could register themselves and their repertoire on the DRAMH database. This information would be accessible by both UGC platforms and CMOs. Responsibility for the workings of DRAMH could be managed collectively by UGC platforms and CMOs. Running costs could be split proportionately between the two groups in addition to EU funding, venture capitalists and R&D companies. Artist registration would not re-introduce copyright registration formalities; it would give the opportunity for niche artists and those unknown, as well as others, to be located and offered fair remuneration, by way of licensing, for their repertoire. This could help to satisfy DSMD compliance.

#### 7.8.1.1 Logistics

As there is already a joint venture between CMOs in the UK, Sweden and Germany, as well as a processing Hub collaboration between nine further MS,<sup>1150</sup> this proposal is for one CPH where all registered artists' details are contained. Ultimately, artists will need to make themselves known under the DSMD; UGC platforms will need to know who they are if they are to negotiate licences. DRAMH should not prevent further joint ventures if CMOs and UGC platforms wish to pursue collaborative strategies for collective rights management. DRAMH is one possible solution, with a harmonising effect, to counteract practical issues caused by Art. 17 obligations. DRAMH could be advertised on UGC platforms to promote its existence. For accessibility, there should be a method for filtering its contents as, potentially, there could be hundreds of thousands, if not millions, of registered artists. Filtering could be by country (and region) and/or by repertoire.

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<sup>1150</sup> Austria (AKS), Belgium (SABAM), France (SACEM), Hungary (Artisjus), Italy (SIAE), Luxembourg (SACEM), Portugal (SPAUTORES), Spain (SGAE) and Switzerland (SUISA) as of 30 June 2022

### 7.8.1.2 DRAMH Listings

Listings could include the artist's name, general location, snippets of their repertoire and current web address/UGC platform space (where possible). Artists should be encouraged to upload 30-60-second sound bites of their music as well as AV soundbites of their performances, where relevant. The listing could look something like this:<sup>1151</sup>

Miles Fox | London, UK | [www.youtube.com/user/milesfoxsinger/videos?app=desktop](http://www.youtube.com/user/milesfoxsinger/videos?app=desktop)

Music artist | singer-song-writer | *grunge, garage, house-style*

[Music Sample Here](#) ©

[Promotional Literature Here](#) ©

[Click Here](#) to register your interest in contacting this artist for licensing purposes only

Portrait pictures of artists should not be included as DRAMH is only for facilitating contact between UGC platforms/CMOs and artists for licence negotiation. Personal information covered by GDPR,<sup>1152</sup> such as (but not limited to) age, contact details, phone numbers, home address and so forth, should not be included in the listing. Images of music works (such as CD/digital music covers) could be included subject to copyright ownership identification/authorisation. The “Click Here” hyperlink could directly email and/or text the artist's registered email/mobile phone number to notify them of UGC platform/CMO interest in licensing use of their music. However, it should not be visible from the messaging centre. The name of the UGC platform/CMO should be included in the email/text at the outset so that the artist can decide whether or not to respond. A traffic light system could operate which

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<sup>1151</sup> Image created by the author, Justine Mitchell. The artist depicted is fictional and used only for illustrative purposes. Any likeness in name, location, repertoire, personal information and other such info is purely coincidental. The hyperlinks could be replaced with images instead of wholly text.

<sup>1152</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1

indicates if the registrant is open to all offers, some offers or very limited offers. As seen from the example above, this fictional artist would be open to all offers from all registered licensees as the background colour is green.

#### 7.8.1.3 Messaging the Artist

The contact message could look something like this:<sup>1153</sup>

**A representative from [YouTube LLC/PRS for Music etc.] wishes to contact you to negotiate licensing some, or all, of your repertoire. Please respond with Y if you would like to connect with [YouTube LLC/PRS for Music etc.] or N if you would prefer not to receive communications from this interested party for the next 6 months. Please respond with 0 if you would prefer not to hear from this interested party again.**

Text message responses from the artist should be free from any mobile phone service provider.

There should also be the option of forwarding communications to email with the same message.

Artists should also be free to indicate with whom they do not wish to negotiate at the outset.

#### 7.8.1.4 Outstanding issues with this OPTION

There are numerous issues to overcome with this proposal as outlined below:

- Artists must be able to prove that they own the copyright to their music and other copyrightable material, perhaps by use of an ECMS (Electronic Content Management System)<sup>1154</sup> or some other form of satisfactory evidence
- EU GDPR – responsibility of DRAMH management to ensure EU GDPR is upheld

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<sup>1153</sup> Text Message Image created by the author, Justine Mitchell, and is for illustrative purposes only. Clearly, the text message could be tweaked to suit a more appropriate/targeted artist etc.

<sup>1154</sup> Jean-Françoise Boisson, 'Electronic commerce of intangible goods: IPR issues' published in Y J Roger, Brian Stanford-Smith and Paul T Kidd, *Advances in Information Technologies: The Business Challenge (Stand Alone)* (IOS Press US 1999) 429

- Accessibility should only be available for UGC platforms and CMOs (not the general public). There should be a separate area on the server for artists to upload their details. Each artist should only be able to view their own profile. Artists' details should not be visible on the artists' server
- Due diligence must be undertaken to authenticate UGC platforms/CMOs. It clearly favours social media giants, rather than niche platforms where the onus will be on smaller platforms/CMOs to prove who they are and what they do. Official business records, such as company records, could satisfy this evidential burden
- There should be a provision for immediate deletion, or deactivation, of the profile by the artist
- There should be a duty on registered artists to keep their details updated; auto-reminders should be sent to artists on a 6-12-month basis to check details
- There will need to be a provision whereby control of the artist's profile can be nominated to another person (selected by the artist), so that on the artist's death (or incapacitation), the profile can be deleted/deactivated by the elected nominee. Reminders should be sent every 12 months to the registered artist to confirm validity of nominee details
- DRAMH should be free for artists but funded proportionately by UGC platforms/CMOs. Further revenue could be collected by third-party advertising, venture capitalists, R&D entities and EU funding
- CMOs may feel 'snubbed' given that this system opens up direct UGC platform-artist contact. Hence, this proposal should be inclusive to CMOs. CMOs have mechanisms to prove copyright origination and have long-standing experience in licence facilitation on this scale; this should be utilised

#### 7.8.1.5 Potential collaborators for the DRAMH Project

Potential collaborators for a project of this scale may include, but not be limited to:

- 'A Europe Fit for the Digital Age' EU Commission Portfolio Team and collaboration with other such relevant portfolios' teams
- Music artists
- Music publishers/producers
- IT companies
- UGC platforms (YouTube et al)

- Music companies
- CMOs
- Google (for use of its automatic translation tool to counteract language barriers, amongst other reasons)
- IPRs legal specialists
- Human Rights specialists
- GDPR specialists
- Cyber Crime specialists
- Security Services
- Venture capitalists/other such financiers, including investment banks
- Research institutions/universities and other such collaborators
- End-users
- Marketing companies
- Interoperability services
- Any other relevant stakeholders

The success of DRAMH and DSMD, will largely depend on collaboration. This will be between CMOs, perhaps building on the joint ventures that some already have in place to try and counteract illegal downloading,<sup>1155</sup> as well as UGC platforms and artists.

### 7.8.2 Recommendation 7: Provision in the proposed EUCR to mandate an EU-wide Central Processing Hub to facilitate compliance with DSMD, Article 17 for online music and audiovisual works

#### *Article 23*

#### **Collective management of copyright and related rights and multi-territorial licensing of rights in audiovisual works for online use in the internal market**

- (1) The Commission, in consultation with Member States, shall organise stakeholder dialogues to discuss mandating collective management of copyright and related rights for multi-territorial licensing of rights in music and audiovisual works for online use in the internal market.

<sup>1155</sup> For example, UK Collecting Society PRS, has a joint venture with collecting societies in Sweden (STIM) and Germany (GEMA) PRS for Music, <[www.prsformusic.com/what-we-do/protecting-music](http://www.prsformusic.com/what-we-do/protecting-music)>

## 7.9 Recommendation for harmonising an “Education Exception” in (EU) 2019/790

As a reminder, it is posited that DSMD, Art 5 (Education Exception) failed to consider sufficiently the numerous learning techniques and pedagogy of the Union’s 20 million university students.<sup>1156</sup> This is particularly acute in AVWKs where it has been suggested that over 65% of students are visual learners.<sup>1157</sup> Voluntary provisions permitting MS to disallow the Education Exception to ‘specific uses or types of works’<sup>1158</sup> fail to harmonise access to AVWKs in Education to any satisfactory standard.

### 7.9.1. Individual issues for AVWKs and Educational Exceptions

#### 7.9.1.1. Education

The consequence of non-harmonisation at EU level, of AVWKs, means that students residing in their home country cannot necessarily access AVWKs available in other MS which are accessible by students in those MS. The reason for this is that, in the absence of collective cross-border licensing, an AVWK may only be licensed in the MS of the educational establishment and accessible by students physically located in that MS. Where students are residing in their home country, rather than the MS of the institution, licensing restrictions and geo-blocking may prevent those students from accessing AVWKs. Viewing the AVWK on *YouTube*, for example, may be denied due to their physical geographic location. Furthermore, educational establishments may not have access to online AVWKs outside their MS. Licences may be disproportionately expensive and extremely difficult to facilitate given the lack of harmonisation, for licensing online AVWKs, in the EU.

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<sup>1156</sup> Europa (*Tertiary education statistics*) n 1098

<sup>1157</sup> BUŞAN n 916

<sup>1158</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 5(2)

DSMD, Recital 23 suggests that collective licensing, or extended collective licensing, should be sought to avoid individual negotiation with rightholders.<sup>1159</sup> This is a logical suggestion due to the issues outlined previously regarding the number of rights contained within a single AVWK. However, if the licence does not have cross-border application, this will not assist students residing in a different MS to the one where use of the AVWK is licensed. Where a licence cannot be easily sourced, the institution will have to rely on the ‘fair use’ or ‘fair dealing’ exceptions and limitations under *InfoSoc*, Art 5. But the same issues of accessibility arise. If the student is trying to access the AVWK content from their home country, rather than the MS of the educational institution, that student may be denied access based on the location of their IP address and their physical location. The Geo-blocking Regulation (2018)<sup>1160</sup> will not assist here as this Regulation only applies to the sale of goods and services online. AVWKs via VoD do not fall within this sphere for this Regulation.

It may be argued that the circumstances of students studying from their home country in a university of another MS is such a rarity that there is not really an issue. Up to March 2020, most people could have agreed. However, the global pandemic of Covid-19 that ground the world to a halt suggests that online, or blended campus-online, learning environments may become the norm for future education. As students generally returned to their home countries during the pandemic, accessibility of such works became vital for continued online learning.

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<sup>1159</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Recital 23

<sup>1160</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L60I/1



### 7.9.1.2. European educational, training and research strategies

Moreover, it can be argued that there is a drive to promote education. ‘Education and culture are essential to develop a more inclusive, cohesive and competitive Europe’.<sup>1161</sup> In the Commission’s 2025 European Education Area strategy, free movement for educational purposes is guaranteed as it is deemed to have become standard that students ought to be able to speak more than one language and spend time in other MS.<sup>1162</sup> It was the Commission’s aim that by 2020, 40% of young Europeans should be educated to degree standard or equivalent.<sup>1163</sup> Although educational delivery is left to MS, ‘EU activities are designed to bring an additional international dimension to studying, teaching, researching or making policy in higher education.’<sup>1164</sup> Furthermore, the EU’s Horizon 2020 project aims to place EU researchers in the global sphere of ‘science, industrial leadership and tackling societal challenges’.<sup>1165</sup> The emphasis is on ‘creat[ing] a genuine single market for knowledge, research and innovation’.<sup>1166</sup>

If EU law does not work in unison with these strategies, it may not meet its targets.

In addition, the number of *Massive Open Online Courses* (MOOCs)<sup>1167</sup> within the EU is increasing.<sup>1168</sup> In 2015, it was reported by the Commission that ‘22% of HEIs declared they are already offering MOOCs and 19% are planning to do so’ in France, Germany, Spain, Poland and the UK.<sup>1169</sup> It has been suggested that ‘[d]igital competence is very important for

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<sup>1161</sup> Europa, ‘Education and Training’ <[https://ec.europa.eu/education/policies/higher-education/about-higher-education-policy\\_en](https://ec.europa.eu/education/policies/higher-education/about-higher-education-policy_en)>

<sup>1162</sup> *ibid*

<sup>1163</sup> *ibid*

<sup>1164</sup> *ibid*

<sup>1165</sup> Commission, ‘Horizon 2020’ <<https://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020>>

<sup>1166</sup> *ibid*

<sup>1167</sup> A MOOC ‘is an online course offered by an education institution which is open to the world - learners can take the course without the need of being formally registered as a student at the institution’ (EU Science Hub <<https://ec.europa.eu/jrc/en/open-education/mooc>>)

<sup>1168</sup> Jonatan Castaño Muñoz, Yves Punie and Andreia Inamorato dos Santos (on behalf of the EU Commission), ‘MOOCs in Europe: Evidence from pilot surveys with universities and MOOC learners’ (2016) JRC101956 <[https://ec.europa.eu/jrc/sites/jrcsh/files/JRC%20brief%20MOOCs\\_JRC101956.pdf](https://ec.europa.eu/jrc/sites/jrcsh/files/JRC%20brief%20MOOCs_JRC101956.pdf)>

<sup>1169</sup> *ibid*, 2

participation in MOOCs'.<sup>1170</sup> It must be argued that so too is access to online sources within the EU's free and open market when undertaking MOOCs. If we are to future-proof a Copyright Regulation, provisions must encompass evolutionary changes to learning environments that may occur.

#### 7.9.1.3. (EU) 2019/790, Art 17

A further complication arises when considered alongside the Art. 17 licensing obligations of UGC. Where a UGC platform, such as *YouTube*, has negotiated an exclusive licence, thus leaving it impossible for an educational institution to obtain a licence to use a particular AVWK, the institution must fall back on the exception/limitation provision in InfoSoc, Art 5. Hence, the same issues occur for students not residing in the MS of the institution. Notwithstanding this, as identified with the AVWK proposals at [7.8], the proposed Regulation will not interfere with rights obtained by an exclusive license. Such issues may fall within the competence of EU competition, rather than licensing.

Given the drive to promote education as a key EU policy, the EU Commission should take steps to mandate a permitted exception for works used for the illustration of teaching.

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<sup>1170</sup> *ibid*

## 7.9.2 Proposal for harmonisation of an Education Exception

### 7.9.2.1 Removal of the voluntary provision in (EU) 2019/790, Art 5(2)

This proposal mandates to increase the EE to include AVWKs as an exception to copyright infringement, in the absence of implementation of the proposals suggested at [7.8]. It is proposed that the following provision should be removed from DSM, Art 5(2):

*Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works or other subject matter...to the extent that suitable licences...are easily available.*

The reason is because we have already seen in this, and previous, chapters how difficult it is to license multi-rights-centric creative works. Where an educational institution is looking to license AVWKs, it is likely to be even more difficult and unaffordable as it is unlikely to have the bargaining power and market sway of Aggregators, such as *Amazon Prime* and *Netflix*. The institution would have to rely on exceptions under *InfoSoc*, Art 5(2) incorporated in their national laws. As a reminder though, Art 5 DSMD contradicts this if it serves to remove ‘specific uses or types of works’ (i.e. AVWKs). Institutes may find themselves in situations where the option to rely on InfoSoc exceptions is no longer available for AVWKs and they are unable to license such works. As it currently stands, these two directive provisions contradict each other to the detriment of over, currently, 20 million European students. With the drive to better educate people, as evidenced by EU strategies to increase higher education, training and research, such copyright restrictions and disharmony do not foster an educational environment suited to the 21<sup>st</sup> century EU single market.

### 7.9.3 Recommendation 8: Educational Exceptions and Cross-Border Licensing

- (1) The Commission should take action to propose measures for cross-border licensing of audiovisual works to the extent that a work in one EUMS is accessible by all. A stakeholder enquiry should be commissioned at the earliest convenience to facilitate this change to effect EU multi-licensing of audiovisual works.
- (2) The Commission should remove the provision in (EU) 2019/790, Article 5(2) which permits MS to disallow education exceptions for works as it deems fit, where licences could be easily sought

### 7.10 Recommendation for amending the Collective Management Rights Directive to introduce mandatory publication of “objectively justified reasons” for refusal of representation

The author’s research in Chapter [4.1] revealed the potential for discriminatory practices in the CRMD where CMOs do not have to include their ‘objectively justified reasons’ for refusing representation of an artist in any official report. The recommendation is that such information is included in the Annual Transparency Report.

#### 7.10.1 Recommendation 9: include “objectively justified reasons” in the Annual Transparency Report

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance [2014] OJ L84/72:

**A new Article 5(6) clause should be inserted:**

“Collective management organisations shall reply without undue delay to requests from individuals, indicating, inter alia, the objectively justified reasons for refusal of membership to the organisation and information needed in order for the collective management organisation to offer a membership.”

**The following clause should be drafted into the Annex for inclusion in the Annual Transparency Report pursuant to 2014/12/EU, Article 22:**

“1(d): information on refusals to grant a licence pursuant to Article 5 setting out the objectively justified reasons for refusal pursuant to Article 5(6)”

## 7.11 Recommendation for annexation to the EU-UK Trade and Cooperation Agreement 2021

In Chapter 6, the author critically analysed the possibility of annexing the proposed EUCR to the EU-UK TCA to supplement the trade agreement in terms of copyright disputes. As was shown, numerous areas of EU and UK law, with regards to copyright subsistence, have already been harmonised. This is due to the UK’s long-standing former membership of the EU. At the time of writing, the majority of these laws are still in place in the UK. The exceptions are the OWD<sup>1171</sup> which was repealed on Exit Day, the Portability Regulations<sup>1172</sup> which ceased to have effect on Exit Day and the DSMD<sup>1173</sup> which was never transposed into UK law. It was argued in Chapter 6 that, despite these differences, there was still sufficient unity between the two states that would permit annexation. Clearly, amendments would have to be made, in terms of annexing the proposed EUCR into the TCA. Notwithstanding this, it was argued in Chapter 6 that suitable alternatives were available in UK law, in terms of the OWD. Given that raft of case law between the two states, and the fact that EU copyright law is still being applied in UK case law, the recommendation is that the proposed EUCR be annexed to the TCA. Should the government of the day repeal EU law from the CDPA, and reinstate fully common law

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<sup>1171</sup> 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 L299/5

<sup>1172</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L 168/1

<sup>1173</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

principles, then the annexed EUCR would cease to have effect and would have to be withdrawn from the TCA.

### 7.11.1 Recommendations 10 and 11: the proposed EUCR should be annexed to the TCA

*7.11.1.1 Recommendation 10: Regulation 20xx/xxx of the European Parliament and of the Council of [date] on European Union copyright [citation] shall incorporate a provision to annex the Regulation to the EU-UK Trade and Cooperation Agreement*

#### *Article 25*

#### Annexation of the EU Copyright Regulation № 20xx/xxx to the EU-UK Trade and Cooperation Agreement, Annex 50

- (1) The Copyright Regulation (20xx/xxx) (“The Regulation”) is annexed to the EU-UK Trade and Cooperation Agreement 2021 (“The Agreement”) insofar as copyright subsistence, ownership and infringement disputes occur between entities in EU Member States and the UK.
- (2) In the absence of any agreement or other law in terms of jurisdiction, the final adjudicator of law is the state in which proceedings are initiated.

*7.11.1.2 Recommendation 11: the EU-UK Trade and Cooperation Agreement 2021 shall be amended to create a new Annex 50 to incorporate Regulation 20xx/xxx of the European Parliament and of the Council of [date] on European Union copyright [citation]*

**The following clauses should be drafted into a newly created Annex 50 “COPYRIGHT PROTECTED GOODS AND SERVICES” for inclusion in the EU-UK Trade and Cooperation Agreement 2021:**

**ANNEX 50**

**COPYRIGHT PROTECTED GOODS AND SERVICES**

For the purpose of this Special Provision, the following clauses apply:

1. Regulation (EU) 20xx/xxx of the European Parliament and of the Council of [date] on European Union copyright [citation] shall apply to the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part OJ L149/10

The following exceptions apply:

2. Regulation (EU) 20xx/xxxx, Article 8 insofar as enforcement of intellectual property rights shall not apply.
3. Regulation (EU) 20xx/xxxx, Article 5 with regards to moral rights shall not apply.
4. Regulation (EU) 20xx/xxxx, Article 18 with regards to orphan works shall not apply.
5. Regulation (EU) 20xx/xxxx, Article 20 with regards to portability shall not apply.
6. Regulation (EU) 20xx/xxxx, Article 21 with regards to the digital single market shall not apply.

## 7.12 CONCLUSION

This chapter proposed unique solutions to harmonise outstanding areas of national copyright laws in the EU. Eleven recommendations were suggested as workable reforms in the following areas: originality, notions of works, authorship, fixation, moral rights, AVWK cross-border licensing, UGC licensing obligations, education exception and annexation of the proposed EUCR to the EU-UK TCA.

It can be argued that the proposed recommendations are founded upon EU law (EU treaties, regulations, directives and CJEU case law) and fall within EU competence. The recommendations endeavour to respect the fundamental EU principles of proportionality and subsidiarity whilst seeking to reduce differences that detrimentally affect the functioning of the single market. It is probable that recommendations 5-6 and 8-9 could not be realised anytime soon, given that relevant stakeholder dialogues require consideration which would likely take place over a number of years. This should be considered when drafting the proposed EUCR. Notwithstanding this, in consideration of Recommendations 1-4 and 7, there is no justifiable reason why the Commission cannot propose a unitary Copyright Regulation encompassing these changes and current piecemeal directives/regulations to harmonise national copyright laws in these areas. Should the UK repeal a sizeable majority of EU copyright legal principles, that will spell the end of annexation of the EUCR to the TCA. Notwithstanding this, as that proposal is only peripheral to the main aim, which is to create a unitary EU copyright regulation, such actions by the UK government of the day, will not affect the functioning of the proposed EUCR. Again, the parting words of this chapter are best left to the EU Commission:



*“There is a clear need for simplification and further harmonisation efforts to render such framework less complex.”<sup>1174</sup>*

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<sup>1174</sup> Business Europe, ‘Intellectual property - Priorities for the next institutional cycle’ *Intellectual Property Report* (Sep 2019) 32 <[www.businessseurope.eu/sites/buseur/files/media/reports\\_and\\_studies/september\\_2019\\_-\\_intellectual\\_property\\_priorities.pdf](http://www.businessseurope.eu/sites/buseur/files/media/reports_and_studies/september_2019_-_intellectual_property_priorities.pdf)>

# CHAPTER EIGHT

## CONCLUSION TO THE THESIS

## 8. OVERALL CONCLUSION TO THE THESIS

### 8.1 What this thesis set out to achieve

This research set out to show that copyright law within the EU could, and should, be consolidated into a single document unitary regulation to harmonise national copyright laws. The author has also posited that copyright law harmonisation should be completed in continuum and incorporated into the proposed EUCR. This thesis has accomplished this vision insofar as critically analysing current EU copyright laws, to suggest amendments and reforms, to harmonise currently unharmonised areas, as well as drafting a skeleton unitary copyright regulation (see Appendix A). In terms of completing copyright harmonisation in its entirety, the author conceded, from the outset, that this was not possible, in a doctoral thesis, given the depth, breadth and reach of copyright law. Moreover, the author had concerns as to whether or not this could be achieved, given the presence of the two differing civil and common law legal systems, each with different copyright rules in key areas.<sup>1175</sup> Although the UK exited from the EU during the writing of this thesis, it still left Ireland as a fully-fledged common law EUMS. Notwithstanding these concerns, given that partial harmonisation was undertaken piecemeal, the author aimed to harmonise the most important issues outstanding that had not been harmonised, and those that had been harmonised but were now in need of further reform, both of which detrimentally impacted the functioning of the single market. However, instead of continuing the current trajectory of the piecemeal approach, the author's ultimate aim was to emulate the EU unitary trade mark and design law regulations, insofar as harmonising national laws, to produce a first working draft of a unitary copyright regulation that could be published, and added to, in due course.

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<sup>1175</sup> Originality standards, notions of work, authorship in terms of computer-generated creations and moral rights

## 8.2 Chapter summaries and key points exposed by the author's research

Chapter 1 offered contextual analysis of copyright, its justifications and the status quo of UK, EU and international law. The most important parts were outlining the areas that would, and could not, be considered within the constraints of a doctoral thesis as well as setting out the research questions, on which the analysis and framework of this thesis were based. Chapter 2 was also important for historic background context because it focused on why other IP unitary regulations/legislative instruments, in terms of trade marks, patents, design law and trade secrets, had been passed at the expense of a synonymous copyright regulation. The author criticised the indisputable fact that EU lawmakers had entirely focused their attention on industrial property, whilst completely ignoring the creative industries, despite the then ECJ, exposing single market fragmentation in the EU copyright markets, as far back as 1971. The key point from this historic research was that it revealed that the focus had been on protecting the markets of inventions and ideas, without any thought for all the creative works that would likely engender from those inventions and whose creations would flood into a single, yet fragmented, market. It is the author's contention that this was a mistake as it set in motion a piecemeal effect for dealing with copyright issues that has survived, unsatisfactorily, to this day. Chapter 3 utilised the published Draft Witterm Group European Copyright Code as a theoretical and practical framework for setting out the scope to posit copyright harmonisation. The research revealed that, although the Code was useful in highlighting selected issues for further critical analysis, it was limited in substance as it only covered five main elements of copyright: originality, works, authorship, moral rights and limitations. Albeit, these were those very important elements that the author had concerns about insofar as accommodating differing legal systems within the EU. Hence, the author was able to use the Code as a benchmark to highlight selected issues and further research questions for deeper critical analysis and reform-suggestions, in Chapter 4.

The findings of this critical analysis of the selected issues were exposed in Chapters 4 and 5, with the former encompassing those identified from the Wittem Code analysis, and the latter, Chapter 5, analysing selected issues from directives passed post-Infopaq, and CJEU case law analysis, in terms of the digital single market. In Chapter 4, the author largely followed the framework of the Wittem Code by critically analysing the five elements, originality, notions of works, authorship, moral rights and permitted exceptions, in the context of directives, CJEU case law and international treaties of which EUMS were members. The author concluded, in this research, that the standard of “originality” had already been harmonised, by virtue of the CJEU’s interpretation of *InfoSoc*,<sup>1176</sup> in the case, *Infopaq*.<sup>1177</sup> Moreover, further critical analysis showed that this standard encompassed all works. This impacted traditional common law states, such as Ireland/UK and Cyprus whose media-type works (films, sound recordings and so forth) did not require such originality. By virtue of the CJEU, though, they do now, as subsequent UK case law, applying EU precedents, has shown.<sup>1178</sup> More contentiously, the research also exposed that, by further analysis of CJEU case law and the court’s interpretation of *InfoSoc*, not only did the EU originality standard encompass all works, it effectively eradicated the necessity for closed categories appurtenant to common law MS. As such, this research exposed that the concerns the author had, in terms of attempting to harmonise originality standards and “works”, were no longer in issue. Reforms in these two areas could be suggested, because of CJEU harmonisation of those standards. In terms of authorship, the

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<sup>1176</sup> Directive 2001/29/EC 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] OJ L167/10

<sup>1177</sup> C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569

<sup>1178</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099; [2011] ECDR 10; *Mitchell v British Broadcasting Corporation (BBC)* [2011] EWPC 42 [28]-[29] (Birss J); *Abraham Moon & Sons Ltd v Thornber & Ors* [2012] EWPC 37 (Birss J); *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482 [38] (Birss J); *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd (Rev 1)* [2020] EWHC 148 (IPEC); [2020] WLR(D) 88 (Hacon J); *Sheeran & Ors v Chokri & Ors* [2022] EWHC 827 (Ch) [21] (Zacaroli J); *Shazam v Only Fools The Dining Experience and Others* [2022] EWHC 1379 IPEC [95] and [125] (John Kimbell QC sitting as a Deputy High Court Judge)

author's research exposed the possibility of amending EU law, pertaining to authorship, to extend copyright to computer-generated creations, albeit, within the confines of the *Software Directive*.<sup>1179</sup> This would satisfy the requisite EU "human author" element. Hence, the posited reform has removed previously held barriers between EU civil law MS', and EU common law MS' laws, in this regard. Moreover, the author's comparative analytical research of each MS' Copyright Act revealed common areas of authorship, which facilitated suggested reforms to harmonise a further three areas of law regarding authorship: collaborative and commissioned works, and works made in the course of employment. These reforms are new to EU copyright law but should help to reduce fragmentation in the single market of copyright-protected goods. Moral rights reforms were difficult due to the indeterminable length of the French moral rights protection and endeavouring to justify, in law, such interference with national laws. By analysis of international treaties, particularly Berne, TRIPS and the ECHR, the author found common ground in moral rights that meant a reform could be found to harmonise moral rights, to minimum standards, and which would not detrimentally impact the single market. Two moral rights set down internationally (integrity and paternity) were suggested for new harmonisation, with the opportunity for MS to retain differing moral rights in line with national laws. Lastly, the author posited reforms to "permitted exceptions" contained in *InfoSoc* by suggesting that three exceptions<sup>1180</sup> ought to be mandated, in terms of education, given that such reforms had also been made, to some extent, in the new DSMD.<sup>1181</sup>

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<sup>1179</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16

<sup>1180</sup> Directive 2001/29/EC 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] OJ L167/10, Arts 5(2)(c), 5(3)(a) and 5(3)(n)

<sup>1181</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 5

Chapter 5 concentrated on critically analysing the selected issues in the context of the digital single market. The focus for consideration was the CRMD,<sup>1182</sup> the DSMD,<sup>1183</sup> exhaustion and AVWKs. The author's analytical research of the CRMD exposed a flaw in its framework, in terms of governance and transparency. The research revealed that CMOs could effectively refuse to represent an artist, and, although Art. 5 mandated 'objectively justified reasons', there was no such governance overseeing the execution of this. The author suggested a reform to correct this by introducing mandatory inclusion of such reasons in the Annual Transparency Report.<sup>1184</sup> Secondary to this, the author also exposed the problems with AVWKs licensing facilitation, in terms of why such works were not included in the CRMD. This is a flaw that permeates throughout the DSMD. In terms of the DSMD, multiple issues were considered in this context. Firstly, a flaw in the mandatory Art. 5 exception for cross-border teaching activities was exposed by the author's critical analysis of the Article because, although the exception is mandatory, it permits MS to refuse exceptions for certain uses or types of works easily available on the market by means of licensing.<sup>1185</sup> This could lead the way for MS not permitting an exception to use AVWKs in teaching, due to complexities in licensing. Yet, a sizable amount of illustrative teaching aids may be audiovisual. As identified above, licensing is not so easily available for such works. Hence, a mandated "education exception" for use of such works was posited as necessary to assist EU policy makers with their drive for educating its masses. With regards to the Article 15 newly created 2-year press publisher's neighbouring

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<sup>1182</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72

<sup>1183</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

<sup>1184</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72, Art 22

<sup>1185</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, Art 5(2)

right, the author's research concluded that this right did not detrimentally impact on the functioning of the single market. If anything, it upheld the copyright protection in the author's work and the newspaper publication's exclusive right to publish it. In terms of the Article 17 UGC platform requirement to license works, where possible, or remove infringing copyright works from those platforms, the author's research concurred what most academics and practitioners have been saying since its conception: that UGC platforms must now content-manage uploads to their platforms to avoid liability for copyright infringement, despite such practices outlawed in the earlier *E-Commerce Directive*.<sup>1186</sup> Notwithstanding this, the author conceded that mass copyright infringement required a mechanism for prevention, at the outset, to safeguard the economic rights of the authors. Hence, a reform to mandate a Central Processing Hub was suggested to facilitate UGC platform compliance with the Art. 17 requirements. The final part of the author's research returned to the issue of AVWKs and concluded that, due to the complexity of the AVWKs infrastructure and the number of rights in such works, this was an element of copyright harmonisation that could not be resolved in a doctoral thesis. Notwithstanding the author's suggested reform to mandate a stakeholder enquiry to determine how this could be accomplished, this was the one area of copyright law, discussed in this thesis, that could not be resolved for inclusion in the posited EUCR.

Chapter 6 was important, particularly in terms of contributing to the field of copyright knowledge, as the author critically analysed the current EU-UK Trade and Cooperation Agreement, to consider if the proposed EUCR could be annexed to the TCA to better support future trading. By critical analysis, the author's research exposed that the majority of copyright

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<sup>1186</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1, Art 16



subsistence areas between EUMS and the UK had been harmonised. There were some anomalies in that the OWD<sup>1187</sup> and the Portability Regulation<sup>1188</sup> had been repealed from UK law. However, this was not deemed to massively impact trade or cause detriment in the single market. Moreover, there was an equivalent current UK law for the OWD with the “law of 2039”. Notwithstanding this, the author’s research confirmed an already outstanding irresolvable issue: the UK will not transpose the DSMD<sup>1189</sup> into its law. However, the author’s research revealed that there was little to be gained by excluding the EUCR wholly on the basis of one directive. As trading relations could be improved by EUCR inclusion, the author suggested a reform to the TCA to annex the proposed EUCR, with specific clauses excluding certain parts of the EUCR that did not conform with UK law, namely the DSMD and the OWD. In view of the author’s research in Chapters 4, 5 and 6, Chapter 7 contained eleven proposed recommendations for completing harmonisation.

### 8.3 The overarching conclusion of the recommendations made for reform

To re-cap, recommendations have been made to codify, into a unitary EU Copyright Regulation, the following general areas of copyright law that have already been harmonised by CJEU case law judgments: originality, notions of works, fixation and the doctrine of exhaustion in terms of tangible works and computer programs/software. Additional recommendations have been made to amend copyright laws already passed in specific directives: mandatory permitted exceptions for educational use/research and private study as

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<sup>1187</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text [2012] OJ L299/5

<sup>1188</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168/1

<sup>1189</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

contained in *InfoSoc*,<sup>1190</sup> *Rental and Lending and Related Rights Directive* and *DSMD*,<sup>1191</sup> and mandatory inclusion in the Annual Transparency report in the *CRMD* of ‘objectively justified reasons’ for refusing artist representation to improve transparency and governance. In terms of proposing new harmonised copyright law within the EU, recommendations have been made to harmonise authorship in terms of extending the scope of the software directive to encompass computer-generated works and allocation of authorship in collaborative and commissioned works and works made in the course of employment, as well as minimum standards for moral rights. Moreover, recommendations have been made to encourage EU lawmakers to endeavour to harmonise licensing of audiovisual works, even if only to minimum standards akin to the *CRMD*.

On this basis, it can be argued that the current piecemeal effect of partial EU copyright harmonisation frustrates rightholders, end-users and contributes to the risk of fewer works in the single market of copyright-protected goods and services. The EU Commission has stated that the time has come when an internal market of intellectual property is foreseeable.<sup>1192</sup> This thesis breathes life into that statement by positing recommendations to harmonise outstanding copyright issues that currently affect the functioning of the single market.

As a reminder, the thesis was twofold:-

- (1) copyright law should be harmonised in the EU and codified into a unitary regulation

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<sup>1190</sup> Directive 2001/29/EC 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] OJ L167/10

<sup>1191</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

<sup>1192</sup> EU Commission, ‘Proposal for a Directive of the European Parliament and of Council’ COM(2013) 813 final, 3

(2) a draft EU Copyright Regulation incorporating harmonised copyright law may annex to the current EU-UK TCA to facilitate copyright trading relations

It is argued that the thesis aims have been met.

In conclusion, this thesis advocates for consolidation of all copyright directives and regulations codified into a unitary Copyright Regulation, continuation of copyright harmonisation of all areas outstanding, some of which, have been posited in this thesis and, that the EUCR is annexed to the current EU-UK Trade and Cooperation Agreement.

The parting words of this thesis is that the EU Commission should take the necessary steps as soon as practicable to complete copyright harmonisation in the form of a unitary regulation.

**Word count: 78,000**

The declared word count excludes the preliminary documents prior to the table of contents, the appendix and the bibliography

**(DRAFT)**  
**Regulation (EU) 20xx/xxx of the  
European Parliament and of the  
Council of [date]  
on the harmonisation of copyright  
and related rights in the European  
Union**



## **PREFACE**

This Draft is appended to the PhD Thesis entitled “**THE LONG TRIP FROM BERNE TO BREXIT: an evolutionary case for copyright harmonisation in the European Union**” written by Justine Mitchell of the University of Central Lancashire and submitted in 2020 (hereafter “the Thesis”).

## **Points to Note**

The unified EU Copyright Regulation is intended to replace the following EU Directives and Regulations and consolidate the provisions into a unified legal document:

Topography Directive 87/54/EEC; Satellite and Broadcasting Directive 93/83/EEC; Database Directive 96/9/EC; Conditional Access Directive 98/84/EC; E-Commerce Directive 2000/31/EC; InfoSoc Directive 2001/29/EC; Artwork Resale Right Directive 2001/84/EC; Enforcement Directive 2004/48/EC; Rental and Lending and Related Rights Directive 2006/115/EC; Software Directive 2009/24/EC; Term Directive 2011/77/EU; TV Broadcasting Directive 2010/13/EU; Enforcement Regulation (EU) 386/2012; Orphan Works Directive 2012/28/EU; Collecting Societies Directive 2014/26/EU; Portability Directive (EU) 2017/1128; Accessibility Regulation (EU) 2017/1563; Accessibility Directive (EU) 2017/1564; TV Broadcasting Directive (EU) 2018/1808; Online Broadcasting Directive (EU) 2019/789; Digital Single Market Directive (EU) 2019/790 (“The Copyright Directives”)

“He” and “She” are replaced with gender-neutral pronouns

Amendments to existing provisions (where drafted) are italicised and referenced

“Community” is/should be replaced with “Union” or “EU”

Transposition times and formalities in repealed directives and regulations are deemed to have been complied with on their relevant transposition dates and by their publication in the Official Journal of the European Union.

## Introduction

The aim of this Draft Regulation is to promote consistency, usability and practicability when researching, understanding and applying copyright law within the European Union for all stakeholders and for copyright and related rights holders and users to be better informed of their rights. It consolidates existing law in regulations and directives and introduces the proposals suggested in Chapter 8 of the Thesis where appropriate.

The Draft considered the template used in the Wittem European Copyright Code Proposal (2010) and has followed its structure in part. Like Wittem, it concentrates on the main elements for codifying copyright: subject matter of copyright (Chapter 1), authorship and ownership (Chapter 2), moral rights (Chapter 3), economic rights (Chapter 4), and limitations (Chapter 5). The Draft goes beyond that in Wittem by introducing a skeleton framework of what the Regulation could look like using content from current directives and regulations and the Thesis proposals.

The Draft Regulation is intended to harmonise the copyright laws of the European Union to promote the four fundamental freedoms, foster innovation and creativity and job creation. As identified in Council Directive 2001/29/, the absence of Union harmonisation results in fragmented national laws and restrictions on free movement of goods and services in the context of intellectual property. This creates significant differences in protections and leads to legislative inconsistency. The Union copyright legislative framework must be adapted to provide consistency in consolidation of intellectual property law generally and for the smooth functioning of the internal market.

# Regulation (EU) 20xx/xxx of the European Parliament and of the Council of [date] on the harmonisation of copyright and related rights in the European Union

## *Whereas*

- for the smooth functioning of the internal market for copyright-protected works in the European Union, as necessitated particularly by the Internet as the primary means of providing information and entertainment services across the Member States, requires common rules on copyright in the EU
- for futureproofing and multi-national trading, the Regulation ought to reflect and integrate both the civil and common law traditions of copyright and authors' right respectively;
- that thirty years of harmonisation has brought only partial harmonisation on certain aspects of the law of copyright in the Member States of the European Union;
- that the consistency and transparency of the harmonised rules on copyright in the EU ought to be consolidated into a unifying Regulation;
- that copyright law in the EU should reflect the core principles and values of European law, including freedom of expression and information as well as freedom of competition, proportionality, subsidiarity and sovereignty;

## *Recognising (following text reproduced from the Wittem Copyright Code)*

- that copyright protection in the European Union finds its justification and its limits in the need to protect the moral and economic interests of creators, while serving the public interest by promoting the production and dissemination of works in the field of literature, art and science [or as depicted by the Member State] by granting to creators limited exclusive rights for limited times in their works;
- that copyright legislation should achieve an optimal balance between protecting the interests of authors and right holders in their works and securing the freedom to access, build upon and use these works;
- that rapid technological development makes future modes of exploitation and use of copyright works unpredictable and therefore requires a system of rights and limitations with some flexibility;
- that the norms of the main international treaties in the field of copyright that have been signed and ratified by the EU and its Member States, in particular the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty, and of the harmonised standards set by the EU directives and regulations in the field of copyright and related rights.

[continue recitals]

# GENERAL PROVISIONS

## *Article 1*

### Subject matter and scope

- (1) Copyright subsists in a work for any expression within the field of literature, art or science if it is the author's own intellectual creation.<sup>1193</sup>
- (2) Works may include, but are not limited to every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramaticomusical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.<sup>1194</sup>
- (3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.
- (4) A Work referred to in Article 1 of this Regulation shall be protected if it is original in the sense that it is the author's own intellectual creation.<sup>1195</sup>
- (5) A computer program, database, graphic user interface, photograph and works published on the internet are original in the sense that they are the author's own intellectual creation. No other criteria shall be applied to determine their eligibility for protection.<sup>1196</sup>

## *Article 2*

### Authorship

- (1) The author of a work is the natural person or group of natural persons who created it.<sup>1197</sup>
- (2) A computer-generated work is protected by copyright if the work is an expression of the software which encompasses the author's own intellectual creation.<sup>1198</sup>
- (3) Where a work has been created by an employee in the course of employment the employer is the first owner of any copyright in the work subject to any agreement to the contrary.<sup>1199</sup>
- (4) In terms of joint authors, the provisions of the preceding Article shall also apply in the case of a work of joint authorship, provided that the terms measured from the death of the author shall be calculated from the death of the last surviving author.<sup>1200</sup>

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<sup>1193</sup> Partly adapted from the Wittem Code and partly drafted by the author implementing Recommendation 1 outlined in Chapter 7

<sup>1194</sup> Copied from the Berne Convention for Literary and Artistic Works 1886, Art 2(1)

<sup>1195</sup> Drafted by the author

<sup>1196</sup> Drafted by the author

<sup>1197</sup> Drafted by the author implementing Recommendation 2

<sup>1198</sup> Drafted by the author implementing Recommendation 2

<sup>1199</sup> Adapted from the Copyright, Designs and Patents Act 1988 to include gender neutral pronouns

<sup>1200</sup> Copied (with minor alterations) from the Berne Convention for Literary and Artistic Works 1886, Art 7bis



### *Article 3*

#### **Fixation**

- (1) An expression of a work must be communicated in a manner which makes it identifiable with sufficient precision and objectivity.
- (2) The work need not be in permanent form.<sup>1201</sup>

### *Article 4*

#### **Economic Rights**

- (1) The initial owner of the economic rights in a work is its author.<sup>1202</sup>
- (2) The economic rights in a work are the exclusive rights to authorise or prohibit the reproduction, distribution, rental, communication to the public and adaptation of the work, in whole or in part.<sup>1203</sup>
- (3) The economic rights in a work may be assigned, licensed and passed in inheritance or succession, in whole or in part.<sup>1204</sup>
- (4) Economic rights assignment and license, whether by the author or the owners of copyright through inheritance, may be subject to receipt of fair remuneration and shared compensation for certain activities as provided for in this Regulation.<sup>1205</sup>
- (5) An assignation is not valid unless it is made in writing.<sup>1206</sup>
- (6) If the contract by which the author assigns or exclusively licenses the economic rights in their work does not adequately specify (a) the amount of the author's remuneration, (b) the geographical scope, (c) the mode of exploitation and (d) the duration of the grant the extent of the grant shall be determined in accordance with the purpose envisaged in making the grant.<sup>1207</sup>

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<sup>1201</sup> Drafted by the author implementing Recommendation 3

<sup>1202</sup> Copied from the Wittem Code

<sup>1203</sup> Copied from the Wittem Code

<sup>1204</sup> Adapted from the Wittem Code

<sup>1205</sup> Adapted from the Wittem Code and amended to incorporate Recommendation 4.

<sup>1206</sup> Copied from the Wittem Code

<sup>1207</sup> Copied from the Wittem Code

## *Article 5*

### **Moral Rights**

- (10) Independently of the author's economic rights, and even after the transfer of those rights, the author shall have the following rights:
- (a) to claim authorship of the work;
  - (b) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation otherwise referred to as the right of integrity;
  - (c) The right of divulgation which is the right to decide whether, and how the work is disclosed for the first time;
  - (d) The right of attribution which comprises:
    - (i) the right to be identified as the author, including the right to choose the manner of identification, and the right, if the author so decides, to remain unidentified;
    - (ii) the right to require that the name or title which the author has given to the work be indicated.
- (11) The rights granted to the author in accordance with the preceding paragraph shall, after death, be maintained in the manner set down in the legislation of the Member State.
- (12) Moral rights shall not be assigned.
- (13) Moral rights may be waived in accordance with the legislation of the Member State.
- (14) Member States that determine moral rights are inalienable are encouraged to mandate a shared compensation scheme for right-holders who contract to transfer or license their copyright, author's rights, related rights and/or economic rights in a work.
- (15) Moral rights inalienability is subject to receipt of fair remuneration.<sup>1208</sup>
- (16) Moral rights may be subject to assertion in accordance with the legislation of the Member State.

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<sup>1208</sup> Drafted by the author

## *Article 6*

### **Exhaustion of Goods in the European Union**

- (1) Member States shall introduce a mandatory provision wherein the first sale or other transaction on the territory of the Member States of the European Union made by the owner of the copyright or with their consent which transfers the ownership of the original or copy of the work shall lead to exhaustion of the right of their distribution on this territory without prejudice to the right to permit their further renting.
- (2) Art 5(1) shall not extend to intangible goods.
- (3) Insofar as Art 5(2) applies, Member States shall create an exception wherein:
  - a. computer programs, pursuant to Article 11 of this Regulation, are exhausted once placed into the European Union;
  - b. This exception shall extend to the number permitted only insofar as set down in the software licence, where relevant.
- (4) This concept shall be referred to as 'Exhaustion'.

# SPECIFIC PROVISIONS CONSOLIDATING AND AMENDING THE COPYRIGHT DIRECTIVES<sup>1209</sup>

*Duration, Accessibility and Enforcement*

## *Article 7*

### **The term of protection of copyright and certain related rights**

- (1) 2006/116/EC and 2011/77/EU are repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directives):
- (2) Article 1
- (3) (1)-(6) (2006)
- (4) 1(7) (2011)
- (5) Article 2 (2006)
- (6) Article 3
- (7) (1) and (2) (2011)
- (8) (3) and (4) (2006)
- (9) Articles 4-9 (2006)
- (10) Article 10 (1), (3)-(4) (2006)
- (11) (2) replaces “92/100/EC of 19 November 1992” with “2006/115/EC of 12 December 2006” (2006)
- (12) (5) and (6) (2011)
- (13) 10a (2011)
- (14) 2011/77/EU
- (15) Articles 2-5 removed (from section)

## *Article 8*

[Repeals (EU) 2017/1563 and (EU) 2017/1564 and consolidates the provisions]

**The cross-border exchange between the Union and third countries of accessible format copies of certain works and certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (EU/2017/1563)**

- (1) Articles 1 are amalgamated from the regulation/directive and drafted here (subject matter and scope)
- (2) Articles 2 are the same in both (definitions)
- (3) Article 3 (regulation) inserted here (export of accessible format copies to third countries)
- (4) Article 3 (directive) inserted here (permitted uses)

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<sup>1209</sup> The remaining provisions have been sourced, by the author, from the current directives and regulations and amended by the author to reflect the recommendations proposed in Chapter 7. Amendments are italicised and referenced.

- (5) Article 4 (regulation) inserted here (import of accessible format copies to third countries)
- (6) Article 4 (Directive) inserted here (accessible format copies in the internal market)
- (7) Articles 5 are virtually the same in both and inserted here with minor amendments required to the directives referred to (obligations of authorised entities)
- (8) Article 6 (regulation) and Article 7(directive) are the same (protection of personal data); replace “98/46/EC” with “EU/2016/679”
- (9) Article 7 (directive) inserted here
- (10) Article 7 (regulation) and Art 10 (directive) are amalgamated and inserted here (review)
- (11) Article 8 (directive) inserted here with minor amendments to the directives referred to (amendment to Directive 2001/29/EC)
- (12) Article 9 (directive) inserted here

### *Article 9*

[Repeals 2004/48/EC and (EU) 386/2012 and consolidates the provisions]

## **Enforcement of intellectual property rights and entrusting the EUIPO with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights**

- (1) It is essential that decisions regarding the validity and infringement of EU copyright goods and services have effect and cover the entire area of the Union, as this is the only way of preventing inconsistent decisions on the part of the courts of ensuring that the unitary character of EU copyright is not undermined. The provisions of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (1) should apply to all actions at law relating to EU copyright, save where this Regulation derogates from those rules.<sup>1210</sup>
- (2) Article 1 (directive) inserted (subject matter)
- (3) Article 1 (regulation) is combined with Article 2 (directive) and inserted here in relevant sub-paragraphs with minor amendments to directives referred to (scope)
- (4) Article 3 (directive) inserted (general obligation)
- (5) Articles 2-7 (regulation) inserted
- (6) Articles 4-17 (directive) inserted
- (7) Article 19 (directive) inserted

### *Rental and lending, related and resale rights*

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<sup>1210</sup> Drafted by this author. Inspiration for this clause is taken from Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1

## Article 10

### The rental right and lending right and on certain rights related to copyright in the field of intellectual property

- (1) 2006/115/EC is repealed. The draft EU Copyright Regulation includes the following provisions (from the repealed Directives):
- (2) Article 1 inserted
- (3) Article 2(2) is inserted and amended as follows:
  - (a) The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.
  - (b) *(2a) 'Co-authors' include machine-based cinematographic or audiovisual works created with or without a human author.*
  - (c) *(2b) Member States may opt out of (2a) where this conflicts with their national laws.*
  - (d) *(2c) Member States who opt out of (2a) shall not refuse protection of such works in Member States who include protections at (2a).*<sup>1211</sup>
- (4) Article 3(1)(a) is inserted and amended as follows:
  - (a) the author *as outlined in Article 2*<sup>1212</sup> in respect of the original and copies of the work;
- (5) Article 4 is inserted and amended as follows:
  - (a) "Article 4(c)" is replaced with "Article 4(2)"
  - (b) "91/250/EEC of 14 May 1991" and replaced with "[EU CR Article that replaces] 2009/24/EC of 23 April 2009"
- (6) Articles 5-6 are inserted
- (7) Article 7(2) is inserted and amended as follows:
  - (a) Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite *and by online digital means.*
- (8) Articles 8-9 are inserted
- (9) Article 10(1) is inserted and amended as follows:
  - (a) Member States *shall* provide for limitations to the rights referred to in this Chapter in respect of *use solely for the purposes of teaching or scientific research.*<sup>1213</sup>
  - (b) The former Article 10(1) is inserted and re-numbered Article 10(2) and includes a-c only as (d) would now be mandatory and included at 10(1))
- (10) The former Articles 10(2) and 10(3) are inserted as 10(4) and (5) respectively and are amended as follows:
  - (c) Former Art 10(2) replaces "paragraph 1" with " (2)"
  - (d) Former Art 10(3) replaces "paragraphs 1 and 2" with "(2) and (3)"
- (11) Articles 11-13 are inserted
- (12) Article 14 is inserted and amended as follows:
  - (a) "Directive 92/100/EEC" is replaced with "Directive 2006/115/EC"
- (13) Articles 15-16 are inserted and amended accordingly

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<sup>1211</sup> Words in italics drafted by the author and incorporates Recommendation 1 from Chapter 7

<sup>1212</sup> Words in italics drafted by the author and incorporates Recommendation 1 from Chapter 7

<sup>1213</sup> Words in italics drafted by the author and incorporates Recommendation 7 from Chapter 7

## *Article 11*

### **The resale right for the benefit of the author of an original work of art**

- (1) 2001/84/EC is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):
- (2) Articles 1-7 are inserted
- (3) Article 8(1) is inserted and amended as follows:
  - (a) “93/98/EEC” is removed and replaced with “EUCR Article referring to (2006/116/EC)”
- (4) Articles 8(2)-(4) are removed as all Member States transposed the Directive into their national laws.
- (5) Articles 9-10 are inserted
- (6) Art 11(1) is inserted and amended as follows:
  - (a) Remove “not later than 1 January 2009 and” and “thereafter”

## *Specific works*

## *Article 12*

### **The legal protection of topographies of semiconductor products**

- (1) 87/54/EEC is repealed
- (2) Articles 1-12 are inserted

## *Article 13*

### **The legal protection of computer programs**

- (1) 2009/24/EU is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directives):
- (2) Article 1 is inserted
- (3) Article 2 is replaced by the following:
  - (a) Art 2 The author of a computer program shall be:
    - i. (1) the natural person or group of natural persons who has created the program; or the legal person designated as the rightholder; and
    - ii. (2) *With regards to machine-based programs created with or without a human author, the legal person designated as the rightholder.*<sup>1214</sup>
    - iii. (3) Where collective works are recognised by the legislation of a Member State, the person considered by the legislation of the Member State to have created the work shall be deemed to be its author.

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<sup>1214</sup> Words in italics drafted by the author and incorporates Recommendation 3 from Chapter 7

- iv. *(4) Member States may opt out of Art (2) where this conflicts with their national laws.*<sup>1215</sup>
- v. *(5) Member States who opt out of Art (2) shall not refuse protection of such works in Member States who include protections at Art (2).*<sup>1216</sup>

- (4) Articles 2(2) and 2(3) in 2009/24/EU are inserted here, re-numbered to Articles 2(6) and (7) respectively and amended accordingly with EUCR Articles replacing 2009/24/EC
- (5) Articles 3-9 inserted
- (6) Article 10 is inserted and amended as follows:
  - i. “Directive 91/250/EEC” is replaced with “[EUCR Article that replaces] Directive 2009/24/EC”
- (7) Article 11 is inserted and amended accordingly

## *Article 14*

### **The legal protection of databases**

- (1) 96/9/EC is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):
- (2) Articles 1-3 are inserted
- (3) Article 4 is inserted and amended as follows:
  - (a) (1) remains the same
  - (b) (2) and (3) become (3) and (4) respectively
  - (c) (2) now reads as:
    - i. *(2a) ‘Author’ includes machine-based database works created with or without a human author.*
    - ii. *(2b) Member States may opt out of Art 4(2)(a) where this conflicts with their national laws.*
    - iii. *(2c) Member States who opt out of Art 4(2)(a) shall not refuse protection of such works in Member States who include protections at Art4(2)(a).*<sup>1217</sup>
- (4) Articles 5-15 are inserted

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<sup>1215</sup> *ibid*

<sup>1216</sup> *ibid*

<sup>1217</sup> Words in italics at i, ii and iii drafted by the author and incorporate Recommendation 3 from Chapter 7



## *Article 15*

### **The legal protection of services based on, or consisting of, conditional access**

- (1) 98/84/EC is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):
- (2) Article 1 is inserted and replaces “approximate” with “harmonise” (check this)
- (3) Article 2(a) is inserted and amended as follows:
  - (a) Replace “Article 1(a) of Directive 89/552/EEC” with “EU CR Article that replaces Article 1e of Directive 2010/13/EC”
  
  - (b) Replace “Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998” with “EU Cr Article that replaces Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015” (mention the two directives at pg 236 but explain lack of relevance for inclusion in EU reg).
- (4) Articles 2(b)-(f) are inserted
- (5) Article 6(1) is inserted and amended to remove the following two provisions:
  - (a) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 28 May 2000. They shall notify them to the Commission forthwith.
  - (b) When Member States adopt such measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States and replace them with:
    - (c) *“The provisions contained in 98/84/EC have been in force in all Member States since 28 May 2000”.*
- (6) Article 7 is inserted and amended as follows:
  - (a) Every two years the Commission shall present a report to the European Parliament, the Council and the Economic and Social Committee concerning the implementation of this Directive accompanied, where appropriate, by proposals, in particular as regards the definitions under Article 2, for adapting it in light of technical and economic developments and of the consultations carried out by the Commission.

**Article 16**

**The coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities**

- (1) 89/552/EEC, 2010/13/EU and (EU) 2018/1808 are repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directives):
- (2) Articles 1-7 are inserted (as updated by (EU) 2018/1808)
- (3) Article 8 is inserted (from 2010/13/EU)
- (4) Articles 9-11 are inserted (from 2010/13/EU)
- (5) Article 12 is deleted (as in (EU) 2018/1808)
- (6) Article 13 is inserted (updated by (EU) 2018/1808) and amended accordingly (dates)
- (7) Articles 14-18 are inserted (from 2010/13/EU)
- (8) Articles 19-20 are inserted (as updated by (EU) 2018/1808)
- (9) Articles 21-22 are inserted (from 2010/13/EU)
- (10) Article 23 is inserted (as updated by (EU) 2018/1808)
- (11) Articles 24-26 are inserted (from 2010/13/EU)
- (12) Ch VIII is removed (as updated by (EU) 2018/1808)
- (13) Ch IX is inserted (from 2010/13/EU)
- (14) Ch IXA is inserted after Ch IX (as updated by (EU) 2018/1808)
- (15) Article 29 is inserted (from 2010/13/EU)
- (16) Article 30 is inserted (as updated by (EU) 2018/1808)
- (17) Articles 31-32 are inserted (from 2010/13/EU)
- (18) Article 33 is inserted (as updated by (EU) 2018/1808) and amended accordingly (dates)
- (19) Article 34 is inserted and amended as follows:
  - (a) “Directive 89/552/EEC” is replaced with “EU CR Articles replacing Directive 2010/13/EC” and “Directive (EU) 2018/1808”
  - (b) Relevant enforcement dates (suitably amended to reflect accurate dates/timings)

## *Article 17*

### **The coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission**

- (1) Articles 1-2 are inserted
- (2) Articles 3(4) are inserted and amended with current Official Journal information
- (3) Article 4(1), (2) and (3) are inserted and amended as follows:
  - (a) “92/100/EEC” is replaced with “[EU CR Article that replaces 2006/115/EC]” in 4(1), (2) and (3)
  - (b) Reference to Art 6 is removed from 4(1)
  - (c) Reference to Art 2(7) is replaced with “[EU CR Article that replaces Art 3(6) Directive 2006/115/EC]” in 4(3)
  - (d) “12” is removed from 4(3)
- (4) Article 7(1) is inserted with the following amendments:
  - (a) Reference to Art 13(6) is removed
  - (b) “92/100/EEC” is removed and replaced with [EU CR Article that replaces “2006/115/EC”]
- (5) Art 8(2) is removed from the new EU CR due to expiration
- (6) Articles 9-11 are inserted
- (7) Art 12 is inserted and amended as follows:
  - (a) Member States shall ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorization for cable retransmission in good faith and do not prevent or hinder negotiation without valid justification. (same text)
  - (b) The number 1 is removed
  - (c) 12(2) and (3) are removed completely due to expiration
- (8) Article 13 is inserted
- (9) Article 14 is inserted and amended as follows:
  - (a) *Member State and Commission obligations to transpose Directive 93/83/EEC and submit relevant reports as per 93/83/EEC, Art 14 were completed by 1 January 2000.*<sup>1218</sup>

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<sup>1218</sup> Amended by the author

**Article 18**

**The harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) as amended on 06.06.19**

- (1) 2001/29/EC is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):
- (2) Articles 1-4 are inserted
- (3) Articles 5(1)(a) and (b) are inserted
- (4) Article 5(1) is amended to incorporate the newly mandated exception from Article 5(2)(c) as follows:
  - (a) Art 5(1)(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (5) Article 5(1) is amended to incorporate the newly mandated exceptions from Article 5(3)(a) and 5(3)(n) and amendments from Council Directive (EU) 2019/790 as follows:
  - (a) Art 5(1)(d) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790;
  - (b) Art 5(1)(e) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections
- (6) Article 5(2)(a)(b) and (d)-(e) is inserted
- (7) Article 5(3)(b) is amended in line with (EU) 2019/790 as follows:
  - (a) “uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability, without prejudice to the obligations of Member States under Directive (EU) 2017/1564 of the European Parliament and of the Council”
- (8) Article 5(3)(c)-(m) and (o) are inserted
- (9) Article 6(1)-(3) are inserted
- (10) Article 6(4) is inserted and amended as follows:
  - (a) Remove “92/100/EEC” and replace with “Regulation 20xx/xxx, Art [xx] that replaces 2006/115/EC”
- (11) Articles 7-10 are inserted
- (12) Article 11 is inserted and amended as follows:
  - (a) (1) removed
  - (b) (2) retain “where the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew”. The remaining text is removed.
- (13) Article 12(1) is inserted and amended by removing “Not later than 22 December 2004 and...thereafter”
- (14) Articles 13-15 are removed due to expiration

## Article 19

### Certain permitted uses of orphan works

- (1) 2012/28/EU is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):
- (2) Articles 1-8 are inserted
- (3) Article 9 is removed due to expiration
- (4) Article 10 is inserted and amended as follows:
  - (a) Para 1: remove “and shall by 29 October 2015”
  - (b) Para 2 is removed due to expiration
  - (c) Paras 3-4 remains intact
- (5) Articles 11-12 are removed due to expiration

## Article 20

### Collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

- (1) 2014/26/EU is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):
- (2) Articles 1-5(7) are inserted
- (3) Article 5(8) is inserted and amended as follows:
  - (a) The following text is removed due to expiration:- “A collective management organisation shall inform those rightholders who have already authorised it of their rights under paragraphs 1 to 7, as well as of any conditions attached to the right set out in paragraph 3, by 10 October 2016.”
- (4) A new Article 5(9) is inserted as follows:
  - (a) “Collective management organisations shall reply without undue delay to requests from individuals, indicating, inter alia, the objectively justified reasons for refusal of membership to the organisation and information needed in order for the collective management organisation to offer a membership.”
- (5) Articles 6-21 and 23-37 are inserted
- (6) Article 22 is updated as follows:
  - (a) “1(d): information on refusals to grant a licence pursuant to Article 5 clearly setting out objectively justified reasons for refusal pursuant to Article 5(3)”
- (7) Article 38(3) is inserted and amended with the following text amendments:
  - (a) Member States *were obligated that* by 10 October 2017, their competent authorities provided the Commission with a report on the situation and development of multi-territorial licensing in their territory. The report *was mandated to* include information on, in particular, the availability of multi-territorial licences in the Member State concerned and compliance by collective management organisations with the provisions of national law adopted in implementation of Title III of this Directive, together with an assessment of the development of multi-territorial licensing of online rights in musical works by users, consumers, rightholders and other interested parties.<sup>1219</sup>
- (8) Article 38(4) is inserted
- (9) Article 39 is inserted and amended as follows:
  - (a) Remove “shall” and replace with “were obligated to”
- (10) Articles 40-41 are inserted
- (11) Article 42 is inserted and amended as follows:
  - (a) Remove “95/46/EC” and replace with “(EU) 2016/679”
- (12) Article 43-45 is inserted

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<sup>1219</sup> Text amended by the author to reflect date expiration

## *Article 21*

### **Cross-border portability of online content services in the internal market**

- (1) EU/2017/1128 is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):
- (2) Articles 1-2(4) are inserted
- (3) Article 2(5)(i) is inserted and amended as follows:
  - (a) Insertion of “as amended by [EU CR Article that replaces] (EU) 2018/1808” after the words “2010/13/EU”
- (4) Articles 3-7 are inserted
- (5) Article 8(1) is inserted and amended as follows:
  - (a) Replace “95/46/EC” with “EU/2016/679”
- f. Article 9(1) is inserted
- g. Article 9(2) is removed due to expiration
- h. Article 10 is inserted
- i. Article 11 is removed due to expiration

## *Article 22*

### **Laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC**

- (1) (EU) 2019/789 is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):
- (2) Articles 1-12 are inserted
- (3) Article 13 removed do to expiration

## *Article 23*

### **Copyright and related rights in the Digital Single Market and amending former Directives 96/9/EC and 2001/29/EC**

- (1) (EU) 2019/790 is repealed. The consolidated EU Copyright Regulation includes the following provisions (from the repealed Directive):-
- (2) Articles 1-5(1)(b) are inserted
- (3) Article 5(1)(2) is inserted and amended as follows:
  - (a) The following words are inserted after “Notwithstanding Article 7(1), Member States may provide”:
    - i. subject to the Education Exception provided at Article 22 of this Directive<sup>1220</sup>*
- (4) Articles 5(3)-(4) are inserted

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<sup>1220</sup> Words in italics drafted by the author to incorporate Recommendation 7 from Chapter 7

- (5) Articles 6-11 are inserted subject to amendments to replace the references to the directives with relevant provisions in this draft regulation
- (6) Article 12 is inserted and amended as follows
  - (a) Art 12(1) “may” is replaced with “shall”<sup>1221</sup>
- (7) Articles 12(1)(a) and (b) are inserted
- (8) Articles 12(2)-(3) are inserted
- (9) Art 12(4) is inserted and amended as follows:
  - (a) Remove “*This Article shall not apply to mandatory collective management of rights*”<sup>1222</sup>
- (10) Article 12(5) is inserted
- (11) Article 12(6) is inserted and dates amended accordingly
- (12) Articles 13-16 are inserted
- (13) Articles 17(1)-(9) are inserted
- (14) Articles 17(10) is amended as follows:
  - (a) The current Article 10 becomes Article 10(1)
  - (b) A new provision is inserted called Article 10(2) as follows:
  - (c) *As of [relevant date] the Commission, in cooperation with the Member States, shall organise stakeholder dialogues for mandating a Central Processing Hub to facilitate cross-border licensing between user-generated content platforms, collective management organisations and right-holders.*<sup>1223</sup>
- (15) Articles 18-23 are inserted
- (16) Article 24 is removed as the amendments to the relevant directives have been incorporated into this draft regulation
- (17) Article 25 is inserted and amended to replace the references to the directives with relevant provisions in this draft regulation
- (18) Articles 26-31 are inserted

## *Article 24*

### **Collective management of copyright and related rights and multi-territorial licensing of rights in audiovisual works for online use in the internal market**

- (1) The Commission, in consultation with Member States, shall organise stakeholder dialogues to discuss mandating collective management of copyright and related rights for multi-territorial licensing of rights in audio-visual works for online use in the internal market.

## *Article 25*

*(Newly created by this Regulation to transpose into law Recommendation 7)*

### **Mandatory exception for limited uses of certain works in the Education Sector**

- (1) Member States shall provide for an exception or limitation to the rights provided for in Article [~~5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC and Article 15(1) of this Directive~~]<sup>1224</sup> in order to allow the digital use of audio-visual works for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved.

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<sup>1221</sup> Words in italics drafted by the author to incorporate Recommendation 7 from Chapter 7

<sup>1222</sup> Words in italics removed by the author to incorporate Recommendation 7 from Chapter 7

<sup>1223</sup> Words in italics removed by the author to incorporate Recommendation 5 from Chapter 7

<sup>1224</sup> Strike-through would be replaced with the relevant Articles from this draft regulation (instead of the “repealed” directives)

- (2) Educational institutes may use online audio-visual works on user-generated content platforms for this exception and transform it into a format that is accessible from any Member State in the European Union.<sup>1225</sup>
- (3) Educational institutes undertaking activities at (2) must ensure that such use
  - (a) takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff; and

is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

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<sup>1225</sup> This is to counteract “geo-blocking” so that students in their Home countries may access audio-visual works from other Member States that may otherwise be blocked. If at such time access to online audio-visual works is harmonised by this Regulation, this exception will be redundant and thus removed.



# REMEDIES TO COPYRIGHT INFRINGEMENT BASED ON MEMBER STATE LAWS (SKELETON ONLY)<sup>1226</sup>

*Rights and Remedies of the Copyright Owner*

## *Article 26*

### **Infringement actionable by copyright owner**

- (1) Member States ...

## *Article 27*

### **Provisions as to damages in infringement action**

- (1) Member States ...

## *Article 28*

### **Injunctions against service providers**

- (1) Member States ...

## *Article 29*

### **Undertaking to take licence of right in infringement proceedings**

- (1) Member States ...

## *Article 30*

### **Right to seize infringing copies and other articles**

- (1) Member States ...

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<sup>1226</sup> Copied from the CDPA 1988. This could be amended to reflect remedies recognised by EU27. These areas were excluded from critical discussion in the thesis but are listed here for completeness

**BIBLIOGRAPHY**  
of  
**SOURCES**

# PRIMARY SOURCES

## **UK STATUTES**

Competition Act 1998

Copyright, Designs and Patents Act 1988

European Union (Withdrawal) Act 2018

European Union (Withdrawal Agreement) Act 2020

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The Collective Management of Copyright (EU Directive) Regulations 2016 (S.I. 2014/221)

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European Convention on Human Rights

European Patent Convention 1973

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

Madrid Agreement Concerning the International Registration of Marks

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

Paris Convention for the Protection of Industrial Property

Statute of the International Court of Justice

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Universal Copyright Convention

Universal Declaration of Human Rights

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