Ana Ramalho

The Competence of the European Union in Copyright Lawmaking

A Normative Perspective of EU Powers for Copyright Harmonization

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Ana Ramalho
Department of International and European Law
Maastricht University
Maastricht
The Netherlands

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Maastricht, the Netherlands
2 November 2015

List of Abbreviations

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice (European Union)—Former European Court of Justice (ECJ)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EIPR	European Intellectual Property Review
General Court	General Court of the European Union—Former Court of First Instance (CFI)
IIC	International Review of Intellectual Property and Competition Law
IPQ	Intellectual Property Quarterly
OJ	Official Journal of the European Union
P.M.A.	Post-mortem auctoris
RIDA	Revue Internationale du Droit d' Auteur
Rome Convention	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration on Human Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty

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Chapter 1
Introduction

Nowadays, the European Union (EU) can proudly advocate that it has dealt with copyright law at the EU level. But does it have reasons to be proud? The Union has, in the past 20-odd years, passed legislation that addresses some features of copyright law. These legislative measures, also known as directives, have supposedly harmonized or approximated the copyright laws of the now 28 Member States.

However, the EU has not acted in a comprehensive fashion. It has touched upon some areas of copyright, while leaving others unharmonized. The choice of targets of harmonization has much to do with the powers of the Union. Because there is no explicit competence to approximate national copyright laws, the EU had to rely on other powers—namely, its competence to harmonize national laws for purposes of building an internal market. The choice of subject matter to harmonize is thus dependent on a notion foreign to copyright law: the "internal market."

The connection between the substantive aspects of copyright and the concept of internal market is not apparent to the naked eye, nor is it clear how the building of an internal market should steer copyright's wheel. The uncertainty surrounding these questions opens the door to private interests influencing the legislative process, which can in turn potentially damage the quality of copyright legislation if such influence is one-sided and devoid of any normative guidelines.

This is the starting point of this book, which analyses the European Union's competence to harmonize national copyright laws while standing at the intersection between European Union law and copyright law. In particular, I will examine whether the internal market-based harmonization of national copyright laws has resulted in a normative gap and, if so, how the EU legislator ought to address that gap. The aim of this book is therefore to contribute to building a normative framework for copyright lawmaking, as such normative framework is, I believe, key to a sound, scientifically-guided EU copyright legislation.

In order to present the research topic and the concrete research questions, this chapter first provides the background of copyright harmonization in the European Union (Sect. 1.1). It goes on to explain the underlying problem definition

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(Sect. 1.2), and to describe the outline and general methodology of the book (Sect. 1.3).

1.1 Background

Harmonizing copyright law at the EU level implies focusing on substantive aspects of national copyright laws, while following certain procedures established by the EU Treaties and developed by EU law. An analysis of the EU legislative competence in copyright therefore draws on both the fields of EU law and copyright law. As mentioned in Sect. 1.3 below, this research is undertaken primarily from an EU law perspective. This means that it examines the harmonization of national copyright laws mainly taking into account EU law principles and objectives. Nevertheless, such process needs to work having the copyright system as a backdrop, since that is, in the end, the subject matter of harmonization. While the EU law framework provides a roadmap for harmonization, it is therefore necessary to bear in mind copyright goals and rationales as well.

The main challenge with this approach, however, is that national copyright laws differ from one another not only in their particular rules, but also in their vision of the copyright system. Moreover, the challenge grows bigger as the EU also does. The first directive in the field of copyright, the Computer Programs Directive, was adopted in 1991 and aimed at harmonizing the laws of 12 Member States; the last one, the Collective Management Directive, dates from 2014 and had the daunting task of harmonizing 28 national laws. Proposing a unitary copyright vision as a basis for harmonization is thus a complex task, due to the growing diversity of national copyright systems. In addition, the harmonization program of the EU has tackled not only copyright but also so-called related or neighbouring rights. This adds up to the disparity between Member States. Not all countries of the EU recognize related rights as a separate category, and the goals and rationales of copyright and related rights are not entirely coincidental.

This section gives an overview of that diverse landscape. It explains the background of copyright and related rights harmonization in the EU. It does not, however, present a detailed account of each national legal order, as such endeavour is outside the scope of this book. Instead, it describes the main copyright theories and systems that provide the basis from where most EU copyright laws developed. Section 1.1.1 suggests that the goals and rationales of copyright are rooted in two main theories—the natural rights theory and the utilitarian theory—and briefly describes them. Traditionally, these two theories or doctrines correspond roughly to two systems of copyright, the *droit d'auteur* and the copyright systems respectively, under which most EU national laws operate. Section 1.1.2 follows suit and elaborates on the differences between the systems of copyright and *droit d'auteur*, as such differences constitute one of the difficulties in harmonizing the copyright laws of the Member States. Next, Sect. 1.1.3. explains the basis for the competence of the EU to legislate in the field of copyright, which is exactly connected to the

disparities between national copyright laws. Finally, Sect. 1.1.4. provides an historical perspective on how the EU legislator made use of that competence to adopt the so far eight directives that have harmonized particular aspects of national copyright laws.

1.1.1 Copyright Goals and Rationales

Many authors have focused on the topic of copyright's goals and rationales. The literature is vast, and the number and classification of the different justifications is not unanimous.[1] For the purposes of this book, a rough distinction will be made between two major lines of argument: the natural rights justification and the utilitarian justification.[2]

The natural rights argument comes down to equating copyright to a natural right. This implies that the legislature does not *create* the right, but instead merely *recognizes* its existence.[3] Natural law is responsible for two main theories of copyright rationales: Locke's labour theory and Hegel's personality rights theory.

The labour theory was formulated in the late seventeenth century by the British philosopher John Locke, and it implies that every man should be the proprietor of the product of his labour. According to Locke, if one puts one's labour and efforts into something which is either common property or nobody's property, then the result of such endeavour should be one's to take. Arguably, and even though Locke never applied his theory to intellectual property, his thought is relevant in that field to the extent that the underlying material of an intellectual property right—an idea or a concept—belongs to the commons. Consequently, if one's intellectual labour contributes to shaping an idea or concept so that it turns into an intellectual good, then one should be entitled to have some kind of proprietary right over the result.[4] This suggests the idea of "reward": the intellectual labour invested in creation should be rewarded.[5] The right to property derived therefrom, however, should

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[1] See, for example, Yen (1990), Strowel (1993), pp. 173 ff. Friedman (1994), Fisher (2001), Guibault (2002), pp. 7 ff. Geiger (2004), pp. 22 ff. Derclaye (2008), pp. 11 ff. Bently and Sherman (2009), pp. 34–39.

[2] Some authors break copyright rationales into more justifications, such as, e.g., the human rights justification (see for instance Derclaye 2008, pp. 13 ff. or the economic justification (which in any case is seen by some authors as derived from the utilitarian argument—see for an account Guibault 2002, pp. 12 ff).

[3] Ginsburg (1994), p. 132; Guibault (2002), pp. 8–9; van Gompel (2011), pp. 217–218.

[4] Fisher (2001), p. 170.

[5] Guibault (2002), pp. 8–9; Hughes (1988), pp. 296 ff. discussing the several interpretations of "reward" in the context of the labour theory).

not be absolute; Locke's theory comprised limitations dictated by the need to preserve the commons.[6]

The personality rights theory, on the other hand, was first approached by Immanuel Kant in the eighteenth century and picked up by the German philosopher Georg Hegel in the early nineteenth century. As its name indicates, this theory is based on the concept of personality, stating that an intellectual work embodies its creator's personality or will. Therefore, said work is worthy of protection because it is an expression of the personality or self of its creator.[7] According to this conception, property is an extension of personality, providing a means for self-actualization and personal expression.[8] Not surprisingly, then, the personality rights theory finds its ultimate expression in the recognition of moral rights.[9]

The two natural rights theories are not necessarily incompatible or self-excludable, not least since both focus on the relation between the author and his work, and not on the link between such relation and society.[10] Indeed, many authors consider copyright to be a mix of property and personality interests, being therefore based on both theories.[11] This question is closely connected to the discussion about copyright's nature, and namely whether it is a property right or a personality right.[12]

In contrast to the natural rights theory, the utilitarian justification, originally developed by British philosophers Jeremy Bentham and John Stuart Mill, considers that the main goal of copyright is to promote social welfare, which is achieved by granting incentives to creation and supporting the dissemination of intellectual

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[6] See Locke (1924) §27, p. 130. Ramello (2005), pp. 134–135, points out that Locke formulated two limitations: the "sufficiency proviso" (where appropriability would be acceptable when "*there is enough and as good left for others*") and the "spoilage proviso" (according to which it is necessary to preserve the integrity of common resources from "*impoverishment and depletion*"). Hughes (1988), pp. 298 ff. stresses the importance of the "non-waste condition" in the context of Locke's limitations to acquisition of property—this condition would not allow the collection of property to such extent that some of it would be destroyed without being used, since that would imply an "*unjustified diminution of the common stock of potential property*." See also Locke (1924) §37, pp. 134–135.

[7] Hughes (1988), p. 330; Fisher (2001), Kretschmer and Kawohl (2004), pp. 31ff.

[8] Hughes (1988), p. 330.

[9] van Gompel (2011), p. 218.

[10] Lacey (1989), p. 1564 and Guibault (2002), p. 8.

[11] See, e.g., Hughes (1988), pp. 329–330 and 365–366; van Gompel (2011), p. 218 and references cited therein.

[12] An argument can be made, however, that at the EU level the controversy around copyright's nature seems to be settled. The Charter of Fundamental Rights of the European Union ("the Charter"), which has the same legal value as the EU Treaties, states that "intellectual property shall be protected" in paragraph 2 of a provision dedicated to the general right to property (Article 17 of the Charter). In 2001, the EU legislator has expressly adhered to this theory by stating, in recital 9 of the Information Society Directive, that "intellectual property has therefore been recognised as an integral part of property." The Court of Justice of the European Union ("CJEU") has also treated copyright as a property right (see, e.g., case C-200/96—Metronome Musik), and the European Court of Human Rights explicitly recognized intellectual property to be protected by the fundamental right to property (in case Anheuser-Busch Inc. v. Portugal (2007), p. 72).

goods to the public.[13] This “incentive” element can sometimes be confused with the “reward” argument presented by the natural rights theory; however, while both concern the economic interests of creators, their objective is not the same: the “incentive” is granted with society’s interests in view, and the “reward” aims at compensating the creators for their intellectual effort.[14] Moreover, unlike the advocates of the natural rights theory, utilitarians do not understand copyright as something that stems from natural law and is merely recognized by the legislator. Instead, the utilitarian theory views copyright as a positive right that is granted with the aim of furthering societal goals. The emphasis here is then on the benefits to society that can come from the creation of intellectual goods, rather than on the self-standing protection of creators. As a result, the rights granted to creators are instrumental to society’s interests, causing them to be carefully delineated; their limitation, conversely, is much less restrained, due to the socially desirable outcome of access to creative works.[15]

The natural rights theory and the utilitarian theory, though differently grounded, are not necessarily incompatible. Several authors have pointed out that both have their merits and neither seem to be capable of being a stand-alone justification for the existence of copyright and some of its features. For instance, some authors have defended that the view that natural rights theory can justify the existence of copyright, but it does not give any guidance regarding the scope or duration of the right, elements which are based on utilitarian considerations.[16] Others are of the opinion that a number of copyright doctrines, such as for example the idea/expression dichotomy, can actually be explained by either theory—arguably, the expression would be the fruit of the labour that the creator applies to something common (the idea); and, at the same time, it is economically more efficient to grant rights over the expression only, leaving the idea free for others to produce creative works.[17]

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[13] Guibault (2002), p. 10; Derclaye (2008), p. 12; Fisher (2001), Geiger (2004), pp. 27–35; Friedman (1994), p. 176.

[14] Guibault (2002), p. 11.

[15] Ginsburg (1994), pp. 132–133; Senftleben (2004), pp. 6–7.

[16] Geiger (2004), pp. 38–39. Along similar lines, see Lacey (1989), pp. 1564 and 1595–1596: the author points out that some aspects of the positive copyright law are not explainable by the natural rights theory, while the incentive justification “does not reflect the complexity of the world of artists and their real needs and motives.” Also suggesting the reconciliation of both theories, see Yen (1990), especially 558–559 (“Copyright has undeniable economic consequences.[. . .] However, we must also remind ourselves that the economic effects of copyright must, in the end, be justified by principles beyond the realm of economics. We must identify the natural law insights which guide how the economic institution of copyright should be shaped”); and Brown (1986), especially, p. 607 (“*Droit d’auteur* theory gives authors an advantage. They need one because they are so often confronted by giant users with more monopoly power than the copyright system gives the author. On the other hand, the rhetoric of rights can be cooled off by the cold bath of economic analysis.”)

[17] Yen (1990), pp. 531 ff.

It should also be noted that the natural rights theory and the utilitarian theory have been mainly used to justify copyright. Related or neighbouring rights have their own goals and rationales. To begin with, related rights are heterogeneous, covering different groups of right holders—namely, performers, film and phonogram producers or broadcasters—whose protection has different rationales.[18] It has been generally acknowledged that at least the objectives of protection of performers differ from those of the other related rights—the position of performers seems closer to that of authors than to the other related rights' owners, since they are individuals and their personality is often reflected in their artistic performances.[19] This is to a great extent linked to natural law arguments applicable to copyright, and in particular to the need to protect the expression of one's personality. As a consequence, it has been pointed out that performers are not all that different from authors of derivate works who adapt the original work, such as translators.[20] Conversely, the activity of producers and broadcasters has a commercial or technical nature and protection is based on investment. The rights granted to these entities aim therefore at securing that investment.[21]

1.1.2 Systems of Copyright Protection

Connected to the different copyright justifications are the two major systems or traditions of copyright: the civil law or *droit d'auteur* system (adopted, e.g., in Germany and France), and the common law or copyright system (followed by such countries as the UK and Ireland). These are not the only systems of copyright protection—for example, the so-called socialist system existed in certain Eastern and Central European countries that are now part of the EU, although these countries have evolved towards a *droit d'auteur* system today.[22] Moreover, each country within each of the two systems has adapted it to its own legal order, resulting in differences from one country to another even if they share a common tradition. This means that contrasting the *droit d'auteur* with the copyright system is only a first step in approaching the question of diversity between the several EU Member States, and how that question influences harmonization efforts.

In addition, the boundaries between those two main systems are not always clear-cut. It is true that, on the one hand, each of these systems privileges different justifications. The conception of copyright as a natural right (either a property or a

[18] Kerever (1991), pp. 5–6; van Eechoud et al. (2009), p. 186.

[19] See Kerever (1991), pp. 6–7; Cohen Jehoram (1990–1991), p. 78; van Eechoud et al. (2009), pp. 186–190 and references cited therein.

[20] Ricketson and Ginsburg (2006), pp. 1206 and 1208; Cohen Jehoram (1990–1991), *id.*; van Eechoud et al. (2009), p. 186.

[21] Kerever (1991), pp. 7–8; van Eechoud et al. (2009), pp. 190–191.

[22] Von Lewinski (2008), p. 34. See, at length, Rajan (2006), pp. 72–88.

personality right, or both) is more dominant in the *droit d'auteur* system, while the copyright tradition is primarily based on utilitarian arguments. On the other hand, however, this divide is not completely rigid, in the sense that each system is not completely oblivious to the other's justifications.[23] There are also some common traits to them—for instance, they both recognize a few basic exclusive rights that cover a broad range of acts of exploitation.[24]

Nevertheless, despite some similarities, the parallelism between each system and its more predominant rationale still explains certain differences between national laws, according to the tradition they are rooted in.[25] These differences can represent an extra challenge for the EU harmonization program, not least because each system also stands for particular cultures and identities.[26] This might bring about added difficulties in finding a common ground and a compromise between EU Member States in the context of harmonization. Some relevant differences between the two systems are briefly outlined below.

A first point of discrepancy is the fact that *droit d'auteur* systems traditionally set a higher threshold in terms of originality and degree of creativity for a work to qualify for copyright protection. As shall be seen in Chap. 6, there has been a convergence of the different thresholds operated by both the EU legislator and the CJEU; however, *droit d'auteur* systems originally required that the work reflected its author personality, while copyright systems valued the skill, labour and judgment invested in creating the work.[27]

As a consequence of these different thresholds for protection, the type of works that can be protected by copyright also differs. Certain kinds of subject matter do not qualify for copyright protection in *droit d'auteur* countries, where they will instead be protected by related or neighbouring rights. Conversely, such subject matter will be considered as a copyright protected work in countries following the copyright system. It is the case, for example, of phonograms and broadcasts.[28]

Moreover, because in the *droit d'auteur* countries the work reflects the author's personality, the initial author will usually be a natural person,[29] while copyright countries comprise significant exceptions to this rule. An example of these

[23] See Strowel (1993), pp. 177–178, noting that each system does not completely overlook the other's justifications. See in addition, along similar lines, Davies (1995), pp. 964–965; Dreier (2001), pp. 298–303; Guibault (2002), p. 12 and references cited therein; Senftleben (2004), pp. 7–10; Nocella (2008), p. 151; von Lewinski (2008), pp. 40–41; Goldstein and Hugenholtz (2010), pp. 14 ff.

[24] Ohly (2009), pp. 212–213.

[25] Goldstein and Hugenholtz (2010), p. 6.

[26] Von Lewinski (2008), pp. 34 and 63.

[27] Strowel (1993), pp. 391 ff. especially 468–469; Davies (1995), pp. 969–970; von Lewinski (2008), pp. 45–46; Torremans (2010), pp. 180 ff.

[28] Von Lewinski (2008) *id.*

[29] There are however exceptions to this rule, such as for example the case of collective works in France—see Strowel (1993), pp. 383–386; Davies (1995), p. 971; and von Lewinski (2008), pp. 47–48.

differences can be seen in the regime of authorship in films. *Droit d'auteur* countries will in principle recognize as authors the director and/or other natural persons whose creativity is somehow comprised in the film; copyright countries, on the other hand, will normally consider the film producer as its author.[30] The same goes for matters of initial ownership. In countries following the copyright system, legal persons can be the initial owners of copyright, e.g., in the context of an employer/employee relationship, if the latter creates the work in the context of his employment contract. Conversely, most *droit d'auteur* countries will allocate initial ownership to the individual author (i.e., the employee).[31]

Also derived from the link between the author and his work is the issue of transferability of rights. In a contract where the author transfers his exploitation rights to a producer or other similar entity, he is often deemed to be the weaker party, as he has less bargaining power. *Droit d'auteur* legislations are usually more prone to counterbalance this situation, for example by establishing interpretation rules that favour authors in case of unclear contractual clauses. Common law countries give more weight to freedom of contract and usually refrain from intervening through legislation.[32]

As regards economic rights, as mentioned above, both systems recognize a few exclusive rights. Such rights differ in scope from country to country, but usually not because of the distinction between the two systems, as demonstrated by differences between countries within the same system of protection.[33] However, remuneration rights—such as the remuneration right for private reproductions, also called private copy levy—are more common in *droit d'auteur* countries.[34]

In addition, one key difference between both systems is the treatment afforded to moral rights. These are broader and stronger in *droit d'auteur* jurisdictions, with many of those countries providing for an unlimited duration of moral rights, and/or their unwaivability, non-transferability or inalienability. Most countries that follow the copyright system have some sort of protection for moral rights. However, there will still be many cases where moral rights do not apply or can be waived in copyright countries, weakening their position in such system.[35]

The regime of exceptions and limitations to the exclusive rights also differs from one system to another. The two systems traditionally do not give equal weight to exceptions or limitations vis-à-vis the exclusive rights, with *droit d'auteur*

[30] Although it is now a requirement for EU Member States to recognize at least the principal director as one of the authors of a cinematographic or audiovisual work—see Article 2 paragraph 2 of the Rental and Lending Rights Directive (2006), Article 2 paragraph 1 of the Term of Protection Directive (2006), and Article 1 paragraph 5 of the Satellite and Cable Directive.

[31] Davies (1995), p. 971; Cornish et al. (2010), pp. 530 ff.

[32] Cornish et al. (2010), p. 530; Von Lewinski (2008), pp. 59–60.

[33] Von Lewinski (2008), pp. 54–55, giving the example of *droit d'auteur* countries Germany (where transfers of ownership are covered by the distribution right) and France (where transfers of ownership are covered by a *droit de destination* developed from the reproduction right).

[34] Von Lewinski (2008) *id.*; Geiger (2010), p. 520.

[35] See Vaver (1999), pp. 272 ff. Nocella (2008), pp. 153 ff. see also Strowel (1993), pp. 481 ff.

countries tending to interpret the limitations restrictively when compared to copyright countries.[36]

Finally, a last difference worth mentioning is the approach taken to collective management organizations ("CMOs") and their regulation. Copyright countries normally keep the regulations of CMOs to a minimum, covering mainly economic-related functions such as the collection of royalties. *Droit d'auteur* countries extend this regulation to other aspects, namely the relation with right owners or the social and cultural roles of CMOs.[37]

Some of the disparities between the two systems were ironed out by the EU harmonization program, as shall be seen later on in Chap. 6. The remaining differences can, however, still constitute a challenge for harmonization endeavours.

1.1.3 EU Competence in Copyright

In order to legislate in any given area, the EU needs to have the necessary legislative competence. The EU will be granted legislative competence whenever the Treaties empower it to act, in order to achieve the objectives set therein.[38] It follows that any legislative act must be based on a Treaty provision that justifies an action by the European legislator. In other words, legislative acts must have a legal basis.

The Treaties do not contain any reference to competence in the field of copyright. The Treaty of Lisbon, which entered into force on 1 December 2009, amends the previous EC and EU Treaties and comprises a new article that allows the EU to create European intellectual property rights[39]—that is, intellectual property titles valid in the 28 EU Member States, much like the current Community Trade Mark[40]

[36] Von Lewinski (2008), pp. 56–57; Geiger (2010), pp. 519–520.

[37] Dietz (2002), pp. 899–904; von Lewinski (2008), pp. 61–62.

[38] This is the so-called principle of conferral, enshrined in Article 5 paragraph 2 TEU: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

[39] Article 118 of the Treaty on the Functioning of the European Union ("TFEU"): "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament."

[40] Instituted by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

or Community Design.[41] The provision thus opens the door for the creation of a European unitary copyright title, valid in all European Member States. The process and the end result of this "unification" are different from the harmonization of pre-existing national laws: the creation of a new, pan-European copyright title adds a new form of right to the legal order (regardless of whether or not it replaces national copyright entitlements), whereas harmonization of national copyright laws arguably adjusts existing national laws by approximating them. Several authors have pointed out the difficulties inherent to the creation of a unitary copyright title, which, for the most part, amount to its interaction with existing national copyrights.[42] Whether the unified copyright title will ever become a reality is hard to predict, but even in the case that it does, it has been argued that working towards such an endeavour should run parallel to the improvement of the current copyright legal framework, namely through further harmonization.[43] In other words, harmonization of national copyright laws is most likely here to stay, and will probably be carried out in the same way as it has been until now, since Treaty provisions granting the EU power to harmonize national laws have not changed much in that regard.

Since there is no specific clause in the Treaties that bestows upon the EU the competence to harmonize national copyright laws, that harmonization has not been based on copyright-related concerns. Instead, legislative activity in this field is linked to the building of an internal market, i.e., "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."[44] This is because cross-border trade of copyright goods and services can be effectively impeded by national legislative differences. The copyright laws of the Member States differed—and still do in many aspects—from one another, in such fundamental features as the type and scope of the rights granted. For example, a difference in the term of protection of copyright could mean that distribution of a copyright good would be free in one country but would depend on the authorization of the right owner in another country where the protection had not yet expired.

Therefore, most harmonization measures in the field of copyright have so far been adopted following Article 114 of the Treaty on the Functioning of the European Union ("TFEU")—formerly Article 95 of the EC Treaty—which grants the EU competence to approximate national laws with the purpose of establishing

[41] Instituted by Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

[42] See van Eechoud et al. (2009), pp. 317 ff.; Cook and Derclaye (2011), pp. 261–263; Hilty (2012), pp. 360–361.

[43] Hugenholtz (2013), p. 291. For a more skeptical view on combining unification with further harmonization, see Hilty (2012), pp. 360–361.

[44] Article 26 paragraph 2 TFEU.

or furthering the functioning of the internal market.[45] However, while conferring the EU competence to harmonize national laws, Article 114 TFEU does not give any guidance regarding what the substantive content of harmonization measures ought to be. The purpose of the granted competences is to enable the establishment and functioning of the internal market, independently of the subject matter that constitutes the direct object of EU legislation. Article 114 TFEU is thus also called a functional competence, since the Treaties grant the EU powers to achieve an objective (the establishment and functioning of the internal market), but leave the substantive choices to the legislator's discretion.[46] In the field of copyright, for example, differences in the term of protection can hinder cross-border trade and can thus fall under the competence of Article 114 TFEU. The provision, however, gives no indication as to how the legislator should decide on the optimal harmonized term of copyright protection.

Due to its functional character, Article 114 TFEU has no normative content. This also makes it a rather flexible competence norm, in the sense that it enables the EU to harmonize a wide range of subjects, so long as there is a point of connection to the building of an internal market.[47] But it can in addition make harmonization greatly dependent on the legislator's discretion—in what concerns, e.g., the choice of the specific subjects to harmonize and their respective regime—which in turn might lead to a situation of "competence creep."[48]

The CJEU has partly addressed this problem, although it has done so by focusing on the definition of the norm's objective, rather than by infusing normative content into Article 114 TFEU. The Court has ruled that, for a measure to be validly based on Article 114 TFEU, it must have as a genuine goal the establishment or functioning of the internal market. According to the Court, the internal market is a genuine goal if obstacles to free movement exist or are likely to occur, and the measure in question is designed to prevent them.[49] As the Court made clear, however, this does not mean that a legislative measure cannot have an impact on other fields or pursue other aims, as long as its main goal is in fact the building of an

[45] Article 114 paragraph 1 TFEU: "Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26 [on the aim of establishing an internal market]. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

[46] Quadra-Salcedo Janini (2006), pp. 68 ff. Weatherill (2004a), pp. 6–7.

[47] It can be argued that the same problem exists in relation to Article 118 TFEU, since the creation of a EU-wide copyright title is also dependent on the "context of the establishment and functioning of the internal market." The attachment of the competence of Article 118 TFEU to the building of an internal market was confirmed by the CJEU in joined cases C-274-295/11—Spain v. Council, p. 21.

[48] Weatherill (2004b), p. 639 and references cited therein.

[49] See case C-376/98—Tobacco Advertising I, p. 84, and case C-380/03—Tobacco Advertising II, p. 41.

internal market.[50] The Court seems thus to imply that it is admissible to build up normative content in the context of Article 114 TFEU, even though it gives no indication regarding what that content ought to be in any given policy area.[51]

It should also be noted that the achievement of an internal market serves as more than a legal basis for the legislator to act. In fact, the building of an internal market is one of the main objectives of the EU.[52] Legislative measures aimed at harmonizing divergent national laws are just one way to achieve that objective; another one is abolishing national rules that constitute barriers to cross-border trade where they cannot be justified in individual situations, which is done by the CJEU. The difference between both methods is usually referred to as positive and negative integration respectively.[53] Therefore, for example, any decision of the CJEU that establishes that a national measure cannot be maintained because it hinders cross-border trade amounts to negative integration. Positive integration, on the other hand, consists of supranational measures that promote the internal market. Such measures are typically legislative acts (e.g., directives or regulations) that are effective throughout the EU. Unlike negative integration—that develops on a case-by-case basis—positive integration has a broader effect, since one legislative measure will in principle cover all EU Member States.

Doctrinal views on this matter generally agree that both types of integration are complementary.[54] CJEU decisions might in some cases prompt the EU legislator to act, for example by referring to the lack of harmonization of a certain field that is causing a hindrance to cross-border trade. Moreover, the Court might establish some principles, guidelines or concepts that are then used by the EU legislator in

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[50] See case C-376/98—Tobacco Advertising I, p. 78, and joined cases C-465/00, C-138/01 and 139/01—Österreichischer Rundfunk, p. 41.

[51] This was too hinted by Advocate General Fennelly in case C-376/98—Tobacco Advertising, p. 64. His opinion points to the need of a functional competence like that of Article 114 TFEU being "influenced by substantive concerns" ("If the condition of having as its object the establishment or functioning of the internal market, or that of addressing national provisions on the taking up or pursuit of activities as service providers, is satisfied, the content of an approximating or coordinating measure—the level of regulation, the type of scheme, etc.—must also, in principle, be influenced by substantive concerns (. . .)").

[52] Article 3 paragraph 3 TEU reads: "The Union shall establish an internal market". Additionally, article 26 paragraph 1 TFEU states that "the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties." On the subject of the internal market as an objective of the EU, see infra Chap. 4.

[53] The terms positive and negative integration were first coined by Tinbergen, who defined them in the following terms: negative integration would be the "measures consisting of the abolition of a number of impediments to the proper operation of an integrated area"; positive integration could be defined as "the creation of new institutions and their instruments or the modification of existing instruments" (Tinbergen 1965, p. 76). In what concerns subsequent literature on this subject, see inter alia Scharpf (1996), p. 15; Steiner et al. (2006), p. 324; Pelkmans (1984), p. 4; Lohse (2011), pp. 293 ff.

[54] See e.g. Weatherill (2010), p. 484, Kurcz (2001), pp. 288 ff. de Vries (2006), p. 319; Jarvis (1998), pp. 328 ff.

positive integration measures. This is related to what has been called "judicial activism"—a term used to refer to the case law of the CJEU as "creative", granting the Court a quasi-legislative role.[55]

The interplay between negative and positive integration means that an analysis of the legislative competence of the EU to harmonize national copyright laws has to take into account the activity of the CJEU. This is particularly true for the field of copyright, which has first been tackled in the context of negative integration—concrete national copyright rules were impeding cross-border trade in certain cases, which were brought before the CJEU. This matter is developed further in Chaps. 3 and 6 of this book. For now, suffice it to say, the activity of the CJEU has, to a certain extent, influenced the development of the EU copyright legislation. An overview of that legislative development is provided in the next section.

1.1.4 Development of the Copyright Acquis

In the field of copyright, nine directives have so far been adopted, all of which are based on the need to further an internal market for copyright goods and services. Their goal is thus to eliminate or at least even out the differences between national laws that hinder the cross-border trade of those goods and services. As a consequence, the main legal basis used to harmonize national copyright laws is current Article 114 TFEU (formerly Article 95 of the EC Treaty). These directives together form part of the copyright *acquis communautaire*, which has been defined as "the body of common rights and obligations that are binding on all the EU countries, as EU Members," thereby comprising "the legislation adopted in application of the treaties and the case law of the Court of Justice of the EU."[56] The *acquis* therefore represents what was "acquired"—something that should not be challenged, binding the European Union and the Member States—and can refer to either secondary legislation or decisions issued by the CJEU.[57]

Each directive reveals a particular vision and deals with specific aspects of copyright. As their names indicate—Computer Programs Directive (1991 and

[55] See Tridimas (1996), pp. 199 ff. Cappelletti (1981), pp. 16 ff. see more generally on the impact of CJEU decisions on subsequent policy-making Stone Sweet (2011), pp. 147–148.

[56] Proposed definition of *acquis communautaire* on the official website of the European Union at http://eur-lex.europa.eu/summary/glossary/acquis.html (last accessed 4 October 2004).

[57] It has been widely accepted that the *acquis communautaire*, as the European legal patrimony, comprises a "judicial *acquis*" as well: see Pescatore (1981), pp. 619 f. and Gialdino (1995), p. 1098. The latter points out that the Court contributes to the *acquis* in two different ways: "on the one hand, the Court cooperates in consolidating the Community patrimony, while also acting as a catalyst for new developments in the definition of a concept which is evolutionary by its very nature; on the other, the Court is called upon to ensure respect of the *acquis*, thus playing the typical role of garantor." See however Tridimas (2012), noting that, even though CJEU decisions are generally followed in subsequent decisions, there is formally no true doctrine of judicial precedence in the EU.

2009),[58] Rental and Lending Rights Directive (1992 and 2006),[59] Satellite and Cable Directive (1993),[60] Term of Protection Directive (1993, 2006 and 2011),[61] Database Directive (1996),[62] Information Society Directive (2001),[63] Resale Right Directive (2001),[64] Orphan Works Directive (2012),[65] and Collective Management Directive (2014)[66]—the individual directives cover specific features of copyright, such as protected subject matter or exclusive rights. In fact, the only directive so far that has had a more horizontal approach is the Information Society Directive, as it covers the main rights in copyright and exceptions thereof. But there is no truly horizontal instrument regulating copyright in a holistic fashion in the EU. Arguably, one of the reasons for this is the fact that the main legal basis to harmonize the field of copyright has been the establishment and functioning of the internal market. Thus, only copyright aspects that have, or threaten to have, an impact on the internal market have supposedly been addressed by the legislature.[67]

However, the EU legislative history in copyright is not originally connected to internal market goals only. The first reference to a legislative intervention in the field of copyright—a resolution approved unanimously by the European Parliament in 1974—was indeed marked by cultural, rather than internal market, considerations. The main focus of that resolution was the protection of Europe's cultural heritage, and not the attainment of internal market goals. In order to achieve protection for Europe's cultural heritage, the Parliament called on the European

[58] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, replaced on codification by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009.

[59] 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, replaced on codification by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006.

[60] 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.

[61] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, replaced on codification by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 and amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011.

[62] Directive 96/6/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

[63] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

[64] Directive 2001/84/EC of the European Parliament and of the Council of 22 September 2001 on the resale right for the benefit of the author of an original work of art.

[65] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

[66] 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.

[67] See von Lewinski (2004), p. 97 and Cohen Jehoram (2001), p. 536.