

**New Developments in EU and International
Copyright Law**

Edited by

Irini A. Stamatoudi



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Editor and Contributors

Irini Stamatoudi, LL.M., Ph.D.

Valérie Laure Benabou, Professor, University Versailles-Paris Saclay, France; DANTE research centre (Droit des Affaires et Nouvelles Techniques).

Michael Blakeney, Winthrop Professor, Faculty of Law University of Western Australia, Australia.

Benjamin Farrand, Assistant Professor, Warwick Law School, University of Warwick, UK.

Mihály Ficsor, Member and Honorary President of the Hungarian Copyright Council; former Assistant Director General of WIPO.

Alison Firth, Professor Emeritus, University of Surrey; Visiting Professor, Newcastle University and Queen Mary, University of London, UK.

Christophe Geiger, Professor of Law, Director General and Director of the Research Department, Center for International Intellectual Property Studies (CEIPI), University of Strasbourg, France; Affiliated Senior Researcher, Max Planck Institute for Innovation and Competition, Munich.

Ysolde Gendreau, Professor, Faculty of Law; and Researcher, Centre de recherche en droit public, Université de Montréal, Canada.

Editor and Contributors

Reto M. Hilty, Director of the Max Planck Institute for Innovation and Competition in Munich, Germany; Professor at the Universities of Zurich (Switzerland) and Munich (Germany).

P. Bernt Hugenholtz, Professor of Intellectual Property Law, Institute for Information Law, University of Amsterdam, The Netherlands.

Marie-Christine Janssens, Professor of Intellectual Property Law, University Leuven, Belgium. Head of the KU Leuven Centre for IT & IP Law, Belgium.

Kaya Köklü, Dr. iur., Senior Research Fellow at the Max Planck Institute for Innovation and Competition in Munich, Germany.

Maria Martin-Prat, Head of the Copyright Unit, European Commission.

Beverley Pereira, PhD, LLB, BA, Barrister/Attorney-at-Law. Head, Intellectual Property Management Unit, Office of Research, The University of the West Indies (UWI), Member of the Advisory Board of the Jamaica Intellectual Property Office, Adjunct Lecturer in Intellectual Property Law (UWI) and former Chairman of the Copyright Tribunal of Jamaica.

Tana Pistorius, South African Research Chair in Law, Society and Technology, hosted by the University of South Africa, funded by the Department of Science and Technology, and administered by the National Research Foundation.

Jörg Reinbothe, Dr iur., M.C.L., Professor, Europa Institute of the University of Saarbrücken, Germany. Former Head of the Copyright Unit, European Commission.

Sam Ricketson, Professor of Law, Melbourne Law School, University of Melbourne, Victoria, Australia.

Marco Ricolfi, Professor, Department of Law, Turin University, Italy.

Jan Rosén, Professor of Private Law, Stockholm University, Sweden.

Paul L.C Torremans, Professor of Intellectual Property Law, University of Nottingham, UK; Special Professor, Faculty of Law, Chiang Mai University (CMU), Thailand.

Rán Tryggvadóttir, PhD researcher at University KU Leuven, Centre for IT & IP Law, Belgium; Associate Professor, Reykjavík University, Iceland.

Editor and Contributors

Silke von Lewinski, Adjunct Professor (Franklin Pierce Center for IP, University of New Hampshire, US) Dr. iur., Max Planck Institute for Innovation and Competition, Munich, Germany; Assistant Professor, University of Zagreb, Croatia.

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Chapter 18

Towards an EU Copyright Code? A Conceptual Framework

Marco Ricolfi*

18.1 A CONTROVERSIAL IDEA AND ITS BACKGROUND

The idea of a European Copyright Code is fairly recent and highly controversial.

The controversial nature of the concept, sometimes also referred to as single European Copyright title, is well illustrated by the 2014 Consultation on the review of the EU Copyright rules.¹ The Consultation, which generated broad interest with over 9,500 replies, asked respondents whether the EU should pursue the establishment of a single EU copyright title and whether, in their opinion, this should be the next step in the development of the EU copyright system or whether it should be part of a long-term project. The reply was quite polarized. End users and consumers, as well as academics, expressed clear support to the idea, sometimes even enthusiastically; all the other players, including authors, as well as business intermediaries between creators and their public, such as publishers and record companies, expressed scepticism and even outright opposition to the idea.

* Marco Ricolfi, Professor, Department of Law, Turin University, Italy.

1. See the *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules* compiled by the European Commission of July 2014, 89–91.

Where does the idea originate from? There are several strands which converge into it.

First we should consider the various policy-making initiatives at the EU level. Five years before the Copyright Consultation, the Commission had come up with a pretty clear description of the notion of EU copyright Code. In a 2009 ‘reflection document’ possessing the weight of originating simultaneously from the two divisions of the Commission which deal with copyright, that is the then DG Information Society (now DG Connect) and the DG Markt, the idea was floated as a ‘suggestion’ from (unidentified) stakeholders.² Illustrating the possible measures to facilitate the emergence of a pan-European copyright licensing market, the article noted that:

A ‘European Copyright Law’ (established, e.g., by means of an EU regulation) is often mooted as establishing a truly unified legal framework that would lead to direct benefits for the coherence of online licensing. A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights. It would overcome the issue that each national copyright law, though harmonized as to its substantive scope, applies only in one particular national territory. A Community copyright would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction and licensing costs. Unification of EU copyright by regulation could also restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonization directives mandate basic economic rights, but merely permit certain exceptions and limitations. A regulation could provide that rights and exceptions are afforded the same degree of harmonization.³

2. See the ‘Reflection Paper’ on *Creative Content in a European Digital Single Market: Challenges for the Future* jointly issued by the DG INFSO and MARKT 22 Oct. 2009, 18–19.

3. The document went on as follows: ‘By creating a single European copyright title, European Copyright Law would create a tool for streamlining rights management across the Single Market, doing away with the necessity of administering a “bundle” of 27 national copyrights. Such a title, especially if construed as taking precedence over national titles, would remove the inherent territoriality with respect to applicable national copyright rules; a softer approach would be to make such a Community copyright title an option for rightholders which would not replace, but exist in parallel to national copyright titles.’ It is noteworthy that Art. 118 of the Treaty on the Functioning of the European Union (TFEU), introduced by the Lisbon Reform Treaty, was mentioned as the candidate legal basis for the measure; the IVIR Study *The Recasting of Copyright & Related Rights for the Knowledge Economy*, 2006 was referred for background.

It is arguable that even before that date implicit reference to the possibility of a creation of single EU copyright title was foreshadowed in EU law provisions, such as Art. 8(2) of the Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 Jul. 2007 on the law applicable to non-contractual obligations Regulation (Rome II),

The idea did not go away in the subsequent documents; on the contrary it was reinforced and articulated. In its 2011 Communication on ‘A Single Market for Intellectual Property Rights. Boosting creativity’, the Communication confirmed that ‘the Commission will also examine the feasibility of creating an optional “unitary” copyright title on the basis of Article 118 TFEU and its potential impact for the single market, rightholders and consumers’.⁴ Here we still find reference to the ‘optional’ character of the single European copyright title; but the subsequent (leaked, and never officially issued) 2014 White Paper⁵ conceptualizes the single title as replacing, rather than complementing, national copyright laws:

‘A third option would be to *substitute* the current system of national copyright titles by a *single unitary copyright* title.’⁶

Also the recent Draft Report by the European member of Parliament on the evaluation of the InfoSoc Directive⁷ ‘considers the introduction of a single European Copyright Title that would apply directly and uniformly across the Union, in compliance with the Commission’s objective of better regulation as a legal means to remedy the lack of harmonisation resulting from Directive 2001/29’.

which provides that: ‘In the case of a non-contractual obligation arising from an infringement of a *unitary Community intellectual property right*, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.’ (Italics added).

4. See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of 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*, Brussels, 24.5.2011 COM(2011) final, 11.
5. European Commission White Paper *A Copyright policy for creativity and innovation in the European Union*, Brussels, XXX Internal draft (Leaked).
6. White Paper *A Copyright policy for creativity and innovation in the European Union*, 7 (the words in italic are in bold in the original).
7. (Draft) Report of the Committee on Legal Affairs on the evaluation of Dir. 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, item 3, 3, rapporteur Julia Reda, February 2015. However, the most recent documents in the area (European Commission, 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*, Brussels, 9.12.2015 COM(2015) 626 final and European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A Digital Single market Strategy for Europe* [SWD(2015) 100 final, Brussels, 6.5.2015 COM(2015) 192 final] do not mention the possibility of the creation of a single EU copyright title. But the declarations by Commissioner Oettinger at Cannes on 18 May 2015 would seem to indicate that the notion of single EU copyright title may still be afloat.

There is also a *second* strand, which goes back to scholarly writings and proposals.⁸ A few years ago the so-called Wittem group of scholars came up with a text which proposed rules concerning several of the most crucial questions of copyright law.⁹ The draft was not specifically intended as a blueprint for EU legislation complementing or replacing national copyright laws; rather, it was conceived as a model which could be taken into account both by national and EU lawmakers. However, in recent times this second alternative has gained ground.

What may be the rationale for the adoption of an EU Copyright Code by way of regulation? One may assume that the reply to this question is to be found along lines similar to the ones which justify other European unitary titles in IP. I submit that the case of copyright is more complicated than that, for a number of reasons I will try to explore sequentially in the following notes. In doing so, I will try to build a conceptual framework to analyse what may be the – very different (and problematic) – rationales which may explain the quest for an EU Copyright Code, to test its admissibility in the current legal framework and to assess its desirability from a few of the possible angles.

18.2 COPYRIGHT IS DIFFERENT

All other major IPRs come both as national rights and as unitary EU rights. Trademark was first, back in 1994; breeders' rights and designs followed; at long last also the European unitary patent seems on its way to finally become a reality. Community trademarks may, on balance, be considered a success story; many of us fear that unitary patents will turn out to be a horror story.¹⁰

8. See among others Annette Kur, Thomas Dreier, *European Intellectual Property Law. Text, Cases and Materials*, Edward Elgar, 351 ff.(2013); Giuseppe Mazzotti, *Copyright in the EU Digital Market. Report of the CEPS Digital Forum*, CEPS, Brussels, 5, 26 ff. (2013); Mireille Van Eechoud, Bernt Hugenholtz, Stef Van Gompel, Lucie Guibault, Natali Helberger, *Harmonizing European Copyright Law. The Challenges of a Better Lawmaking*, Kluwer, 316 ff. (2009).

9. See <http://www.copyrightcode.eu/>. On the project – to which I took part as a member of the Advisory Committee – see Thomas Dreier, *The Wittem Project of a European Copyright Code*, in C. Geiger (ed.), *Constructing European Intellectual Property. Achievements and New Perspectives*, Edward Elgar, 292 ff. (2013) and Jane Ginsburg, *European Copyright Code - Back to First Principles (with Some Additional Detail)*, Columbia Public Law Research Paper No. 11-261, <http://ssrn.com/abstract=1747148>.

10. For a recent negative assessment see Joseph Drexler, *The European Unitary Patent System: On the 'Unconstitutional' Misuse of Conflict-of-Law Rules*, Max Planck Institute for Innovation & Competition Research Paper No. 15-01, available at SSRN: <http://ssrn.com/abstract=2553791> or <http://dx.doi.org/10.2139/ssrn.2553791>. The most damning indictment of this hybrid instrument comes from Hans-Ullrich, *Select from within the System: the European Patent with Unitary Effect*, Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 12-11, according to whom the main flaws derive from the desire of accommodating business interests rather

For copyright, the story is altogether different. In no other area of IP law we have experienced as many harmonization directives as in copyright. However, harmonization as such does not lead to a single copyright market, as it is well known and actually quite obvious;¹¹ quite to the contrary, in copyright law botched harmonization powerfully contributes to additional layers of fragmentation, as it has indeed happened in connection with limitations and exceptions.¹² This is the reason why, at the end of several decades of harmonization, the conditions prevailing on the EU market for copyright-protected goods and services are quite fairly characterized in terms of territorial fragmentation and of compartmentalization between Member States. No single market here.

It is usually remarked that the inherent limits to the notion of exhaustion under copyright go a long way to explain this outcome, as the first sale doctrine applies only to goods and does not concern services.¹³ This is an accurate statement; except that even in connection with goods it may well be that the first sale in Member State A does not lead to exhaustion in State B, as it is the case where the goods – e.g., perfumes – are not copyright-protected in A but are protected in B.¹⁴ So it turns out that ‘the single most important obstacle to harmonization’ ultimately is to be found in ‘the

than balancing the interest of incumbent businesses, newcomers and users. I myself have criticized the European patent on two limited – if very significant – grounds: the creation of a single Appeals Court is bound to prevent the emergence of competing approaches to controversial issues (see my *The Recasting of Brussels I Regulation from an IP Lawyer's Perspective*, in Fausto Pocar, Ilaria Viarengo, Francesca Villata (eds.), *Recasting Brussels I*, Cedam, Padova, 2012, 147–157, at 156–157) and has adopted an unsound – and illegal – approach in dealing with the issue of ‘bifurcation’ of infringement and invalidity actions (see my *La ‘biforcazione’ tra azioni di validità ed azioni di contraffazione: ragioni teoriche e problemi applicativi*, in Costanza Honorati (ed.), *Luci ed ombre del nuovo Sistema UE di tutela brevettuale*, Giappichelli, Torino, 2014, 171–182).

11. As shown by banking and insurance directives, which failed to contribute to the creation of a single market in banking and insurance services as long as they were confined to harmonizing the separate Member States’ rules and until the second generation of directives took up the task of providing for freedom of establishment and of provision of services on the basis of a combination of minimum harmonization and mutual recognition: in this connection see Gerard Hertig, *Imperfect Mutual Recognition for EC Financial Services*, 14 *Int. Rev. of Law and Economics* 177 ff. (1994).
12. See Van Eechoud, Hugenholz, Van Gompel, Guibault, Helberger, *Harmonizing European Copyright Law*, *supra* at n. 8, 104 ff.
13. Contrast ECJ 8 Jun. 1971, Case C-78/70 *Deutsche Grammophon Gesellschaft v. Metro* [1971] ECR-487 to ECJ 18 Mar. 1980, Case C-62/79 *Coditel v. Ciné Vog Films* [1980] ECR-881.
14. For quotations of the relevant French and Dutch cases see Bernt Hugenholz, *The dynamics of harmonization at the European level*, in Christophe Geiger (ed.), *Constructing European Intellectual Property. Achievements and New Perspectives*, Edward Elgar, 273 ff., 278 (2013).

territorial nature of copyright',¹⁵ rather than in the working of one specific copyright law rule.

The persistence of EU compartmentalization may appear odd and even paradoxical in a digital network-driven environment. At first blush it would seem that the emergence of the web should greatly contribute to the creation of a single market in copyright content, even more so than in connection with patented and trademarked products. After all one does not deliver trucks and fridges *via* the Internet; but text, music and video can be easily translated into digits and are therefore amenable to being easily transmitted digitally. Still, not much is happening over the web in terms of pan-European cross-border services. It is reported that as a rule subscriptions for digital programmes, e.g., football tournaments, are neither accessible from a country other than the one where the subscription was purchased nor 'portable' by a travelling purchaser: a subscription offered by a Greek provider does not give access to the same service in the UK.¹⁶ This is an inconvenience which, while making furious a football fan, may be deemed of comparatively minor importance; except that similar difficulties arise in many different copyright-relevant areas. We may well turn our attention to more exalted areas – e.g., digital copies of books and magazine held by public libraries and educational institutions – but the outcome is not different: currently e-lending from one European institution to the other is not allowed.

Not always all the blame falls on copyright. Many restrictions to cross-border transactions originate from payment methods, from tax divergences and similar non-copyright hindrances,¹⁷ including, of course, restrictive contractual arrangements. However, it is out of question that harmonized EU copyright law is not designed, at least at the moment, with a view to contributing to the creation of a European single market.

15. Hugenholz, *The dynamics of harmonization*, *supra* at n. 14, 274.

16. See EU Court 4 Oct. 2011, Cases C-403/08 and C-429/08, *Football Association Premier League, NetMed Hellas SA and Multichoice Hellas SA v. QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen; Karen Murphy v. Media Protection Services*, [2011] ECR I-903 ff., 'Premier League'. The issue is dealt with, with some terminological fuzziness, by European Commission, *Towards a modern, more European copyright framework*, *supra* at note 7, 3-6-

17. A thorough review and assessment was conducted by the EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A Digital Agenda for Europe*, Brussels, 19.05.2010 Com (2010) 245; not much has changed since.

18.3 THE TROUBLE WITH COPYRIGHT BETWEEN
SINGLE EU MARKET AND GLOBAL DIGITAL
ENVIRONMENT

What is then the trouble with copyright? According to the narrative I just referred to, the trouble with copyright consists in the fact that, in its current form based on a bundle of national copyright laws, it does not contribute to the creation of a single EU market, or, in other words, it does not ‘deliver’ on the promise of wealth creation through cross-border, pan-European, added value, copyright-protected goods and services.¹⁸

I am not totally sure that this vision, of the benefits in store from a single-market friendly copyright, is altogether compelling. After all, a fridge or a truck may well perfectly fit the need of any European person, which explains why an EU dimension for patents and trademarks may make plenty of sense; but many cultural products do not ‘travel’ as well. It is not a chance that we do not have pan-European newspapers (with the notable – albeit possibly elitist – exception of the *Financial Times*). Also, it would appear that even in areas where a truly pan-European market is, as we will see shortly,¹⁹ already possible, satellite and cable television, it is a fact of life that broadcasters often prefer for possibly very sound reasons a local rather than pan-European dimension, tailored around linguistic barriers²⁰ (with the notable exception, again, of sports, the appetite for which transcends national borders).²¹ A similar fragmentation prevails also in the movie sector, where the centralization of rights in the hands of movie producers would – at first blush – appear to enable and even facilitate cross-border licensing.²² We may therefore doubt that out there we have 650 million European consumers clamouring all the time for a single market in copyrighted goods and services.

Even in terms of supporting European champions through the creation of a single market for copyright-protected goods and services, there may be misgivings. Maybe it was a mistake that we failed to act in the past. For instance, a dozen years ago or so the rules we inherited from the past

18. The lamentation is recurring: see European Commission, *A Single Market for Intellectual Property Rights*, *supra* at n. 4, 9 ff.

19. Section 4.1.

20. For a similar remark see Kur-Dreier, *European Intellectual Property Law*, *supra* at n. 8, 317 f.

21. But even there the local character of audiences – and even more of advertisements – may account for the persistence of territorial fragmentation on the basis of probably unobjectionable legal grounds: see Mazzotti, *Copyright in the EU Digital Market*, *supra* at n. 8, 52 ff., 58.

22. For this remark see Mazzotti, *Copyright in the EU Digital Market*, *supra* at n. 8, 1, 11–14 and 51 ff. (explaining how the pre-launch grant of rights to distributors, essential to finance movie production, takes place along territorial boundaries to dovetail local ‘windows’ in releases – for theatres, DVDs, TV etc. – and to enable price discrimination across geographical markets).

compelled the European music industry to go around to set up digital music shops, negotiating, hat in hand, with multiple national collective rights management organisations (CRMOs) and striving to accomplish simultaneous compliance with divergent national sets of rules. Our lawmakers were not able to remedy to this failing. Apparently this is the reason why a genuinely European music or movie service is yet to come.²³ But it is uncertain that this is the right moment to recover the lost ground. It is arguable that, e.g., Netflix, which is waiting in the wings to dip its feet in European waters, would be very happy of such a development and more likely to grab it than its by now dispirited European rivals.

Finally, it is arguable that the possibility of fragmentation of markets – and their divisibility into a variety of separate submarkets by means of contractual field of use restrictions – is coessential, rather than inimical, to the achievement of copyright purposes, as it enables the optimal exploitation of works; and that in any event it would be inane to adopt a unitary copyright at the EU level while allowing contractual restrictions as to territories and modes of exploitation.²⁴

Maybe there is an altogether different narrative which is more convincing. Under this second vision, the trouble with copyright is that it has failed to deliver not in connection with the creation of a European single market, but with the promises and opportunities of a global, digital network-driven ecosystem of culture and creativity. For three centuries, it may – rather plausibly – be argued, copyright was for professionals. This did make sense all along. However the time has come that copyright starts to serve also the interests of the vastly increasing number of amateur creators, who tend to coincide with users and indeed are therefore often described as ‘prosumers’ (producers/consumers).²⁵ In a digital environment, the case could be made, copyright’s mission should be redefined and enlarged: it should first acknowledge the new realities and, second and foremost, focus on enabling the coexistence of the original, but still vital, exclusivity-based culture with the ethos and norms of access, sharing and scientific research which have found their voice with the advent of the web.²⁶

23. With the notable exception of Spotify.

24. This point was forcefully made by Davide Sarti in his scathing criticism to an early draft of this paper at the Conference held in Rome 19 Feb. 2015 and organized by the business law professors’ association, *Orizzonti di diritto commerciale*.

25. See in this connection Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 *Vanderbilt J. of Ent. & Tech. Law* 841 ff. (2009). The EU Commission has not failed to deal with the novel perspective introduced by user generated content quite a while ago: see Commission of the EU Communities, Green Paper *Copyright in the Knowledge Economy*, Brussels, COM (2008) 466/3, 19 f.

26. A brilliant treatment of the challenges implicit in this – difficult – quest for coexistence is in Alexander Peukert, *Das Urheberrecht und die Zwei Kulturen der Online-Kommunikation*, GRUR-Beilage 1/2014, 77 ff.

As a first step in our exercise, we may however as well accept, at least for a moment, the first narrative, according to which the current compartmentalization in the EU of copyright markets is a problem which calls for adequate solutions.

18.4 OVERCOMING (THE COSTS OF)
TERRITORIALITY IN COPYRIGHT: THREE
SOLUTIONS

Working under this (not unchallengeable) assumption, we can test the quite widespread idea that there are three options which may contribute to the creation of a single market for copyright goods and services:²⁷

- (a) The first one consists in the expansion or generalization of the *satellite model*. According to Article 1(2)(b) of the Satellite and Cable Directive of 1993, a satellite broadcast amounts to a communication to the public only in the country of origin of the signal, i.e., where the ‘injection’ (‘start of the uninterrupted chain’) of the programme-carrying signal can be identified. Under this system, only the copyright clearance in the country of origin of the broadcast (‘home country’) is required. Thereby satellite broadcasting and (in a somewhat different way) cable transmission may enjoy a pan-European audiovisual space;²⁸ which induces to wonder to which extent this rule, sometimes aptly described as ‘home country’ or ‘European passport’ principle, may be generalized to other copyright based services.²⁹
- (b) The second option consists in a mixed bag of ad hoc measures all ultimately aiming to force or at least to induce the grant of pan-European copyright licenses. The tools which have been adopted – or are being considered for adoption – are many; what they have in common is the desired result. CRMO rules are designed in such a way as to assist the emergence of Union-wide

27. The rest of this paragraph is largely based on Hugenholtz, *The dynamics of harmonization*, *supra* at n. 14, 280 ff.

28. On the specificity of the cable retransmission regime see Van Eechoud, Hugenholtz, Van Gompel, Guibault, Helberger, *Harmonizing European Copyright Law*, *supra* at n. 8, 120 ff.

29. For a similar approach see the Directive 2010/13/EU of the European Parliament and of the Council of 10 Mar. 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), on which see Mazziotti, *Copyright in the EU Digital Market*, *supra* at n. 8, 59 ff. This approach may to a large extent be assimilated to the EU passport adopted in banking and insurance services: see Hertig, *Imperfect Mutual Recognition for EC Financial Services*, *supra* at n. 11 -

operators and to enable them to license works to users across the whole EU.³⁰ Also antitrust may contribute towards the creation of the single market, thus confirming once more the ‘integrationist’ slant which since the beginning characterized EU competition law. This approach is perfectly in line with competition law traditional tenets. After all, it can hardly be denied that the exclusive licensing agreements which the Premier League had entered into with the Greek satellite pay television vendor, which included an obligation not to sell decoder cards to consumers residing abroad, amount to absolute territorial protection,³¹ which EU competition law abhors as the blackest of capital sins. It may well be unwise to use antitrust as a blunt instrument forcing the adoption of cross-border, pan-European business models; but it may aptly serve the – humbler, but not unimportant – goal of allowing cross-border access from one Member State to the others. Competition law may also contribute – and has indeed been contributing all along – to the dismantling of the traditional arrangements whereby in the past national CRMOs had stabilized their respective geographical spheres of influence. The so-called reciprocal representation agreements, whereby the CRMO in State A would represent there the rightholders which had given a mandate to the CRMO in State B, and vice versa, have been for a long time a stable feature in the European landscape;³² but they are being increasingly subjected to antitrust scrutiny.³³

Other fragments of a pan-European design can be traced with increasing frequency in a variety of recent measures. For example, the recent orphan works directive³⁴ provides that the recognition of the orphan status of a work by any Member State is to be given full faith and credit also in all the other Member States. Here the well-oiled mechanism of minimum harmonization and mutual recognition once again comes to fruition.

It is widely acknowledged, however, that neither option is by itself sufficient to overcome fragmentation. The extension of the satellite model, while mooted in connection with streaming, is deemed inappropriate in connection with on-demand and retail

30. See the 2005 Recommendation and the 2014 Directive. For a discussion see Mazziotti, *Copyright in the EU Digital Market*, *supra* at n. 8, 31 ff.

31. EU Court 4 Oct. 2011, ‘Premier League’, *supra* at n. 11.

32. On the details of the Santiago and Barcelona agreements see Paul Florenson, *Management of Authors’ Rights and Neighbouring Rights in Europe*, RIDA 2 ff., 58 ff. (2003).

33. Hugenholz, *The dynamics of harmonization*, *supra* at n. 14, 288.

34. Directive 2012/28/EU of the European parliament and of the Council of 25 Oct. 2012 on certain permitted uses of orphan works, OJ L 299/5 of 27 Oct. 2012. This “mixed bag” approach is now at the basis of European Commission, *Towards a modern, more European copyright framework*, *supra* at note 7,

services, which are believed to entail also reproduction and distribution, in addition to communication to the public.³⁵ Moreover the fear to trigger regulatory competition, and what Justice Brandies designated a ‘race of laxity’ a long time ago,³⁶ looms large.

A piecemeal approach as envisaged in the second option has the obvious disadvantages of all patchwork solutions. It produces friction; transaction costs are not abated but rather shifted. This is the reason why a third, more radical, solution is considered with increasing frequency.

- (c) The third option is precisely the adoption of an EU Copyright Code we referred to at the outset of these notes. We thus finally come to our original research question. Here we have a few issues to deal with. It has been convincingly argued that the adoption by regulation of an EU Copyright Code would amount to ‘a truly structural and consistent solution, which would immediately remove all copyright-related obstacles to the creation of the Single Market’.³⁷ This makes sense: to the extent the true enemy of integration is territoriality, removing it from the national level to transfer it at the regional, EU-wide level should (more or less) do the trick.³⁸ Except that, even accepting this conclusion, we still have to face the question whether an EU Copyright Code should not pursue the other, broader goals we earlier mentioned in parallel to the single market targets or maybe even in preference to them. I will later on come back to this issue; but, before doing so, I will ask a few elementary questions about the legal admissibility of an EU Copyright Code.

18.5 AN EU COPYRIGHT CODE: PLAIN SAILING OR TROUBLED WATERS?

At first sight, the adoption of an EU Copyright Code would appear to be an easy task for European lawmakers. In the past, it would have been necessary

35. See Van Eechoud, Hugenholtz, Van Gompel, Guibault, Helberger, *Harmonizing European Copyright Law*, *supra* at n. 8, 91 ff. . On the current Consultation on the review of the EU Satellite and Cable Directive to Tv, radio and internet services (<https://ec.europa.eu/digital-agenda/en/news/consultation-review-eu-satellite-and-cable-directive#English>) see the 15 Nov. 2015 response of European Copyright Society, available at [http://www.ceipi.edu/index.php?id=5428&L=2&no_cache=1&tx_ttnews\[tt_news\]=8739https://ec.europa.eu/digital](http://www.ceipi.edu/index.php?id=5428&L=2&no_cache=1&tx_ttnews[tt_news]=8739https://ec.europa.eu/digital).

36. See his dissenting opinion in *Louis K. Liggett v. Lee*, 288 U.S., 517, 557–559 (1933).

37. Hugenholtz, *The dynamics of harmonization*, *supra* at n. 14, 289.

38. One might wonder, however, if this is really so, as long as territorially restricted licenses are admissible.

to tease out the legitimacy of the corresponding regulation from the penumbra of Article 308 of the (then) EU Treaty.

Now Article 118 TFEU provides in its first part:

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.

It might at first appear that this is sufficient basis for adopting a regulation providing for a European Copyright Code; and this view is widely shared.³⁹

Except that, as usual, the devil is in the detail. What exactly do we mean under the notion of EU copyright, a second, separate layer of protection or a replacement of national copyright laws?⁴⁰ If we mean a second, separate layer of protection, the goal may be outside of the normative reach of the EU. Obtaining two layers of protection is a normal occurrence when the grant depends both on some form of application by the private person or entity and on the corresponding grant from a public authority. Clearly enough, the trademark applicant who asks protection both to a national office and to Alicante, in whichever sequence she may choose, intends to obtain and will obtain, provided the respective requirements are met, two separate layers of protection. The same applies for patents, breeder's rights and – up to a point – for designs. It is true that for this last title no application is required for the protection to set in. Still a double layer of protection postulates that a national application is made. This is not the way the mechanism would work in the area of copyright. Copyright protection is automatic, that is it is triggered by the fact itself of creation and extrinsecation – to which UK laws add a requirement of fixation – without the need of any specific act of application from the creator.⁴¹ As a result, any work would *ipso facto* enjoy automatic double protection. Therefore national rights would continue to apply *pari passu* with their novel EU counterpart. As a result, territoriality would not be superseded; and rightholders might as well continue to assert their rights, e.g., by denying that in a specific case exhaustion of their national rights has set in, exactly as in the past.

A single market advocate would not like the outcome. Indeed any reasonable person who is aware of the futility of an exercise, which leaves the legal situation exactly as it was in the beginning after a tremendous

39. Hugenholz, *The dynamics of harmonization*, *supra* at n. 14, 290; Kur, Dreier, *European Intellectual Property Law*, *supra* at n. 8, 319.

40. For a discussion of the two alternatives see Kur, Dreier, *European Intellectual Property Law*, *supra* at n. 8, 319.

41. Except for the – questionable – requirement of assertion of copyright under UK law: see William Cornish-David Llewelyn-Tania Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Thomson-Sweet & Maxwell, 517 (2010).

exertion of law-making prerogatives, might then wish to explore the other alternative I mentioned.

What happens if the here mooted regulation *replaces* national copyright laws? In this case it may well be expected that EU law indeed meets all its targets: it overcomes territoriality, contributes to the single market and – why not? – hopefully serves the broader goals we briefly sketched out before. There should be reasons to cheer, at least for the supporters of copyright as a tool to create a single market,⁴² except that one may begin to wonder what difficulties this solution may entail.

18.6 EU COPYRIGHT LAW DISPLACING MEMBER STATES' COPYRIGHTS: FOUR QUESTION MARKS

At a first glance, it would appear that there are (at least) four difficulties, some of which are located in a territory which is familiar to IP lawyers, while others lead us to areas of law which are somewhat more remote and unfamiliar to us. Let us try to sketch out an inventory of these difficulties.

A. End of national copyright laws as source of fallback rules not dealt with by the single EU titles

The first difficulty has to do with the fact that all other single EU IP titles are based on the assumption that national laws survive and may be resorted to in areas which are not directly regulated by EU law. Let us take Community Trade Marks as an example. Article 14, paragraph 1, of CTMR in principle provides that 'The effects of Community trademarks shall be governed solely by the provisions of this Regulation'. However, there is a quite wide range of issues which are not dealt with by the Regulation itself. According to Article 102, paragraph 2 CTMR, 'On all matters not covered by this Regulation a Community trade mark court shall apply its national law, including its private international law.' Reference is here made not only to rules of procedure (Articles 14, paragraph 3 and 101, paragraph 3), remedies (Article 102) and some of the private law consequences of declarations of invalidity or revocation, but, even more importantly, to trade marks 'as an object of property' (Article 16) as well as, consequentially, rules concerning transfer, licensing, creation of rights in rem (Articles 18, 18 and 19). Thus national trademark rules still have an important role to play in fashioning norms which apply to Community trademarks, as fallback provisions which step in when the matter is not directly dealt with the single EU title.

Here reference is made to trademarks; but the same mechanism applies across the board to all other single EU titles we earlier mentioned, in a way

42. See however Kur, Dreier, *European Intellectual Property Law*, *supra* at n. 8, 320 who (exactly) underline the loss of the advantages deriving from system competition which the solution would entail.

that clearly shows the importance – and possibly the indispensability – of the continued existence of national Member States laws as fallback complementing and buttressing the from time to time relevant IPR.

Now, this fallback role could no longer be played by national rules in the event a single EU copyright title replaces national copyright laws. The disappearance of these would not only affect national copyright protection as such but also as a treasure chest providing solutions which may fill in the gaps left by the copyright rules at the EU level. This inconvenience may in certain regards be dealt with by establishing a more comprehensive set of EU rules. For instance, conflict of laws rules are already to a large extent unified at the EU level, as far as contractual and non-contractual obligations are concerned;⁴³ and EU conflict of laws rules concerning specific areas of law are not unheard of, e.g., in the field of insurance.⁴⁴

However, doing away with the help and backstop provided for by national legislation would prove in some regards awkward (e.g., by requiring the adoption of EU remedies specific of copyright, which might turn out not to be in unison with remedies provided under national laws for violation of non-copyright IPRs) or altogether inconvenient and possibly even unacceptable (e.g., in connection with matters of ownership of intellectual property rights, which are traditionally held to belong to national lawmakers as specifically rooted in domestic arrangements on title to property).⁴⁵

B. Impact of an EU single copyright title on the continued participation by EU Member States to the Berne Union and on EU participation to the same

The second one is half-way between IP and international law. It has to do with continued participation to the Berne system. Imagine that the single EU copyright title replaces national copyrights. Would Member States of the EU still be entitled to be members of the Berne Union, even when they have given up protecting copyright nationally and have handed over the corresponding responsibility to the Union? Would the European Union, which currently is not member of the Berne Union, qualify as a ‘country’ which ratifies and accedes to the Berne Union itself under Article 28 of the Berne Convention? I certainly feel uncomfortable in addressing these questions, which entail matters beyond the pale of a traditional intellectual property lawyer as myself.

43. See Regulation (EC) No 593/2007 of the European Parliament and of the Council of 17 Jun. 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 Jul. 2007 on the law applicable to non-contractual obligations (Rome II).

44. See my *Non-life insurance and reinsurance contracts in the European Union: proper law and mandatory rules*, in *International Journal of Insurance Law*, 140 ff. (2000).

45. That issues of IP ownership belong to the competence of national lawmakers is also assumed by WTO Panel Report 6 Aug. 2001, WT/DS176/R, US – *Sec. 211 Omnibus Appropriations Act of 1998*. On the question whether issues of property may be devolved to the EU level see below, s. 6.3.

In this connection, it occurs to me that, as indicated by the Opinion 1/94 of the ECJ in connection with TRIPs negotiations,⁴⁶ the EU possesses a shared competence with Member States in IPR issues, so that I would expect that Member States retain a say – possibly not on the negotiation of the Convention itself, which in fact was adopted a long time ago, but – on the accession of the EU. Does this mean that any Member State unhappy with the Regulation establishing a single EU copyright title might then block the process leading to the ratification and accession by the EU?

The more one looks at the issue, the more one feels to be on slippery ground; or, at least, badly needing help from public international law and European law scholars.

C. Compatibility with Article 345 TFEU

The *third difficulty* visualizes an issue which is rooted in EU law. Here the question is what are the respective legislative competences of EU and national laws in the field of property law. Article 345 TFEU provides: ‘The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.’ Now, we may wonder: isn’t the phasing out of the whole of national copyright protection in a way which finds no precedent in any other IPR a quite clear case of prejudice to the Member State’s system of property protection in connection with this specific right? The literature and precedents carefully reviewed by other IPR scholars suggest a reply in the negative.⁴⁷ The same conclusion is reached by scholars coming to the question from an international public law angle. After all, the legislative history of the relevant norm links back to the troubled times in which the European Coal and Steel Community was set up, and suggests that what the drafters meant by adopting the predecessor provision, Article 222 of the Rome Treaty, was that, in spite of the imposition of a private property regime for coal and steel undertakings by the Allied in post-war Germany,⁴⁸ nothing in the Treaty stood in the way of Member States’ choice between private and public ownership of undertakings and of production means.⁴⁹

46. Opinion of the EC Court of 15 Nov. 1994. – *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* – Art. 228(6) of the EC Treaty. – Opinion 1/94, in *ECR* I, 5267ff (1994). In the current context, the relevant provisions would appear to be Arts 3(2) and 216 TFEU on which see for initial background Roberto Adam, Antonio Tizzano, *Lineamenti di diritto dell’Unione europea*, Giappichelli, Torino, 25 ff. (2010).

47. For a discussion of the issue see Van Eechoud, Hugenholtz, Van Gompel, Guibault, Helberger, *Harmonizing European Copyright Law*, *supra* at n. 8, 319 ff.

48. The issue happens to be one to which I devoted a very remote writing of mine at a time I was dealing with public enterprises in Germany: see my *L’intervento pubblico in un’economia ‘forte’: la Germania*, in Gastone Cottino (ed.) *Ricerca sulle partecipazioni statali*, Einaudi, Torino, Vol. III, 49–58 (1978).

49. This position is now supported by Bram Akkermans, Eveline Ramaekers, *Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations*, 16 *European Law Journal*

I still have misgivings: it has been convincingly argued⁵⁰ that Article 345 TFEU deals with the division of competences between the Union and the Member States in fashioning the rules concerning ownership; and that division not only entails *negative* limits on the impact of EU law on Member States' choices in this regard,⁵¹ such as the ones we just considered, but also *positive* limits on the Europeanization of property law, i.e., on the extent EU law may bring about property law regimes which do away with ownership regimes set up by Member States. If this perspective is correct, than a single EU copyright title – and particularly one which has severed all its ties to national Member States copyrights which it replaces – risks running afoul of Article 345 TFEU.

D. Replacement of Member States' national copyright and protection of fundamental rights

In dealing with this issue, we have finally come to the *fourth difficulty*, which concerns compliance of the envisaged solution with fundamental rights.

How about the rightholder who complains that, in the transition from the old, national copyright, to the new EU one, she has been deprived of one stick in the bundle? It is arguable that this situation is subject to fundamental human rights scrutiny under Article 1 of the Protocol to the European Convention on Human Rights,⁵² Article 17 of the Charter of Fundamental Rights and possibly also under those national constitutions which provide for a fundamental rights guarantee of IPRs.⁵³

Of course, one might also consider an alternative approach under which the EU single copyright title would not replace national protection and would rather give creators and rightholders an option between EU and national

291–314 (2010) and adopted by Opinion of the Advocate general Nilo Jääskinen of 16 Apr. 2013 in joined Cases C-105/12 to C-107/12, *Staat der Nederlanden v. Essent NV, Essent Nederland BV, Eneco Holding NC and Delta NV*, case 'electricity and gas distribution system operators', paras 41 ff. In this connection see also Anna Gardella, *Comment to Art. 345 TFEU* in Antonio Tizzano (ed.), *Trattati dell'Unione europea*, Giuffrè, Milano, 2510 ff., 2510 (2014).

50. By Fernando Losada Fraga, Teemu Juutilainen, Katri Havu, Juha Vesala, *Property and European Integration: Dimensions of Article 345 TFEU* (2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012983.

51. As carefully reviewed by EU Court 22 Oct. 2013 (Grand Chamber), joined cases C-105/12 to C-107/12, *Staat der Nederlanden v. Essent NV, Essent Nederland BV, Eneco Holding NC and Delta NV*, case 'electricity and gas distribution system operators'.

52. For a case where it was held that a later Treaty retroactively abridging an IPR may fall afoul of the provision see Grand Chamber of the ECtHR 11 Jan. 2007, *Anheuser Busch v. Portugal*.

53. See in this connection Berndt Grzeszick, *Geistiges Eigentum und Art. 14 GG*, 51 *Zeitschrift für Urheber und Medienrech* 353 ff. (2007).

provision.⁵⁴ In this event the choice between national and EU protection would be in the hands of creators and their assigns; so that these could hardly complain of having been expropriated of their rights. One may however wonder if this solution, which might entail that rightholders announce their choice in some public register, would be compatible with the ban on formalities enshrined in the Berne Convention.

I am not sure that a private law person like myself can get all the details of this conundrum straight; however, I might still offer a thought on the matter. Maybe the issue whether the unitary EU copyright complements or replaces national copyrights should not be understood as binary. It is well possible that copyright law enables the carving out of areas of mutually exclusive competences, where, hypothetically, some matters would remain under Member State jurisdiction, while others are translated to the EU level.⁵⁵ Maybe this is a possibility worth looking into; except that, even if it were a perfectly acceptable way out of the conundrum I sketched out before, I am afraid we still should not enthusiastically jump at it. Indeed, adopting the ‘shared competences’ approach would immediately create a problem of boundaries; which, as we lawyers always remind to economists, dramatically increases transaction costs. This might turn out to be another instance of a compromise which maybe could be politically feasible, but ultimately might make things worse rather than better than they were at the original starting point.

18.7 COPYRIGHT’S MISSION REDEFINED AND THE EU COPYRIGHT CODE

Leaving aside these concerns on the compliance with EU, international and national norms, however fundamental they may be, there is still an area to be explored to complete the conceptual framework against which a hypothetical EU Copyright Code has to be assessed. I am reverting here to the second narrative and vision, whereby the task of a rejuvenated copyright would consist not so much in contributing to the accomplishment of the EU Single Market as in designing and organizing the current and future coexistence of the two separate but complementary cultures I mentioned earlier: the original, proprietary and exclusivity-based culture of a copyright heeding the interests of professionals and of the businesses they rely on, and the more

54. This possibility has been hinted, albeit rather obscurely, by one of the several positions taken by the EU Commission. See European Commission, *A Single Market for Intellectual Property Rights*, *supra* at n. 4, 11.

55. For a discussion of a third, ‘hybrid’, option see Kur, Dreier, *European Intellectual Property Law*, *supra* at n. 8, 320; G. MAZZIOTTI, *Copyright in the EU Digital Market*, *supra* at n. 8, 5–6.

recent digital network-driven culture of access, sharing and cooperation in creativity and innovation which has emerged in the last two decades.

What would be the components which should go into an EU Copyright Code if one accepts this second view? While I am tempted to draft an extensive wish list, which would consist of a long, oh ever so long!, inventory of arguably indispensable components, I am also aware that this temptation should be resisted and ought to give way to a soberer attitude.

Indeed, many items on my enlarged wish list would absolutely not do in the present context, as they would include also issues which are outside of the province of EU law-making powers and therefore are located outside the perimeter of this paper. Indeed, a substantial shortening of the term of protection, or the adoption of a registration requirement as the basis for a dual Copyright 2.0,⁵⁶ would require the renegotiation and amendment of several international Treaties.

So I had better to confine myself to four points which would appear truly essential for present purposes, and then in sequence ask whether they may, could or should belong to basic component of the mooted EU Copyright Code. Here is the – ‘abridged’ – list:

- (i) the reconceptualization of *limitations and exceptions*. Here the crucial questions are: which limitations and exceptions should be mandatory rather than optional?⁵⁷ How can they be enforceable against technical protection measures?⁵⁸ Is it possible to combine the advantages of the civil law tradition of a list of specific options with the flexibility of US fair use?⁵⁹

User generated content, UGC, should be considered a likely candidate for a new exception, following in the wake of advanced legal systems, such as Canada, Singapore and Israel;⁶⁰

- (ii) the *relationship between rightholders and end-users* never was of much concern to copyright law, and rightly so. The sale of fixed,

56. Such as the system I proposed quite a long time ago: see the text of the conference I gave in Louvain in July 2008, *Digital libraries in the current legal and educational environment*, www.communia-project.eu/.../conf2008p_Copyright_Policy_for_digital_libraries_in_the_context_of_the_i2010_strategy.pdf, subsequently re-published in Lionel Bently, Uma Suthersanen and Paul Torremans (eds.), *Global Copyright. Three hundred years since the Statute of Anne, from 1709 to cyberspace*, Edward Elgar, 2010, 216–229.

57. See Christophe Geiger, *Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 Vanderbilt J. of Ent. and Tech. Law 515 ff. (2011).

58. Van Eechoud, Hugenholtz, Van Gompel, Guibault, Helberger, *Harmonizing European Copyright Law*, *supra* at n. 8, 162 ff.

59. For a proposal in this direction LAWRENCE LESSIG, *Remix. Making Art and Commerce Thrive in the Hybrid Economy*, The Penguin Press, 266 ff (2008).

60. See also for the necessary references Peukert, *Das Urheberrecht und die Zwei Kulturen*, *supra* at n. 26, 89.

stable, tangible, material copies, such as books and records, does not require much beyond general contract law, with the possible exception of the rules concerning exhaustion. In a digital environment, all of sudden the same relationship becomes all important. On the one hand a single digital copy may lead to the creation of a potentially infinite number of perfect copies, in such a way as to turn consumers into possible competitors of producers of digital goods. Legal, contractual and technological restrictions on uses and users therefore become a necessity for rightholders. On the other hand, the same restrictions need to be in turn restricted, lest the consumer at the end of the day is unconsciously left in possession of an entity which delivers much fewer (and lesser) utilities than the ones which were to be expected in the analogue world.

In this connection rules dealing with interoperability immediately spring to mind. This is only an example, though; and particularly so in the recent context in which the emergence of the cloud has further shifted away the balance of power to the detriment of end-users and to the benefit of rightholders and businesses.⁶¹

Probably the time has come to start thinking about ways to rebalance this growing asymmetry. Some issues are likely not to have much to do with copyright, at least directly.⁶² Others do: to make an example, let us consider that much of the current environment is based on unilateral consent by intermediaries, e.g., to access and re-use of Google maps. These no doubt enjoy copyright protection but may (for now) be freely accessed by end-users and re-used by businesses, as it is both technologically feasible, considering their non-rivalry in production,⁶³ and

61. See Daniel Lametti, *The Cloud. Boundless Digital Potential or Enclosure 3.0*, 17 Virginia Journal of Law and Technology 190 ff. (2012).

62. For example, the lock-in effect which is built into many relationships between end-users and the platforms or other powerful intermediaries they deal with is much more a matter of contract, privacy and antitrust law, even though the non-exclusive license of IPRs without time limits which end-users are asked, under current terms of use, to grant platforms in connection with materials uploaded may exacerbate the scenario. The same reasoning applies to one-sided modifications of the relationship. Indeed, intermediaries are wont to retain the right to unilaterally alter the terms and conditions of the relationship not only *de iure* but also *de facto*, particularly when the device in the hands of consumers is being constantly updated and the completion of update rounds may require signing in to new terms and conditions. Here again this is not a matter specifically of concern to copyright although it may ultimately impact on it.

63. See Justina Hofmök, *The Internet commons: towards an eclectic theoretical framework*, 4 International Journal of the Commons 226 ff., 243 ff. (2010).

commercially usual, e.g., in connection with location based services (LBS).

Here a question looms large: is this consent, which in a way amounts to a dedication to public domain, revocable?⁶⁴ If it is revocable, as rightholders probably expect, much of our current digital environment may at some point turn out to be built on sand.

So in the area which concerns the relationship between rightholders and end-users, which may at times be consumers, at other times businesses, some rules may at some point help.

Nor would I totally neglect an interesting phenomenon occurring in the course of digital-network driven cooperation, which – as I noted elsewhere – is not based on contract law but on the law of unilateral obligations; and moreover is delinked from any specific national law system.⁶⁵ Indeed, we may easily understand that individuals contributing to a Wikipedia article from, say, Italy, India and Brazil hardly engage in contractual activity, rather expressing their separate unilateral consents converging towards a common goal. We should also realize that it is an impossibility that their little grains of contribution are ruled by different laws when they go to form a single product, the article. Welcome to the era of global unilateral acts, we might say; and pause to think whether the law has something to say in this regard;

- (iii) not all the items which ideally belong to a Single Market agenda are out of place in the perspective of access and sharing. Indeed, many of the components which would enable cross-border services, e.g., e-lending of materials digitized by public libraries, would also help to increase *access to heritage* for the benefit of end-users and novel creators. After all, EU Single Market and digital network driven open culture may meet;
- (iv) in connection with *levies*, the cloud is much more apt to enable metering and charging in proportion to actual use; so that its emergence forces us to rethink the basis on which to calculate and organize the collection of levies. Videocassettes, DVDs and hard disks would appear to be recessive in this regard; but metering and charging usage of the cloud is not an uncontentious task. May be some fresh rules might help in this connection. It has also been suggested that levies should ideally be collected to support those

64. On the issue see the thoughtful analysis by Philip Johnson, 'Dedicating' Copyright to the Public Domain, 71 *Modern Law Review* 587, 604 ff. (2008).

65. See my *The New Paradigm of Creativity and Innovation and Its Corollaries for the Law of Obligations*, forthcoming on the issue 0 of a new review, *Kritika*.

creators and artists who do not resort to proprietary exploitation of the rights they may have over copies of their works and performances.⁶⁶ However, the frequently mooted idea of levying a flat-rate tax on access as a premise to legitimize file sharing would seem to go the opposite direction. May be the time has come to face this issue as well.⁶⁷

18.8 FINAL REMARKS

So, our imaginary EU Copyright Code is in a fix. It is torn between those who see it as a tool to accomplish the market objectives of a truly pan-European, frictionless supply of copyrighted goods and services and those who see it a tool to enrich the digital-network enabled access and cooperation culture. On top of this, it may also be a legal impossibility.

Is this a reason for despair? Probably not, at least if the way forward may lead us to a point where the two different strivings may plausibly converge, by planning for the coexistence between the two different and separate cultures. If we see a light at the end of this road, maybe we should have a second look at the legal feasibility of the whole project.

66. Peukert, *Das Urheberrecht und die Zwei Kulturen*, *supra* at n. 26, 90 ff.

67. The list might be further extended to include: (i) the optimal design of safe harbours for ISPs; (ii) the copyright status of text and data mining (TDM); (iii) a brake on the resort to neighbouring rights to accomplish aims which run counter copyright's purpose; and, possibly, also (iv) provisions concerning unwaivability of artists' and creators' rights in their dealings with businesses.

