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## A Unitary Copyright for Europe?

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This contribution discusses pending EU copyright reforms in the context of the EU's digital agenda.

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### **1. Existing EU Harmonising Measures in the Field of Copyright and Related Rights**

[Rz 1] Since 1991 the EU legislator (the European Parliament and the Council of Ministers) adopted eight «vertical» Directives dealing with specific categories of works or particular copyright issues. Such Directives concern computer programs (Directive 91/250/EEC, replaced by Directive 2009/24/EC<sup>1</sup>), rental and lending rights (Directive 92/100/EEC, replaced by Directive 2006/115/EC<sup>2</sup>), satellite broadcasting and cable retransmission (Directive 93/83/EEC<sup>3</sup>), the term of protection (Directive 93/98/EEC, replaced by Directive 2006/116/EC<sup>4</sup>), databases (Directive 96/9/EC<sup>5</sup>), resale rights (Directive 2001/84/EC<sup>6</sup>), orphan works (Directive 2012/28/EU<sup>7</sup>) and collective rights management as well as multi-territorial licensing (Directive 2014/26/EU<sup>8</sup>).

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<sup>1</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111 of 5 May 2009, p. 16.

<sup>2</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376 of 27 December 2006, p. 28.

<sup>3</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248 of 6 October 1993, p.15.

<sup>4</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372 of 27 December 2006, p.12.

<sup>5</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77 of 27 March 1996, p. 20.

<sup>6</sup> Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art OJ L 272 of 13 October 2001, p. 32.

<sup>7</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance, OJ L 299 of 27 October 2012, p. 5.

<sup>8</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights in musical works for online use in the internal market Text with EEA relevance, OJ L 84 of 20 March 2014, p. 72.

[Rz 2] By contrast the information society Directive (Directive 2001/29/EC<sup>9</sup>) is a «horizontal» Directive applying to all copyrightable subject matter which is not covered by the other Directives.

## 2. Consultation and Evaluation Exercises

[Rz 3] Further to previous impact and implementation assessments more recently the EU institutions and in particular the European Commission carried out various stakeholder consultation and evaluation exercises against the background of a planned modernization of the existing EU copyright «acquis».

[Rz 4] One of those was the consultation on «Content Online» which took place from 22 October 2009 until 5 January 2010. It discussed issues such as limitations and exceptions with the objective of a deeper harmonisation; a «*streamlined pan-European and/or multi-territory licensing process*» and «*governance and transparency of collective rights management organisations*». Moreover it considered an extension of the scope of application of the satellite and cable Directive (Directive 93/83/EEC) by a possible inclusion of the online transmission of audio-visual contents. Finally it raised the issue of an elimination of the territoriality of rights by introducing an EU copyright title on the basis of an EU Regulation.

[Rz 5] It was followed by a public consultation on the review of the EU copyright rules between 5 December 2013 and 5 March 2014. The issues raised involved «*territoriality in the single market*», a (further) harmonisation of limitations and exceptions to copyright in the digital age and the (existing) fragmentation of the EU copyright market. It also considered how to improve the effectiveness and efficiency of (copyright) enforcement while underpinning its legitimacy in the wider context of copyright reform. Once more again it came up with the idea of establishing a unified EU copyright title.

## 3. The EU Copyright Evaluation Report

[Rz 6] Another step forward towards copyright reform in the context of the «digital agenda» constitutes the report of the Legal Affairs Committee of the European Parliament of 10 July 2015. This EU copyright evaluation report had initially been prepared by rapporteur Julia Reda from the Pirates party. It contained a total of 68 conclusions. Amongst those are the assessment of a single European copyright title; an improved cross-border accessibility of services and copyright content for consumers; the preservation of the public domain; a (further) harmonisation of the term of protection; as well as the need to ensure the technological neutrality and future-compatibility of exceptions and limitations.

[Rz 7] The Committee also suggested a review of a number of the existing exceptions and limitations in order to better adapt them to the digital environment and to open up access to content for

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<sup>9</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 of 22 June 2001, p. 10. For a comprehensive and up to date article-by-article analysis of all EU law in the area of copyright see IRINI A. STAMATOUDI/PAUL TORREMANS (eds.), *EU Copyright Law – A Commentary*, Elgar Commentaries series, 2014, as well as MICHEL WALTER/SILKE VON LEWINSKI (eds.), *European Copyright Law – A Commentary*, Oxford University Press, 2010.

people with different disabilities. Moreover the EU Parliament proposed an assessment of «text and data mining» or «content mining» for research purposes. Contrary to Ms Reda the Committee took the view that any reform of the copyright framework should be based on a high level of protection and ensure appropriate enforcement. The MEPs also suggested a review of the liability of service providers and intermediaries.

#### **4. The Follow-up: The Digital Single Market Package of 9 December 2015**

[Rz 8] On 9 December 2015 EU Commissioner Oettinger presented a draft Regulation and a communication. The legislative proposal<sup>10</sup> concerned cross-border portability of online content services in the internal market. It concerns one specific aspect concerning EU wide access to copyrighted works.

[Rz 9] The communication<sup>11</sup> presented a plan involving additional legislative proposals for the short term and a long term vision including further convergence. The suggested gradual approach shall ensure a better functioning of the digital single market

#### **5. The Regulation on Cross-border Portability**

[Rz 10] A first legislative measure was adopted on 14 June 2017. Regulation (EU) 2017/1128<sup>12</sup> aims at ensuring that consumers who buy or subscribe to films, sport broadcasts, music, e-books and games can access them when they travel in other EU Member States.

[Rz 11] It applies as of 1 April 2018<sup>13</sup>. The Regulation constitutes the first EU legal act in the field of copyright which is directly applicable in all EU Member States in accordance with Article 288 TFEU<sup>14</sup>.

[Rz 12] The legal basis of the Regulation is Article 114 TFEU which concerns the approximation of national legislation with the objective of ensuring the functioning of the EU's internal market as set out in Article 26 TFEU. In this context it is intended to ensure that subscribers to online content services in a home Member State can access and use these services when they are temporarily present in another Member State.

[Rz 13] Article 1 of the Regulation concerns the subject matter and scope. The legislative measure concerned aims at ensuring that subscribers to portable online content services which are lawfully provided in their Member State of residence can access and use those services when temporarily present in a Member State other than their Member State of residence.

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<sup>10</sup> Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, 9 December 2015, COM(2015) 627 final.

<sup>11</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions –Towards a modern, more European copyright framework, 9 December 2015, COM(2015) 626 final.

<sup>12</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168 of 30 June 2017, p. 12.

<sup>13</sup> See Corrigendum to 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 198 of 28 July 2017, p. 42.

<sup>14</sup> Treaty on the Functioning of the European Union, OJ C 326 of 26 October 2012, p. 47.

[Rz 14] Article 2 thereof defines inter alia the online content services concerned as well as the notions of subscriber, temporarily present in a Member State, portability and the Member State of residence concerned.

[Rz 15] According to such provisions «portable» means a feature of an online content service whereby subscribers can effectively access and use the online content service in their Member State of residence without being limited to a specific location.

[Rz 16] Article 3 introduces an obligation for service providers to enable cross-border portability of such online content services.

[Rz 17] Article 4 provides for a legal presumption. Accordingly, the provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence.

[Rz 18] Article 5 refers to the verification of the Member State of residence. Article 6 concerns the options of an online service provider in case cross-border portability of online content services is provided without payment of money. Article 7 deals with unenforceable contractual provisions.

[Rz 19] Furthermore, it is noteworthy that by virtue of Article 8 the protection of personal data is also addressed in this specific context.

[Rz 20] Finally, Article 9 concerns the application to existing contracts and rights acquired.

## 6. The Communication

[Rz 21] The Communication sets out how to achieve the goal of a «*more modern, more European copyright framework*». In addition to the initial proposal on the «portability» of online content services it announced a set of further proposals planned for 2016 and a «long term vision». Towards this end it considers a higher level of harmonisation (more single market) and addresses aspects related to the territoriality of copyright. Moreover it refers to a possible modernising of copyright rules reflecting new technological realities. At this stage it suggests a gradual approach.

[Rz 22] I also referred to the fact that efforts to make multi-territorial licensing easier have already been undertaken (cf. Directive 2014/26/EU). Moreover, further to the consultation on the review of the cable and satellite Directive (which took place from 24 August 2015 to 16 November 2015) it considered the Directive's potential application in the online environment. In this context it is noteworthy that this Directive applies the country of origin principle, contrary to all other EU copyright legislation.

## 7. Consideration of new (Additional) Legislative Proposals

[Rz 23] The communication suggested facilitating inter alia an enhancement of cross-border distribution of television and radio programs. Furthermore it suggests adaptations of copyright exceptions inter alia to digital and cross-border environments, such as:

- Exceptions related to education, research and access to knowledge.
- The panorama exception (which is a provision in the copyright laws of various jurisdictions that permits taking photographs and video footage and creating other images of buildings

and sometimes sculptures and other art works which are permanently located in a public place, without infringing on any copyright that may otherwise subsist in such works).

- The disability exception (implementing the Marrakesh Treaty)<sup>15</sup>, Text-and-data mining for scientific research purposes.
- An exception authorising libraries to provide on-screen consultation of works.

## 8. The Second Set of Legislative Proposals

[Rz 24] A second set of legislative proposals aims at modernizing the copyright framework, focusing on allowing for wider online availability of content across the EU, adapting exceptions and limitations to the digital world, and achieving a well-functioning copyright market place.

[Rz 25] Such proposed measures consist of a Regulation and a Directive on copyright in the digital Single Market.

[Rz 26] The proposed Regulation 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<sup>16</sup> aims at simplifying the rights clearance for broadcasters and operators of retransmission services (such as IPTV providers) that want to offer wider access to TV and radio programs across borders.

[Rz 27] The proposed Directive on copyright in the Digital Single Market<sup>17</sup> aims at creating a fairer market place for online content especially for press publications, online platforms and remuneration of authors and performers.

[Rz 28] To this end the proposal intends to modernize the EU rules applicable to key exceptions and limitations in the areas of teaching, research and preservation of cultural heritage, focusing in particular on digital and cross-border uses.

[Rz 29] The mandatory exceptions that the proposed directive announces are related to teaching activities, text and data mining and the preservation of cultural heritage. Moreover, it has been proposed to introduce EU-wide related or «neighbouring» rights for press publishers. With a term of protection of 20 years.

[Rz 30] It also suggests a reinforced position of right holders to negotiate and be remunerated for the online exploitation of their content of video-sharing platforms. And a remuneration of authors and performers via new transparency rules.

[Rz 31] The two legislative proposals are currently being discussed by the European Parliament and the Council.

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<sup>15</sup> WIPO, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled of 27 June 2013, [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=301019](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301019) (all websites last visited on 2 May 2018).

<sup>16</sup> Proposal for a Regulation of the European Parliament and of the Council 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 of 14 September 2016, COM(2016) 594.

<sup>17</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market of 14 September 2016, COM(2016) 593.

## **9. The Implementation of the Marrakech Treaty**

[Rz 32] A Directive and a Regulation Implementing the WIPO's Marrakech Treaty in the EU were adopted on 13 September 2017. The former is Directive (EU) 2017/1564<sup>18</sup>. The EU Member States shall implement the Directive by 11 October 2018. The latter is Regulation (EU) 2017/1563<sup>19</sup>. It shall apply from 12 October 2018.

[Rz 33] People who are blind, visually impaired, or otherwise print disabled within the European Union and from other countries will be able to access more books and other print material in accessible formats, including adapted audio books and e-books, from across the European Union and the rest of the world.

## **10. Further Reflections**

[Rz 34] Further reflections concern the issue how reprography and private copying levies can be more efficiently distributed to right holders. Moreover, the definitions of the rights of communication to the public and of making available are going to be further examined. The role of alternative dispute resolution mechanisms shall also be further assessed. Finally the usefulness of codes of conduct shall be considered and the legal framework for the enforcement of IPRs shall be (re-)assessed.

## **11. A Long-term Vision**

[Rz 35] The communication also refers to objectives which are unlikely to be reached in the near future. In this context it mentions issues such as a need for overcoming the fragmentation of the (national) copyright systems, fostering of convergence of national laws and a full harmonisation by virtue of a single copyright code. It also hints at the creation of a single EU copyright title. It even mentions the creation of a single copyright jurisdiction against the background of precedents in the fields of trademarks and patents.

## **12. A Personal View on the Options and Difficulties Related to the Long-term Vision**

[Rz 36] An implementation of the long-term vision would require political willingness in the EU Member States for substantial changes of the existing copyright acquis. It goes without saying

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<sup>18</sup> Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 242 of 20 September 2017, p. 6.

<sup>19</sup> Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, OJ L 242 of 20 September 2017, p. 1.

that in the digital age of the 21st century also for copyright there is a need for fully establishing the single market as it was already achieved for other intellectual and industrial property rights. [Rz 37] EU legislative action in the field of copyright and related rights has always been based upon the single market mandate. According to Article 26 (1) TFEU «*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*». An implementation of the «*long term vision*» would finally achieve a single EU copyright market.

### 13. The Precedent of the Unitary Patent

[Rz 38] A recent precedent constitutes Regulation (EU) No 1257/2012 of 17 December 2012<sup>20</sup>. It created, for participating Member States, a unitary protection conferred by a (national) patent. It did so by taking account of the existing European patent protection governed by the European Patent Convention (EPC)<sup>21</sup> (in the context of the European Patent Organisation). Such a European patent splits post grant into bundle of national patent titles. By virtue of the Regulation such patents have now a unitary effect.

[Rz 39] It is noteworthy that Article 142 (1) EPC already provides since 1973 that «*any group of (EPO) Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States*».

[Rz 40] With the entry into force of the Lisbon Treaty<sup>22</sup> on 1 December 2009 EU primary law finally provides for a specific legal basis for the creation of European intellectual property rights. Pursuant to Article 118 (1) 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*».

### 14. The Precedent of the EU Trademark (new Regulation)

[Rz 41] Regulation (EU) 2015/2424<sup>23</sup> of the European Parliament and the Council amending the Community trade mark regulation entered into force on 23 March 2016. It is based upon Article 118 (1) TFEU. The Community trade mark is now called the European Union trade mark.

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<sup>20</sup> Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361 of 31 December 2012, p. 1.

<sup>21</sup> Convention on the Grant of European Patents of 5 October 1973, <https://www.epo.org/law-practice/legal-texts/html/epc/2013/e/ma1.html>.

<sup>22</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306 of 17 Decemebr 2007, p. 1..

<sup>23</sup> Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 341 of 24 December 2015, p. 21.



## 15. Relevant Jurisprudence

[Rz 42] By a judgment of 13 July 1995 in case C-350/92<sup>24</sup> the European Court of Justice (ECJ) had already decided that «*Regulation No 1768/92 concerning the creation of a supplementary protection certificate for medicinal products, which, having regard to the period needed to obtain marketing authorization, permits the duration of the protection conferred by the patent to be extended in the case of medicinal products for which such authorization has been granted, was validly adopted on the basis of Article 100a [ECT; now Article 114 TFEU], and did not therefore have to be adopted on the basis of Article 100 or Article 235 [ECT]*»<sup>25</sup>.

[Rz 43] The «*creation of that certificate, at a time when it appeared that various Member States were in the process of strengthening the protection conferred on medicinal products by patent law, was intended to prevent the heterogeneous development of national laws, which would be likely to create obstacles to the free movement of medicinal products within the Community and thus directly affect the establishment and the functioning of the internal market. It therefore came within the scope of Article 100a ECT [now Article 114 TFEU]*».

[Rz 44] Further to a challenge of the unitary patent Regulation the ECJ ruled on 5 May 2015 in case C-146/13<sup>26</sup> that Article 118 TFEU, which forms part of Chapter 3 («Approximation of laws») of Title VII TFEU, does not necessarily require the EU legislature to harmonise completely and exhaustively all aspects of intellectual property law.

## 16. Options for Future Action

[Rz 45] In the light of this jurisprudence of the ECJ both a single copyright code and a single EU copyright title would be possible options.

[Rz 46] The first option would be a Regulation with unitary effect replacing the existing copyright Directives. Article 114 TFEU would appear to be the appropriate legal basis. The second option would be a Regulation providing for a single EU title. As in the case of the new EU trademark Regulation Article 118 (1) TFEU should be used as legal basis in the case that this option would be chosen by European lawmakers.

## 17. Differences with the Patent Reform

[Rz 47] In order to choose the right approach a number of specificities of copyright should be taken into account.

[Rz 48] Contrary to patent law copyright is not governed by a European convention, which despite failures in the past already paved the way for unitary protection. Furthermore, copyright does not only involve economic rights. There is thus also a need for complying with human rights, national constitutions and certain specific international covenants.

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<sup>24</sup> ECR 1995, p. I-1985.

<sup>25</sup> See Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products, OJ L 182 of 2 July 1992, p. 1.

<sup>26</sup> Cf. reason 48.

[Rz 49] Moreover it must be borne in mind that Article 5 of Directive 2001/29/EC allows numerous optional copyright exceptions whereas the patent Regulation is providing for a catalogue of uniform exceptions.

[Rz 50] Copyright rights are also not subjected to formalities such as registration. In contrast to patent rights right holders would thus also have no choice between national, bundles of national or even European titles.

[Rz 51] Much longer terms of protection and certain complex issues related thereto will also have to be taken into account. The patent term involves a period of 20 years from application whereas copyright subsists for at least 70 years *post mortem auctoris* (p.m.a.).

[Rz 52] For copyright there is also a need for protecting acquired rights. This involves for example the «*prorogations et prolongations de guerre*» in France or crown copyright in the UK.

[Rz 53] In certain cases (composers of musical works who lost their lives as French fighters during the First World War) the duration of protection could last for up to 114 years and 272 days.

[Rz 54] In the UK in certain cases crown copyright for literary, dramatic and artistic works expires 125 years after creation.

[Rz 55] In this context Article 13 (1) of the term Directive must be taken into account: «*Where a term of protection, which is longer than [70 years p.m.a.] is already running in a Member State on [1 July 1995] this Directive shall not have the effect of shortening that term of protection in that Member State*».

## 18. Conclusion

[Rz 56] The implementation of the European Commission's long term vision will be a difficult venture since it will have to address a number of controversial issues. However, there is no other option for a complete achievement of the EU's single market in the digital environment of the 21<sup>st</sup> century.

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