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# Territoriality and the Quest for a Unitary Copyright Title

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**Abstract** After 30 years of harmonization at EU level, copyright and related rights remain decidedly territorial in scope. This is despite the continuous quest for an internal market and the profound impact on cross-border creation, dissemination and use of cultural content. This contribution recounts the outcome of research done on territoriality in the context of the ReCreating Europe project. It discusses why national territorial rights persist, what type of legal mechanisms the EU legislature employs to address the adverse effects of territoriality, and sketches a number of models for a unitary title based on Art. 118 TFEU which could be explored going forward.

**Keywords** EU copyright · Unitary title · Territoriality · Article 118 TFEU

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## 1 Introduction

Sometimes it can be helpful to point out open doors, especially if they have been open for so long that the observer runs the risk of no longer noticing them. So here are some examples. The importance of copyright for the realization of the internal market has been grasped from early on, although its cultural significance has from the start been an argument to protect right owners (and member states) from the full force of provisions that promote the free flow of goods and services.[1] After the European Court of Justice embraced the exhaustion doctrine for intellectual property in the 1970s,[2] limiting the territorial exercise of rights, in the 1980s the European institutions embarked on a harmonization journey that they pursue to this day. Thirty years on from the first directive, the *acquis* is composed of 13 directives and two regulations, and a rich body of interpretative judgments of the Court. In all that time, the principle that copyright and related rights are territorial in nature has remained a cornerstone of EU policy. The EU has grown from its initial six member states to 27, so that in the digital single market a copyright in each work is now in reality a basket of 27 territorially distinct rights. The same is true, of course, for the various related rights and *sui generis* database rights.

The reasons for the continued mosaic approach are historic and path-dependent. Territoriality at the level of nation states is a firm feature of the international copyright system developed in the 19th century, and it is shaped by and continues to shape industry practices and business models that separate distinct geographical markets. Also, and paradoxically perhaps, the EU's Better Regulation framework for policy intervention tends to favour incremental, piecemeal legislative action. The Better Regulation approach requires that interventions are evidence-based (with a large role for stakeholders providing input), and help simplify existing legislation and reduce regulatory costs. What is more, the Commission currently also has a policy of one-in/one-out, i.e. for each new piece of legislation in a given area, one existing piece in the same area must in principle go.[3] The Better Regulation agenda has been characterized by civil society as a form of deregulation that risks prioritization of business interests.[4]

Whatever its shortcomings, it is obvious that the Better Regulation approach does not invite grand projects. It is worth noting that unitary titles in other areas of intellectual property typically predate the Better Regulation agenda, and of course originated in times when the EU had relatively few member states. Trademarks valid for the entire EU were created nearly 30 years ago; EU-wide designs over 20

[1] Synodinou (2021), p. 41.

[2] For an indepth historical account, *see* Mezei (2022).

[3] *See inter alia* Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ 2016 L 123; European Commission (2021), The 2021 Better Regulation: Joining forces to make better laws, Brussels.

[4] Giménez Bofarull, Hoffmann-Axthelm and Manzi (2021), pp. 32–33.

years ago.[5] The unitary patent was a special and incredibly complex case, the European Patent Convention not being an EU instrument. However, that too has in the end graduated from the drawing board and become a reality. On the copyright front, however, discussion on a unitary title has not yet started in earnest. The industry preference for national territorial rights played an important role in the decision to create EU-wide titles on top of the existing system of harmonized national rights. This allowed businesses with a predominantly local profile to continue to obtain local protection (through national trademarks and designs) while making it easier for businesses active in part or all of the EU to obtain EU-wide rights. As we shall see, such a dual approach would be much more of a challenge to adopt in copyright and related rights. But before turning to the matter of an EU copyright title, let us first briefly turn to the question why territorial rights are problematic and what mechanisms the EU has used so far to overcome the adverse effects of territoriality.

## 2 Problems of Territoriality and Repair Mechanisms in the *Acquis*

To the extent that the existence, scope and duration of rights are subject to precisely the same rules across EU countries, rightholders, intermediaries and users know how to direct their behaviour. When exploiting or using a work, it is not necessary to take into account the copyright laws of various member states that may somehow be involved.[6] Overcoming differences in national laws has therefore been a staple of EU copyright policy. By now, in large part, the subject-matter, scope and duration of rights are indeed harmonized, although gaps in the *acquis* remain. Harmonized does not mean unified, and there is a wealth of material out there detailing how differences in national laws remain; various contributions in this issue highlight them. This alone already leaves rightholders and users alike with a certain level of uncertainty and costs associated with compliance in case activities are not strictly limited to one member state. The situation is aggravated where parties need to clear necessary rights for extensive cross-border use. The territorial nature of rights is an important cause.

Due to their territorial nature, intellectual property rights are well suited to partitioning the internal market along national borders. The Commission and the Court in their roles as guardians of *inter alia* EU competition law have occasionally prohibited arrangements which, having territorial rights as their foundation, overly curbed the freedom of rightholders or service providers, for instance, to deal with collective management organizations outside their own place of establishment.[7] But broadly speaking, the adverse effects of territoriality that policymakers sought to

[5] Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark, OJ 1993 L 11, *current* Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), OJ 2017 L 154.

[6] This is a simplication, of course, because contract law, civil procedure, etc., are also relevant in many cases involving exploitation or use of protected content.

[7] On exclusive licensing agreements and anti-competitive behaviour, *see* Mazziotti and Simonelli (2016), pp. 55–66.

address have not been informed by competition concerns, but by the desire to facilitate clearing rights and to increase legal certainty for (institutional) users of copyright material, predominantly in the cultural heritage and educational sectors.

An example of the former is the system for multi-territorial licensing of the Collective Rights Management Directive.[8] The licensing of music for online use should be facilitated as a result of quality requirements for collective management organizations ("CMOs") that want to run licensing hubs, by installing a so-called "tag on" regime that makes it possible for other (often smaller) CMOs to make use of the services of these hubs; and by imposing transparency obligations on CMOs so that both rightholders and parties seeking licences are in a better position to make informed choices. An example of measures introduced to enhance predictability and legal certainty for libraries and archives is the system set up for out-of-commerce works and other protected subject matter (Arts. 8–11 DSM Directive, to be discussed later). More recently, the ability of consumers or certain specific groups of persons to access cross-border services has become a recurrent topic of intervention. This is evident from the Marrakesh Directive,[9] which should make it easier for visually impaired persons to access materials adapted to special formats by organizations in other member states, and for such organizations to deliver them. Another example is the Online Content Portability Regulation[10] which seeks to ensure that people who are temporarily abroad retain access to their (content) services. Tellingly, the most far-reaching instrument, the Geo-blocking Regulation which seeks to promote access to online services does not apply to services that have the provision of access to copyright content at their core, e.g. audiovisual content, games, e-books or music. The Geo-blocking Regulation puts limits on refusals to supply services to customers on the basis of nationality or place of residence/establishment. Following the first short-term review of the Regulation (2021),[11] it already seems unlikely that the exclusion for digital content services will be dropped. I will return to the Geo-blocking Regulation later.

## 3 A Typology of Mechanisms

If we consider the *acquis*, legislative measures designed to overcome the adverse effects of territoriality have been undertaken since the 1993 Satellite and Cable

[8] 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, OJ 2014 L 84.

[9] 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, OJ 2017 L 242.

[10] 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, OJ 2017 L 168.

[11] *See also* Procee et al. (2020).

Directive, that is, almost since the beginning of the harmonization of national laws. It is possible to distinguish various types of measures:

- Limitations to the exercise of distribution rights: the exhaustion doctrine, first laid down by courts on the basis of the free movement of goods as enshrined in the TFEU and its predecessor, since codified in directives, most generically in 2001 in Art. 4 Copyright Directive.
- The localization fiction of acts in one particular place (also described as the "country-of-origin principle").
- Mutual recognition of the special status of works or beneficiaries, coupled with pan-European licensing.
- Harmonization of private international law rules (applicable law).

To show that these solutions do not resolve problems caused by territoriality, the following is a brief description of their application.

### 3.1 Exhaustion Rules

The exhaustion doctrine in EU law is informed primarily by the principle of the free flow of goods, and also protects the interests of the owners of goods (the physical carrier of protected content). As case law stands, exhaustion only applies to physical copies of works. Recital 29 of the Copyright Directive also says the same. There is some discussion whether the CJEU would apply exhaustion to the online transmission of copies where these are the functional equivalent of copies on a physical carrier, considering earlier cases decided under the Software Directive.[12] In any event, the later *TomKabinet* judgment (a case on trade in second-hand e-books) suggests this is highly unlikely.[13] The limitation of the exhaustion rule to goods may even have an additional effect: some authors argue that the exhaustion doctrine contributes – through *a contrario* reasoning and using the exhaustion metaphor by the courts – to a very broad reading of the right of communication to the public.[14] It is well known, of course, that the significance of the exhaustion doctrine is diminishing in an age where in sectors like music, audiovisual media, games, software and all manner of professional information services, online distribution has become the norm. As a measure to overcome the restrictive effects of territoriality, its effectiveness is likewise diminishing.

### 3.2 Localization Fiction ("Country of Origin")

Counting by numbers, the majority of legislative measures taken to overcome issues with territoriality is by means of what can be termed "fictitious localization" or "localization fiction". A copyright-relevant act is presumed to be taking place in one specific member state only, thus relieving the party who may otherwise be

[12] Case C-128/11, *UsedSoft*, ECLI:EU:C:2012:407; and Case C-166/15, *Ranks and Vasiļevičs*, ECLI:EU:C:2016:762.

[13] Case C-263/18, *TomKabinet*, ECLI:EU:C:2019:1111.

[14] Oprysk (2022), pp. 1323–1342.

confronted with copyright claims arising under the laws of different member states from having to comply with all those laws. The term "localization fiction" would seem to capture better what the rules actually do than the term "country of origin" (often used in connection with the Satellite and Cable Directive, see below) or even the term "country of use".[15] Moreover, the term "country of origin" is inherently vague. Origin of what or who? Also, it may cause confusion because it is a concept used in international treaties on copyright and related rights for different purposes, namely to determine whether a work/author (or performance/performer, phonogram/producer, etc.) enjoys protection in a contracting state and if reciprocity rules apply.

The localization fiction approach was first followed for satellite broadcasting, with the introduction of an exclusive right to authorize broadcasting via satellite for authors and owners of related rights (the 1993 SatCab Directive).[16] Article 1(2)(d) provides that an act of communication to the public by satellite occurs solely in the member state where (under the control of the broadcast organization) the broadcast signals are introduced in an uninterrupted chain of communication leading to the satellite and down towards the earth.[17] In the recent *AKM/Canal+* case, the CJEU confirmed that also in the case that a satellite package provider takes part in the act of communication to the public, authorization is only required in the member state "in which the programme-carrying signals are introduced into the chain of communication leading to the satellites where the signals are introduced", and not in all countries of reception.[18]

A more recent example of localization fiction is contained in the 2019 Online Broadcasting Directive, also known as "SatCab II" or as the "NetCab" Directive.[19] The original SatCab Directive only covers satellite broadcasts, and not the various types of online broadcasting activities that broadcasters engage in today. To facilitate the clearing of rights for online transmissions, the Online Broadcasting Directive introduced the presumption that communication to the public of so-called "ancillary broadcasts" takes place in the member state where the broadcasting organization has its principal place of establishment. Note that this is a different

[15] In his overview of exceptions to territoriality in the *acquis*, Thomas Dreier adopts the term "place of use". Dreier (2017), p. 7.

[16] 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, OJ 1993 L 248.

[17] Art. 1(2)(b) Satellite and Cable Directive: "The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth".

[18] Case C-290/21, *AKM/Canal*, ECLI:EU:C:2023:424. The Luxembourg-based satellite TV provider Canal+ offered high definition packages in multiple countries; these encrypted packages included free-to-air television programmes. The Austrian collecting society AKM sued for infringement, asserting that Sky had no authorization to relay the free-to-air programmes in Austria.

[19] 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, OJ 2019 L 130.

"connecting factor" from that used in the SatCab Directive. However, usually the injection of signals happens in the member states where the broadcaster is established so that the two presumptions lead to the member state. For many of their online activities, broadcasters still have to clear rights on a territory-by-territory basis, since the scope of application of the final Online Broadcasting Directive (compared to the EC proposal) has been severely limited in terms of types of service and types of programmes. Some argue that for broadcasting, because the localization fiction (country-of-origin approach) provides the necessary legal certainty where the acquisition of rights by broadcasters is concerned, it should not be treated as an exception that applies only in very limited circumstances. Whether the 2024 review of the SatCab II Directive will result in wider application of fictitious localization to online ancillary broadcasts remains to be seen, especially considering the preference rightholders have for territoriality.[20]

The Portability Regulation for online content services is broader in the range of services it covers.[21] To ensure consumers retain access to (paid) services when temporarily abroad, the Regulation uses the fiction that the consumer who is temporarily present in another member state accesses the content in her normal country of residence (Art. 4). Providers of audiovisual media services (e.g. streaming video on demand, TV broadcasting) and other services offering access to digital content are, in principle, obliged to ensure their subscribed consumers retain access when abroad.[22] The localization fiction is a measure that ensures service providers do not have to clear rights for all the member states that their itinerant customers visit.

A final example concerns the use of copyright materials for educational purposes. Under Art. 5 of the DSM Directive, member states must "allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved". Differences in member-state laws will persist because they have some leeway.[23] To ensure that schools do not have to take into account such differences when offering, for example, distance education, the Directive stipulates in Art. 5(3) that: "The use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments [...] shall be deemed to occur solely in the Member State where the educational establishment is established".

It is noteworthy that most instances of fictitious localization look to the place of establishment or habitual residence of the party that can directly benefit from the provision. This is in itself a sensible approach, as the place of establishment of the

[20] Ruijsenaars (2022), pp. 710–718.

[21] 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, OJ L 2017/168 (Online Content Portability Regulation).

[22] For an overview, *see* Engels and Nordemann (2018).

[23] Priora, Jütte and Mezei (2022), pp. 543–566.

"beneficiary" can relatively easily be determined and will likely coincide with the place that on the whole has the closer connection to the use. The place of establishment also plays a key role in the next type of mechanism to be discussed: mutual recognition.

### 3.3 Mutual Recognition

Mutual recognition is a much used concept in EU law, *inter alia* in regulating the marketing of goods, e-commerce and audiovisual media services.[24] It is, however, antithetical to restrictions imposed on the basis of territorial rights, and is thus not often applied in intellectual property law. There are two instances where the copyright *acquis* specifically adopts a system based on mutual recognition. One concerns orphan works, i.e. works or other protected subject-matter for which the right owners are unknown or cannot be found despite diligent searches. Under the Orphan Works Directive[25] member states have to allow certain uses of orphan works by, broadly speaking, cultural heritage institutions, and make sure that a process is in place to enable institutions to establish "orphan work" status. Once a work or phonogram has obtained orphan-work status under a national member state's regime, this status must be recognized in other member states. This system of mutual recognition means that the work or phonogram may be used and accessed in all member states (Art. 4 Orphan Works Directive).

The second instance of mutual recognition relates to out-of-commerce works. A key element of the system set up for out-of-commerce works is collective licensing. It is quite a complicated system, but for our purposes what is relevant is that a licence granted by the collective management organization of the member state where the licensee (simply put: cultural heritage institution) is based must allow cross-border use in the EU. Collective licensing organizations in other member states cannot require that the user obtains a licence from them as well. This system is combined with a fictitious localization rule for cases where no (extended) collective licensing option is available. An institution is then allowed to provide online access for non-commercial uses to its collection anyway, relying on the exception for out-of-commerce works as legislated in its country of establishment.

[24] *E.g.* for goods, Art. 34 TFEU and Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No. 764/2008, OJ 2008 L 91; for information society services, Art. 3(2) 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 (Directive on electronic commerce), OJ 2000 L 178; for audiovisual media services, Art. 3 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 (Audiovisual Media Services Directive), OJ 2010 L 95.

[25] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (Orphan Works Directive), OJ 2012 L 299.

[26] Art. 9 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 (DSM Directive), OJ 2019 L 130.

To shield an institution from claims in other member states, it is presumed only to engage in copyright-relevant acts at its place of establishment.[26]

### 3.4 Conflict Rules (Private International Law)

Properly speaking, rules of private international law, more specifically rules on applicable law (as opposed to rules on jurisdiction of courts and on enforcement of foreign judgments), are not direct "solutions" to problems caused by territorial rights. They are second-order rules, designed to single out an applicable law in international situations where more than one (domestic) law may claim application. For copyright and related rights, of relevance is the EU's Rome II Regulation on the law applicable to non-contractual obligations,[27] as it contains rules that determine the applicable law in case of infringement of intellectual property. The rules apply regardless of the nationality or residence of the parties. Note that Rome II does not address questions on the existence of rights, on (initial) ownership, transfer and other "property" type matters. There is no EU law for those questions, but in most countries it is accepted (sometimes legislated, mostly not) that the *lex protectionis*, or law of the country for which protection is claimed, is the law applicable to such matters of copyright and related rights. The Rome II Regulation does not apply to contracts involving intellectual property; instead the Rome I Regulation is the appropriate instrument.

Article 8 of the Rome II Regulation provides that for infringement of intellectual property, the *lex protectionis* applies. This solution is based on the idea of territoriality, and is therefore unhelpful. Its application easily results in multiple laws governing a dispute simultaneously, or in uncertainty about which laws apply to begin with, especially where internet communication is involved.

## 4 Drawbacks of the Current Approach

Considering the limited number of measures as well as their scope, it is fair to say they have no significant impact on the territorial exploitation of rights. What is more, since the EU's private international rules on copyright infringement follow the logic of territoriality, they do not curb the adverse effects of territorial rights on the single market either. Although the use of localization-fiction mechanisms and mutual recognition in principle can provide targeted solutions for specific stakeholders in specific cross-border settings, such rules also add to the overall complexity of copyright law and thus adversely affect legal certainty. The fact that the approach of the EU lawmakers has been piecemeal further complicates copyright law. There is no sign that this piecemeal approach will be traded in for a more fundamental rethink of territoriality, as has been the case in other areas of intellectual property law.

[27] 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), OJ 2007 L 199.

But how about extending the Geo-blocking Regulation to digital content, one might ask; would that not solve matters? Probably not much. One reason is that only customers that are consumers or end-users benefit from the Geo-blocking Regulation. Cultural heritage institutions and other professional users would not benefit, so providers of content services ("traders") would still be allowed to block or redirect access to their websites, apps, etc. More importantly, the Commission issued a statement on the review clause of the Geo-blocking Regulation (Art. 9) saying (*inter alia*): "it will thoroughly assess the way in which the Regulation has been implemented and has contributed to the effective functioning of the internal market. In so doing, it will take account of the increasing expectations of consumers, especially of those with no access to copyright-protected services". Notably, its in-depth analysis of the feasibility, costs and benefits of extending the Regulation to digital content services would only look to situations "where the trader has the required rights for the relevant territories".[28] So even if as a result of the upcoming 2024 review the EC were to change course, it is unlikely that the Geo-blocking Regulation will have any real impact. After all, it is the rightholders who decide who gets licences for which territories, and as long as country-by-country licensing is the norm, geo-blocking would still be allowed.

As said above, politically it seems unlikely that the Geo-blocking Regulation will be extended. It is still the case that large parts of the audiovisual industry favour the current system of separate national rights. This is clear from the reactions to the Commission's stakeholder dialogue aimed at improving the online availability of and cross-border access to audiovisual works across the EU.[29]

In its recent *ex post* evaluation, the research service of the European Parliament reiterated the Commission's findings that, especially for audiovisual services, industry financing and licensing models currently depend on territory-by-territory licensing.[30] Paradoxically, this might also be a reason why it is so difficult, for example, for films produced in member states to reach a pan-European audience and thus raise the prospect of success, especially for productions from smaller member states.[31] Consumer groups have recently (again) called for an end to the geo-blocking of audiovisual services.[32] A factor that makes it difficult to determine whether, on balance, it makes sense to extend the scope is that little research has

[28] Statement from the Commission, OJ 2018 L 601, p. 15.

[29] For a description of the process and (interim) outcome, *see* Cabrera Blázquez et al. (2023).

[30] Binder and Juhász (2023).

[31] Poort and Van Til conclude that current funding structures in the film industry deepen reliance on territory-by-territory licensing. This is one factor that makes it more difficult for films to find a pan-European audience. They also warn that "drastic and sudden changes to the possibility for producers to license on a territory-by-territory basis could have significant effects on the European film industry". Poort and Van Til (2020), p. 614.

[32] Reyna (2023), p. 6.

[33] *See e.g.* EC (2020) Commission staff working document, First short-term review of the Geo-blocking Regulation accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the first short-term review of the Geo-blocking Regulation, SWD/2020/294 final, EC, Brussels. *See also* for a critique, Mylly and Herrero (2022), p. 1038.

been done on the potential impact on the broad array of creative industries.[33] Thus, the "evidence" that is required to justify intervention under the Better Regulation approach is patchy.

If the prospects for an extension of the Geo-blocking Regulation are already poor, does it make sense to think at all about the possibilities for an EU-wide copyright? I think so. The history of the creation of unitary intellectual property titles shows that they have a long gestation period. For a unitary title to result, in whatever form, the debate about it needs to restart, mature and then stay on track. The European Commission and Parliament have been sending mixed signals for some time. On the one hand, the aim remains to achieve a well-functioning digital single market and to eliminate the differences between laws. On the other hand, there is great reluctance to seriously contemplate alternatives to territorial rights.

A case in point is the 2015 resolution of the European Parliament that called for decisive action to remove differences in the field of limitations and exceptions.[34] In the same breath, however, the European Parliament called for a reaffirmation of the principle of territoriality. Over the years, the EC has cautiously announced some exploratory work, notably to study whether a "codification" of the existing *acquis* would make sense, and to look into the creation of an optional unitary copyright title (based on Art. 118 TFEU).[35] But for the past decade silence has prevailed.

Perhaps the milestone of 30 years of the internal market and the arrival of a new Commission in 2024 will prove to be a moment for change. The EESC recently issued several calls for a more ambitious strategy towards a more complete single market.[36] The European Parliament also called for strategies that would help realize a "real digital single market", when it extended happy birthday wishes to the internal market on its 30th birthday.[37]

As a contribution to the debate, in the next section I will briefly recall the groundwork that has been laid, especially by the so-called Wittem group of legal scholars. Wittem's Copyright Code will be discussed against the background of wider initiatives aimed at the unification of EU law, especially private law. I will then turn to the recent endeavours undertaken as part of the ReCreating Europe project, and sketch a few models that might inform future thinking about a unitary title.

[34] Geiger et al. (2015).

[35] EC (2011) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first-class products and services in Europe, COM(2011) 287 final. EC (2012) Communication from the Commission on content in the Digital Single Market, COM (2012) 789 final. The latter only stated that territoriality in the internal market was still an issue on the EC's agenda.

[36] EESC (2023) Opinion for the European Economic and Social Committee on the Single Market at 30 – how to further improve the functioning of the Single Market (exploratory opinion), EESC 2023/00148, OJ 2023 C 228. Earlier also: EESC (2022) Opinion of the European Economic and Social Committee on the Cost of Non-Europe – the Benefits of the Single Market (Exploratory Opinion), EESC 2022/01691, OJ 2022 C 443.

[37] EP (2023) European Parliament Resolution of 18 January 2023 on the 30th Anniversary of the Single Market: Celebrating Achievements and Looking towards Future Developments (2022/3015(RSP), OJ 2023 C 214.

## 5 From Wittem Code to a Unitary Title?

### 5.1 Preparing the Ground: The Wittem Copyright Code and Other Proposals

The outcome of a three-year collaborative research project, the guiding principles of the Wittem Code are as valid today as they were in 2010. Initiated by Professors Quaedvlieg, Hugenholtz and Visser, it brought together legal scholars from Belgium, Germany, the Netherlands and the UK, backed by an advisory board of legal scholars for several (other) jurisdictions.[38] The ambition of the drafters was not to come up with a full-fledged "copyright act", but rather to present a concise text that might serve as an inspiration for EU and national lawmakers alike.[39] Seemingly driven by suspicion of the quality of EU law-making – a lack of transparency and too little attention to legal scholarship are highlighted in the Code's introduction – the group did not advocate a completely unified copyright in the form of a unitary title, nor did it advocate against it.

Its structure is as follows: a first chapter focuses on the notion of a work, with a (non-exhaustive) list of categories of works eligible for protection, framed in more contemporary and succinct language than Art. 2(1) of the Berne Convention. The Code also makes it explicit what is not protected, and exempts official texts (laws, court decisions and the like) from protection, while limiting protection of other official documents. Government information is an area the EU has not really dealt with to date in intellectual property law proper, although notably the Open Data Directive limits the exercise of copyright and related rights in public sector information under certain conditions.[40]

A second chapter deals with authorship and ownership, i.e. it gives basic rules for who qualifies as an author and initial owner of economic and moral rights, specifies that economic rights are transferable and can be licensed, and combines this with provisions which seek to protect the authors from unnecessarily broad transfers and to ensure adequate remuneration. It also contains rules on works made in the context of employment and on commission. The third chapter is devoted to enumerating the moral rights of the author, including the right of divulgation ("first publication"), attribution, and the right to integrity. Chapter four sets out the author's economic rights, in language that is more simple but that does capture EU directives as regards the right of reproduction, distribution, rental and lending. An open-ended, broad right of communication to the public is formulated which includes the types of public performance that are not harmonized (i.e. live public performances). Also, a separate right of adaptation is proposed. Compared to the *acquis* at the time, the Code sets out a clear structure for exemptions, albeit refraining from giving a closed list. Instead, it groups various known limitations according to the primary goal they serve, e.g. uses for the purpose of freedom of expression and information, uses

[38] *See* the composition at: https://www.ivir.nl/nl/copyrightcode/draftingcommittee_and_advisoryboard/.

[39] Wittem Group (2010), pp. 123–128.

[40] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on Open Data and the Re-Use of Public Sector Information (Open Data Directive). Its predecessor from 2003 as revised in 2013 also limited the exercise of copyright in public sector information.

permitted to promote social, political and cultural objectives, and uses to promote competition. Apart from these mandatory limitations, a general clause allows further limitations provided that they meet the three-step test. The Code does not propose full unification of limitations and exceptions, and thus would not be a complete solution for the current persisting inconsistencies and differences in the laws of the member states.[41] It does not have the same level of specificity as many existing provisions in the *acquis*.

As can be inferred from the preamble to the Code, frustration at 20 years of piecemeal harmonization was an important driver for its drafters. It leans more towards utilitarianism than one might expect from a European project. As Ginsburg observed in her discussion of the Code, it does not enumerate the protection of intellectual property (enshrined in Art. 17(2) EU Charter of Fundamental Rights) as one of the core values that an EU copyright code would need to protect.[42] Nor does it accept the author's rights as natural rights; it focuses on law as an instrument to safeguard the moral and economic interests of creators, while simultaneously serving public interests such as freedom of expression and free competition, and the derivative interests of users. All this is against the backdrop of the EU's internal market ambitions and in keeping with international copyright norms. The Wittem Code has been recognized as a good starting point for further development,[43] which is still the case today.

### 5.2 A Radical International Copyright Code

The Wittem proposal does not go as far in some respects as an earlier proposal for an international copyright code. Conceived by Professor Sterling and colleagues at Queen Mary University of London (UK), it was based on the "principles of non-discrimination, territorially unlimited application, and recognition of rights in all creative productions and related achievement".[44] The International Copyright Code would not replace national law or international norms. It would, however, grant protection "irrespective of any criterion of nationality, location, place of fixation or place of publication" and for "every place, whether terrestrial or extra-terrestrial" (Art. 3) under a parallel system that states can join.

The Code extends to copyright proper (the author's own intellectual creations) and related rights, even including database "makers" (producers) and "semiconductor topography makers". At its heart are broadly framed economic rights, i.e. generic "exclusive rights to make use of such [protected] subject matter" and moral rights. The Code itself does not provide for limitations, but mandates that any limitation in a Code country must comply with the three-step test (as per Art. 9 Berne Convention). Adjudication would take place through a (virtual) International

[41] *See* the contribution in this issue of IIC by Sganga et al. (2023), https://doi.org/10.1007/s40319-023-01413-9.

[42] Ginsburg (2011), p. 265.

[43] *See* the discussions by Cook (2011); Dijkman, Belder and Mombers (2011); Ginsburg (2011); Graf (2010); and Rosati (2010).

[44] Sterling (2001).

Copyright Tribunal, the decisions of which would have to be recognized in the relevant states to obtain legal effect there.

This radical proposal was a consequence of the recognition of certain particular issues. Sterling maintained that, in a globalized age where digitization permeates every aspect of our lives, the need to enforce effective protection of intellectual property is greater than before. At the same time, it has become increasingly difficult to arrive at an international consensus on many aspects of copyright protection, making the updating of the international legal framework difficult. Sterling's Code therefore emphasizes effective cross-border enforcement of rights. In the long term, the influence of such a system existing in parallel with national rights would "help towards bringing unified solutions to problems arising at the international level".[45] Sterling's International Code was thus not primarily aimed at unification; by his own admission his ambition was more to alleviate problems of private international law such as jurisdiction, applicable law and enforcement. As we have seen above in the discussion of Art. 8 of the Rome II Regulation, on the applicable-law front the territoriality that Sterling sought to overcome still reigns supreme in the EU.

### 5.3 Copyright as Part of a Wider Code?

Intellectual property is largely private law, so in a way it is perhaps surprising that the huge effort to draw up common principles of European private law has consistently excluded intellectual property.

The enormous (draft) Common Frame of Reference for European Private Law (DCFR) and comments contain principles, definitions and (model) rules of private law, especially focusing on contractual and non-contractual obligations, as well as movable property.[46] It runs to some 6,500 thousand pages in print, which surely dwarfs the combined intellectual property law *acquis*. Although the DCFR does not include copyright or other intellectual property as such, it does have some bearing on intellectual property matters. For example, regarding transfer and licensing generally but also regarding specific types of contracts including the provision of services (arguably this includes commissioned creative works), design contracts and franchise.

Despite its long gestation period and being a massive effort, the DCFR seems to have drawn surprisingly little attention in intellectual property circles. Although for quite a while the project had traction in Brussels – over its many years of conception the EC also contributed financially –, after delivery of the draft in 2008, the EC did not take it any further. [47]A much more limited proposal for a Common European Sales Law (CESL) was laid before Parliament in 2011 but, after a scaling down by

[45] Sterling (2001), p. 533.

[46] von Bar and Clive (2009).

[47] Micklitz (2022).

Parliament, the legislative process stalled and eventually in 2020 the EC withdrew the proposal.[48]

The history of the DCFR shows that the chances of major unification projects coming to fruition are slim. Nevertheless, calls for unification are still being heard in various fields. For example, some argue that it is time for a uniform business law (company law, insolvency law, and commercial law), which is also an area characterized by piecemeal and inconsistent harmonization.[49] With respect to intellectual property, it is also argued that if the EU were to embark on such a project, it would have to be as part of a wider comprehensive European intellectual property code, considering the interaction between various intellectual property rights, e.g. design, trademark, and copyright. But also because a truly comprehensive Copyright Code (which would be more than a restatement of the current *acquis*) will contain provisions on matters that copyright shares with industrial property, e.g. on enforcement, customs, and other horizontal matters at the interface with primary EU law, notably competition law and the freedom of goods and services.[50] Obviously, the challenges facing such a project are even bigger than those to be overcome when drafting an instrument aimed at copyright and related rights. For this author, the call to legislate an EU intellectual property code brings to mind the situation in the Netherlands. The new comprehensive Civil Code introduced in 1992 is composed of 10 books. Book 9 is still empty, reserved for intellectual property law. Because virtually all intellectual property law emanates from Brussels in a steady stream of revisions or new instruments – whether in the form of directives or regulations – there is little appetite to try and shoehorn all these laws into the structure and principles of the Dutch Civil Code.

## 6 Working Towards a Unitary Title

Despite the challenges posed by a unification project, the alternative of continuing down the road of (piecemeal) harmonization indeterminately is not attractive either. This will likely only lead to ever more complex law, with a growth in transaction costs and persistent legal uncertainty. It is good to bear in mind the most recent related right to come out of Brussels: the press publishers exclusive right to authorize online uses of publications (Art. 15 DSM Directive). So far, it has been implemented with substantial variations across member states, meaning that users will have to take multiple laws into account.[51]

Unification of at least the core of copyright and related rights law (subject-matter, ownership, scope, and duration) is a precondition for the introduction of unitary titles. But it is also possible to have unified national rights, without a unitary title.

[48] *See* EP Procedure file 2011/0284(COD) – 26/02/2014 – Common European Sales Law, available at: https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1339866&t=e&l=en.

[49] Lehmann (2020).

[50] Chiou (2015).

[51] Sganga and Contardi (2022).

The next sections discuss why it would be a good idea to embark on such a project, and sketch four models that could serve as a starting point for further development.

Notably, what follows is based in large part on two deliverables of the ReCreating Europe project: the roundtable report and policy recommendations. In the context of that project's task on territoriality, we also (albeit briefly) looked into the advantages and disadvantages of having a uniform title, and created a first inventory of what issues would need solving should the legislators consider the introduction of EU titles. Two expert roundtables were convened as part of this effort.[52] The first roundtable focused on the (dis)advantages of unitary rights; the second roundtable on the relationship to intellectual property as a fundamental right protected under the EU Charter of Fundamental Rights (Art. 17(2)) and on identifying various models. The outcomes of the roundtables fed into the recommendations. The participants in the roundtables, however, bear no responsibility for the text of the deliverables (or below).

### 6.1 Why a Uniform Title?

The consensus that emerged during the roundtables was that, from the perspective of the European project for continuous (market) integration, it is logical to have unification in the form of a unitary title. There has been a continuous growth of the copyright *acquis*, which by now is very complex. At the same time, implementation in member states of harmonization measures continues to produce local differences, e.g. the implementation of Arts. 15 and 17 DSM Directive are recent cases in point. In the field of related rights, differences between member states are even starker. The increasing complexity and variation in national implementation of copyright and related rights produces legal uncertainty, which may even grow with each new harmonization measure. Also, having to rely on national implementation means it takes longer for copyright law to be adapted to changing needs.[53]

Importantly, the project of drafting a uniform title would provide the opportunity to articulate a clear(er) vision of what European copyright aspires to. There is not much vision in the often repeated message that the economic value of creative industries justifies strong copyright protection, that for the internal market effective cross-border enforcement is needed, and that a balancing of interests is also important. That there is no clear vision can be explained by the incremental approach to harmonization so far, which is driven mainly by the desire to remove large differences between member states' laws.

Even when the EU Charter of Fundamental Rights was drafted, intellectual property was included without much discussion about the why and wherefore. It is telling that even Art. 17(2) CFREU merely states that "intellectual property shall be protected", without any vision of why, unlike for instance the US constitutional

[52] Van Eechoud (2022).

[53] *See e.g.* Strowel (2014), noting that the time between the initial proposal and implementation in member states can take up to 10 years.

copyright clause.[54] The wording "intellectual property shall be protected" leaves open many alternative ways of protecting copyright, and itself offers no guidance as to subject-matter, proper scope or duration. Article 17(2) CFREU does not prescribe a minimum level of protection, nor set a clear boundary for how rights might be scaled back (i.e. in terms of duration). Case law is of limited help, as judgments of the CJEU addressing Art. 17(2) are scarce. What is more, the superficial nature of the analysis of fundamental rights in CJEU judgments further contributes to uncertainty about the impact of Art. 17(2) CFREU on copyright law. There is also little case law from the European Court of Human Rights on intellectual property as property protected under Art. 1 First Protocol European Convention on Human Rights (ECHR). Such judgments are relevant at EU level due to the conformity clause in Art. 52(3) CFREU and Art. 6(2) TEU. Obviously, the introduction of a unitary title in whatever form will require careful consideration of the effect on existing copyrights and related rights, since to the extent that existing rights are protected as fundamental rights, any limitation of these rights must meet the requirements of Art. 52(1) CFREU.

A further key advantage of unitary titles is the reduction of costs that it can bring. It is a fair presumption that a unitary copyright would reduce transaction costs involved in licensing and distribution of works which would be good for all involved. At the level of law-making, costs for member states and the EU would also be reduced. Currently, with each step in the harmonization process come the (social) costs of lobbying at member-state level and in Brussels, the costs of implementation at local level, and the costs associated with litigation caused by legal uncertainty about proper implementation and the interpretation of provisions. Possibly, enforcement costs would decrease as well, especially if pan-European orders become more readily available.[55] To get a better sense of the impact of a unitary title on transaction costs for stakeholders in creative industries, it would be advisable to estimate this through economic analysis.

### 6.2 Scope of Unification

There are various aspects of copyright law that have not been (fully) harmonized, e.g. initial ownership, transfer, limitations and exceptions, so that unification of substantive law would have to be completed for these issues. An important question is to what extent it is desirable or even essential to maintain room for national differences with respect to limitations and exceptions because they reflect culturally diverse traditions and because copyright as an instrument of cultural policy might work better if it corresponds to local needs. Of course, there are many more – and possibly more effective – instruments to safeguard the creation of access to culturally diverse works, e.g. subsidies, tax relief, and media law. Still, it is important to consider in a uniform title project how rules can safeguard a role for

[54] Art. I, Sec. 8 United States Constitution states: "Congress shall have Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

[55] Strowel (2014) discusses the possibility of a specialist EU court system to handle disputes, *e.g.* over infringement and licensing of unitary titles.

copyright, especially for language-based cultural production in languages spoken by fewer people.

Considering that owners are, in principle, free to decide how to exploit their IPRs, licensing locally (language-based and geographically) would still be possible, even if a transfer of the rights would have to be for the entire EU, as is the case with EU designs and trademarks. One of the issues that merits closer study is to what extent unification of copyright contract law is needed. A unitary copyright regulation would have provisions on transferability and there are certain aspects of copyright contract law that are then logical to regulate as well. There are already some provisions in the *acquis*, e.g. on fair remuneration for exploitation rights granted (DSM Directive) and supporting rights. These rules are generally designed to protect authors and performers against information and power asymmetries in their relationship with publishers. Other provisions in the *acquis* facilitate cross-border use through multi-territorial licensing (e.g. for out-of-commerce works). But a thorough analysis of copyright contract law in member states might yield more aspects of copyright contract law that warrant an EU approach. The principles and certain provisions of the DCFR will be useful to consider as well.

A key feature of the current unitary system for industrial property is adjudication through specialized courts, on the basis of tailored jurisdiction rules. Depending on which model is adopted for copyright (and related rights), provision will have to be made for some kind of structure for uniform interpretation and effective EU-wide enforcement. Apart from dispute adjudication, there is another dimension to copyright that will also require some accommodation. Where the *acquis* prescribes that lawmakers must facilitate stakeholder dialogues or negotiations, for topics that are regulated in the EU title there would need to be provision for that at EU level. It does not seem feasible – or from the perspective of the distribution of powers desirable – to task policy units of the EC with this. Importantly, considering that authors and performers are typically in a weak position in relation to (large) content providers, producers and distributors, any structure must be such as to ensure that authors and performers have sufficient agency at the EU level.[56]

### 6.3 Sketch of Some Possible Models

Article 118 TFEU created explicit legislative competence for the introduction of unitary intellectual property titles. The provision is agnostic as to the scope of such titles, although in terms of objectives a unitary title must contribute to the establishment and/or functioning of the internal market. As indicated above, another key provision, namely Art. 17(2) CFREU does not itself provide guidance on what a unitary title might look like.

Taking inspiration from the existing models in the EU for industrial property, the participants of the second roundtable tentatively identified four different models for unitary rights. Other models can of course be imagined, perhaps drawing features from the different models described here. The ambition was not to be complete, but to sketch different approaches.

[56] *See* in a different context: Geiger and Mangal (2022).

The premise for all models is that it makes little sense to simultaneously provide for national and EU-level protection of individual works. In the case of trademarks and designs, for example, as prospective rightholders have to make a conscious choice and apply for protection, the current system of parallel national/regional rights and EU-wide rights can function because rightholders who are only active in one or a few national markets (and thus seek protection there) can easily opt to apply for national rights only. But since copyrights arise automatically upon the creation of a work, parallel systems have no added value. On the contrary, it would only add a territorial layer of protection to the existing situation, increasing complexity and transaction costs.

For all models, two key principles of the international copyright system informed debate. One, that the mere creation of works gives rise to copyright, which for foreign works is enshrined in the prohibition of formalities in the Berne Convention (Art. 5(2)). The second is that the term of protection is long and as a rule dependent on the life of the author(s). Currently the duration of copyright is, as a rule, 70 years *post mortem auctoris* (PMA), and international conventions require a minimum of 50 years PMA.

In short, the models identified during the roundtables were:

A. Uniform title for all works, existing and new.
B. Uniform title for new works, with continuation of national rights for pre-existing works.
C. Uniform title with supplementary national rules (e.g. with some limitations and exceptions for off-line use).
D. National rights with a trigger point for transformation into a uniform title.

These models represent two dimensions in which the relationship between the EU and member states can be seen. One is about the geographic scope: moving towards one uniform title for the entire EU (A, C) or maintaining national territorial rights as well (B, D). The other is about the level of unification: aiming for a full unification of copyright law at the EU level (A, B, D) or maintaining some discretionary room for member states (C).

If the ultimate aim is to replace all bundles of national rights with a uniform title, then *Model A* requires some kind of conversion regime with respect to rights in existing works, as these have already arisen upon creation. A major challenge here is how to deal with the ownership of rights. Who qualifies as an author or initial owner is a matter that is far from fully harmonized and the laws of member states differ in this regard. What is more, copyrights in most jurisdictions are transferable, also in part. There is no particular authenticated system of registration of ownership (although in the music industry for example, registries exist for collective management purposes). Any transitory regime needs to safeguard the fundamental right to property of current copyright owners.

*Model B* would phase out national territorial rights eventually, but considering the term of protection, increasing life expectancy, and rules for collective works (and co-written musical works) that calculate the term on the basis of the death of the last surviving author, this would take a very long time (typically more than a century). During that time a highly complex system would continue to exist. Of

course, the vast majority of works have a much smaller economic lifespan than 70 years PMA, so it is likely they would pose more of a theoretical problem than a practical one. Possibly, an extended orphan works system could reduce some of the legal uncertainty this model would bring. The model would be simpler to implement from the perspective of fundamental rights – at least on paper – because it leaves rights in existing works intact.

*Model C* is based on the idea that it might not be necessary (following the principle of subsidiarity of EU law) to have full unification of copyright law. For example, there may be certain local uses that have no or little impact on the internal market, or there might be cultural or linguistic needs that are specific to a certain region which could justify local rules. In terms of geographical scope, this model can be combined with A or B. The downside of such a partially unified system is that it has the drawbacks that come with those other models, e.g. the long-lasting or continued co-existence of national and EU-wide rights in the same works. Also, it may be difficult to determine what space should be left to member states, considering that changes in cultural production, dissemination and use will continue to occur.

*Model D* accounts for the fact that a substantial number of created works will never be of commercial interest or will only be exploited or used locally. In those cases, one can question the need to have an EU-wide, unified title as the default form of protection. A system of national rights with a certain "trigger point" for unitary effect might be more appropriate. For example, the author could be given agency to transform rights into a unitary right, or the trigger point could be that an act of exploitation occurs (e.g. the first transfer of copyright as a sign of exploitation, akin to the historical example from the UK where the first sale of a manuscript would trigger copyright protection). More variations are conceivable, for example, that the rightholder can opt in for EU-wide enforcement. Generally speaking, the more autonomy there is for the author/owner, the easier it becomes to meet the standard for protecting copyright as a fundamental right. That is a plus. A downside of this model is that if one wants to ensure predictability for (co)authors, for contracting parties like publishers, and for users, it seems inescapable to introduce some form of registration for works for which a unitary effect is triggered.

Obviously, fundamental rights, notably freedom of expression (Art. 10 ECHR, Art. 11 CRFEU) and privacy and data protection (Art. 8 ECHR, Arts. 7 and 8 CRFEU), and more general public interests would need safeguarding in any model. The challenges of reconciling potential conflicts between these with the protection of copyright as a fundamental right will not diminish.

A precondition for the introduction of a uniform title is that shared norms are developed for those areas of copyright law that are still not harmonized. These would need to be comprehensively identified. As said above, decisions would also have to be made about what legal aspects to include – as belonging to the core of copyright – and which aspects to leave out. National copyright laws differ, for example, with respect to copyright contract law, transferability of rights, treatment of moral rights, initial ownership and collective ownership, and may regulate issues that are indirectly related to intellectual property (e.g. publicity rights). The academics in the Wittem group, when drafting a European Copyright Code had a

clear focus on the core aspects of copyright, such as the definition of the work (and excluded works), authorship and ownership, moral and economic rights, and key limitations and exceptions.[57] What to include in a shared copyright law will also depend on an articulated vision: what role must copyright play in the EU legal order, underpinned by which fundamental principles?

## 7 Final Thoughts

Based on work done on territoriality in the ReCreating Europe project, this contribution has highlighted how problems with the territorial nature of copyright and related rights in an ever-developing internal digital single market are addressed. The main message is that it is time to rekindle the idea of a unitary copyright. Although the realization of a unitary copyright title (and by the same token, unitary titles for related rights) may be a very challenging project that will take a long time to complete, this is no reason to disregard its potential, and instead continue on the path of piecemeal harmonization of national laws, combined with the introduction of ever more exceptions to territoriality for specific instances. Paradoxically perhaps, a driver of piecemeal harmonization continues to be that legislative interventions are based on the economic considerations that come with the completion of the internal market. As Spuznar, Advocate General to the Court of Justice of the European Union, observed in the recent case on the fictitious localization rule in the SatCab Directive, territoriality stands in the way of achieving the internal market in the cultural domain that the internet enables:

> "If I had to do it again, I would begin with culture", Jean Monnet is supposed to have said about the process of European integration. However, culture, in any event from its economic aspect, is to a large extent regulated by copyright. And one element stands in the way of progress towards integration in that field and helps to entrench the fragmentation of the internal market according to national borders: the immutable principle of territoriality (in the sense of national territory) of copyright, and also the practices of the market players, including those of the collective management organisations which have been set up on the basis of that principle.[58]

[57] Wittem Group (2010).

[58] Opinion of Advocate General Szpunar, Case C-290/21, *AKM/Canal+ Luxembourg Sàrl*, ECLI:EU:C:2022:711, para. 1. This case involved application of the "country of origin" rule, also known as the "injection rule", of the SatCab I Directive (83/93). A preliminary issue was whether Canal+ was performing an act of communication to the public itself, *i.e.* independent of the broadcasters, or jointly, and thus whether it was required to obtain authorization itself. The Advocate General concluded that Canal+ acted (merely) to support distribution of the broadcasts, and that it did not need authorization in countries where the signals could be received. The CJEU did not pronounce on the role of Canal+, but ruled that *if* the satellite provider must have authorization (for taking part in an act of communication by satellite), it is only in the member states where the signals are introduced: Case C-290/21, *AKM/Canal+*, ECLI:EU:C:2023:424.

The importance of copyright and related rights law for access to culture and cultural diversity is traditionally seen as best safeguarded at the member-state level. Perhaps it is time to reconsider that position.



## References

Binder E, Juhász V (2023) Implementation of the 2018 Geo-blocking Regulation in the digital single market (European implementation assessment). EPRS Ex Post Evaluation Unit, Brussels

Cabrera Blázquez FJ, Cappello M, Grece C, Simone P, Talavera Milla J, Valais S (2023) Territoriality and release windows in the European audiovisual sector. European Audiovisual Observatory, IRIS Plus, Strasbourg

Chiou T (2015) Lifting the barriers in intellectual property law: fragmentation v. integration and the practicability of a European Copyright Code. EIPR 37:138

Cook TM (2011) An EU Copyright Code: what and how, if ever? Intellectual Property Quarterly 259

Dijkman LE, Belder L, Mombers AE (2011) The age of copyright: Wittem's copyright reform proposal compared to Samuelson's preliminary thoughts. Queen Mary J Intell Property 1:200

Dreier T (2017) Copyright in the times of the internet – overcoming the principle of territoriality within the EU. ERA Forum 18:7

Engels S, Nordemann JB (2018) The Portability Regulation (Regulation (EU) 2017/1128): a commentary on the scope and application. JIPITEC 9. Available at: https://www.jipitec.eu/issues/jipitec-9-2-2018/4728

Geiger C et al (2015) The Resolution of the European Parliament of 9 July 2015: paving the way (finally) for a copyright reform in the European Union? EIPR 37:683–701

Geiger C, Mangal N (2022) Regulating creativity online: proposal for an EU copyright institution. Available at: https://papers.ssrn.com/abstract=4107644

Giménez Bofarull A, Hoffmann-Axthelm L, Manzi M (2021) Hiding a forest behind the trees. Transparency, integrity and accountability at the European Commission. Transparency International Europe

Ginsburg J (2011) "European Copyright Code" – back to first principles. J. Copyright Soc'y USA 58:265

Graf K (2010) Entwurf eines besonders schlanken "European Copyright Code". Archivalia

Lehmann M (2020) EU law-making 2.0: the prospect of a European business code. Eur Rev Private Law 28:73–106

Mazziotti G, Simonelli F (2016) Another breach in the wall: copyright territoriality in Europe and its progressive erosion on the grounds of competition law. Info 18(6):55–66

Mezei P (2022) Copyright exhaustion: law and policy in the United States and the European Union, 2nd edn. Cambridge University Press, Cambridge

Micklitz H-W (2022) What kind of private law for what kind of Europe? A rejoinder to Martijn Hesselink's "progressive code." Eur Law Open 1(2):402–412

Mylly U-M, Herrero M (2022) Free movement of audiovisual content for benefit of European consumers of culture. IIC 53:1038

Oprysk L (2022) How much "new" public is too much? The CJEU's VG Bild-Kunst judgment and non-exhaustive control over a work's consumption. IIC 53:1323–1342

Poort J, Van Til G (2020) The role of territorial licences and public support schemes in financing European films. Int J Cultural Policy 26(5):597–616. https://doi.org/10.1080/10286632.2019.1690475

Priora G, Jütte BJ, Mezei P (2022) Copyright and digital teaching exceptions in the EU: legislative developments and implementation models of Art. 5 CDSM Directive. IIC 53:543–566
Procee R et al (2020) Study on the impacts of the extension of the scope of the Geo-blocking Regulation to audiovisual and non-audiovisual services giving access to copyright protected content: final report. EC, Brussels
Reyna A (2023) The EU single market at 30. How best to ensure consumers benefit? BEUC, Brussels
Rosati E (2010) The Wittem group and the European Copyright Code. J Intellect Prop Law Pract 5:862
Ruijsenaars H (2022) The EU (Netcab) directive on online broadcasting services: missed opportunities. EIPR 44:710–718
Sganga C, Contardi M (2022) When harmonisation leads to fragmentation (and potential invalidity claims): snapshots from the implementation of the new press publishers right. EIPR 44:472–482
Sganga C et al (2023) https://doi.org/10.1007/s40319-023-01413-9 (in this issue of IIC)
Sterling JAL (2001) The International Copyright Code and e-justice: basic proposals for global solutions to global problems. EIPR 23:528–538
Strowel A (2014) Towards a European copyright law: four issues to consider. In: Torremans P, Stamatoudi I (eds) EU copyright law. A commentary. Edward Elgar Press, Cheltenham
Synodinou T-E (2021) The desirability of unification of European copyright law. In: Rosati E (ed) The Routledge handbook of EU copyright law. Routledge, Abingdon
Van Eechoud M (2022) D4.4 territoriality roundtables (combined report). Zenodo. https://doi.org/10.5281/zenodo.7564660
von Bar C, Clive EM (2009) Principles, definitions and model rules of European private law: draft common frame of reference (DCFR). Vols 1–6. Sellier, Munich
Wittem Group (2010) European Copyright Code. JIPITEC 1:123–128