A Unitary Copyright System for Europe?

Impediments to Further Harmonisation and of any Transition to a Unitary System

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The Commission Paper “Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKT” of 22 October 2009 has, in its discussion of “Possible EU Actions for a Single Market for Creative Content Online” floated in Section 5.2 the prospect of a unitary copyright system for Europe:

In order to create a more coherent licensing framework at European level, some stakeholders are suggesting a more profound harmonisation of copyright laws. 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 harmonised 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 harmonisation 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 harmonisation.

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. Naturally, the existence of such a title would raise important issues for the organisation of rights management. A recent report analysed the impact that the introduction of a Community title for copyright would have on current rights management practices. Further reflection on the future of European rights

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1 Paper for joint BLACA/BCC Seminar Tuesday 9 March 2010 – “European Copyright Law: A Consolidated Approach and Future Possibilities - Where did Harmonisation Lead Us and is a Single EU Copyright Act the Way Forwards?”
2 Partner, Bird & Bird LLP – trevor.cook@twobirds.com
3 A further straw in the wind came from the new European Commissioner for the Internal Market, Michel BARNIER, who in January 2010 stated that he is “in favour of an exhaustive and consistent framework for copyright law which will enable us to meet new challenges such as digitisation.” - see Written answers to the European Parliament, 8 January 2010 (IMCO/15/2009)
4 [FN 49 in Original] The legal basis could be the new Article 118(1) of the Treaty on the Functioning of the European Union, as introduced by the Lisbon Reform Treaty, which reads as follows: “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.”
5 [FN 50 in Original] The Recasting of Copyright & Related Rights for the Knowledge Economy, 2006: “Surely, for collecting societies, the prospect of introducing a Community copyright and
management would therefore have to precede the introduction of a Community copyright title.

By saying that such a proposal has been “often mooted” the Commission may rather be over-stating matters, as it is hard to find much in the literature by way of discussion of a unitary copyright system, whether by way of specific proposals as to what such a system would look like, or, and perhaps more important and certainly more difficult, a road map as to how we might get to there from where we are now.6

It should be emphasised that what the “Creative Content” paper suggests is a unitary copyright system having effect throughout the EU, and not just greater harmonisation of national copyright systems by yet further harmonisation beyond the existing acquis as established by the several Directives that already serve to harmonise many aspects of the law of copyright and related rights7. It is implicit however in such a proposal for a unitary right that it would have to go hand in hand with a much greater degree of harmonisation, if not total harmonisation, of copyright law in the EU than exists at present. This paper seeks to explore what such process would entail, especially as the “Creative Content” paper is opaque as to the relationship of the new unitary copyright system that it floats with the existing national ones. Does it replace them, as this author, and as those commentators who have addressed the issue, suggest would be necessary, or does it, as is suggested by the comments in the “Creative Content” paper as to “[s]uch a title, especially if construed as taking precedence over national titles” and “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”? And whether it is envisaged that national copyright systems are replaced by the new regime, or continue to exist in some limited way alongside it, what will happen to national copyrights that are already in existence when the new regime comes into force and which have the potential to continue in existence for another 100 years or so?

At a superficial level, it is easy to suggest that there is no fundamental problem with establishing a unitary system of copyright for the EU because we already have severalabolishing ‘national’ rights is unattractive, to say the least. Territorial rights are the bread and butter of most existing collecting societies”; available at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

6 A notable exception is Bernt Hugenholz, who has written on the topic, primarily in the context of territoriality, in Hugenholz and ors “The Recasting of Copyright & Related Rights for the Knowledge Economy” (IVIR 2006) (see Footnote 5 above), Hugenholz and ors “The Last Frontier: Territoriality” in “Harmonizing European Copyright Law” (Wolfers Kluwer 2009) and Hugenholz “Copyright without Frontiers: the Problem of Territoriality in European Copyright Law” in “Research Handbook on the Future of EU Copyright (ed Estelle Derclaye – Edward Elgar 2009). See also the papers referenced in Footnote 965 in “The Last Frontier: Territoriality,‖ including Joachim Bornkamm – “Time for a European Copyright Code?” (2000), available at http://ec.europa.eu/internal_market/copyright/docs/conference/2000-07-strasbourg-proceedings_en.pdf One might also have expected the Wittem Group, a group of academics who are reputed to study European copyright harmonisation, to have published something on the topic, but this author has been unable to locate any such contribution.

7 The discussion in this paper will focus on copyright, as opposed to related rights, although many similar considerations would apply to attempts to establish a unitary system for each of the related rights that have so far been the subject of harmonisation in the EU. There are many other related rights in the Member States of the EU that have never been the subject of any attempt at harmonisation - see for example the UK “copyright” that subsists in typographical arrangements and that was considered in Newspaper Licensing Association v Marks & Spencer [2001] UKHL 38.
intellectual property rights of a unitary nature in the EU\textsuperscript{8} and the passage of the Lisbon Treaty has provided, in Article 118 TFEU, a new legal basis for establishing these.\textsuperscript{9} However, just because there is now a more solid legal basis for such systems than that which existed before and assuming that establishing a unitary system of copyright is considered to be desirable\textsuperscript{10}, establishing copyright as a unitary European Union right presents certain unique problems. These are problems that have not been faced in establishing other unitary intellectual property regimes in Europe.

Firstly, all of these other unitary regimes, with the exception of the very short in duration (3 years) unregistered design right, establish registered intellectual property rights, so the rights in issue do not, unlike copyright, come automatically into existence, but need to be applied for. Secondly, these other unitary regimes all exist in parallel with, and not in replacement for, existing national regimes, which have to large extent (with the exception of the plant variety rights and unregistered design right) also been harmonised with the corresponding unitary rights.\textsuperscript{11} This allows users of these systems a choice of the right that they apply for, and allows them, albeit at a cost which limits the extent to which they avail themselves of the possibility, to seek to register both types of right. Whether in fact such a potential multiplicity of cumulative rights, and the legislative thicket that underpins it, is in fact desirable from the point of view of EU society at large is not an issue that has, so far, apparently troubled the EU legislature. However the cost to the potential rights holder, with registered intellectual property rights, of availing itself of the possibilities for multiple rights that this situation offers does at least provide some measure of practical control over the extent to which any particular right exists in parallel.

In contrast, and despite what the Commission says in its “Creative Content” paper about parallel systems, it is hard to envisage how a unitary EU copyright could subsist in parallel with national copyrights, with the two rights coming into effect

\textsuperscript{8} See the Community Plant Variety Regulation, establishing a Community Plant Variety Right, the Community Trade Mark Regulation, establishing a Community Trade Mark, and the Community Design Regulation, establishing both Registered and Unregistered Community Designs. Each is enforced under a modified Brussels I Regulation jurisdictional regime enabling relief throughout the EU to be secured in a single proceeding when the defendant is sued under the right in question in its member state of residence or domicile, and allowing (except in the case of the Community Plant Variety Right) the court so seized of the matter to adjudicate also on the validity of such right.

\textsuperscript{9} Bornkamm and Hugenholtz (see Footnote 6 above) both discuss the degree to which, before the TFEU came into effect, the legal basis for the other unitary intellectual property rights could also have been applied to establish a unitary copyright, and both envisaged difficulties in seeking to apply such legal basis to establish a EU copyright, especially were it to supplant national rights.

\textsuperscript{10} This is not self-evidently the case, but the pros and cons of such a system are not explored in this paper – certainly Bornkamm did not even favour full harmonisation of national laws in one go, but favoured a more gradual approach, and Hugenholtz suggests that on grounds or proportionality and subsidiarity total harmonisation may be inappropriate. It should also be noted that the Commission's proposal in its “Creative Content” paper is in response to one particular issue that troubles it – namely rights management practices such as those for on-line licensing. The Commission does not however seem to consider itself to be without remedies in such matters having already chosen to use EU competition law to challenge certain territorially limited licensing practices – see Commission Decision C (2008) 3435 final of 6 July 2008, against which an appeal is pending in Case T-442/08 CISAC.

\textsuperscript{11} This has led to the absurdity that there are four, cumulative, regimes available to protect designs in an EU Member State such as the UK, and in others copyright and unfair competition law may also be available to protect designs. It can perhaps be expected in the longer term that the uptake of such national rights where registered will fall, and that in some cases the scope to secure such national rights will be withdrawn, but this has not as yet happened anywhere.
simultaneously and in parallel every time a new work is created and then enduring for life plus 70 years.12 Although the Berne Convention does not seem to envisage it, such a situation does currently exist under the Paris Convention for the EU and its Member States in relation to designs and trade marks, so it seems unlikely that Berne precludes it. However, if two types of copyright were to co-exist in the EU in parallel then, unless the establishment of a unitary right were to be accompanied by the corresponding degree of harmonisation of national rights, many of the aims behind introducing a unitary right would be wholly frustrated. Moreover, harmonisation of national rights would do nothing to address the Commission’s main aim in proposing a unitary right, namely to overcome the inherent territoriality of national rights. So it would seem most likely that, and in contrast to the existing unitary intellectual regimes, a unitary EU copyright regime would have to be introduced as a replacement for, rather than an addition to, national copyrights in EU member states.

But replacing an existing intellectual property regime is not easy, especially where the right is one that is as long–lived as copyright. As Hugenholtz has observed, the “introduction of a Community copyright would of course pose challenges in terms of enacting adequate transitional law.”13 Even if national copyright systems are to be wholly supplanted by the new unitary EU copyright regime for new works, such national regimes will, on the face of matters, have to remain in existence for already subsisting national copyrights in old works, and for more than hundred years afterwards. Thus Hugenholtz’ observation is something of an understatement, especially when one considers that EU intellectual property harmonisation in the past has in general avoided the need for transitional measures by increasing protection14 or adding new protection. Certainly such measures have been careful to preserve existing rights, even where the underlying basis of protection has been restricted in scope for the future15. Any approach which did not however radically cut back on the scope to which existing rights could be asserted inconsistently with the new unitary right would undermine the aim of introducing a new unitary right.

Whatever approach were to be adopted in moving towards a unitary EU copyright law, extensive further harmonisation of copyright will need to take place, whether implicitly as part of establishing the new unitary right, or as part of a preparatory exercise on further harmonisation of national rights (despite the fact that this cannot in and of itself address the territoriality issue). The problem here is that the copyright harmonisation that has taken place so far, despite being effected through several Directives, has only been of the “low hanging fruit” of copyright harmonisation. This may well be reflected in the relatively few references that there have so far been to the

12The existence of a unitary EU unregistered design rights regime in parallel to unregistered design rights protection regimes at a national level (either by unfair competition law, copyright, or by specific regimes such as that in the UK) presents considerably fewer difficulties, because design rights are hardly harmonised at all at an international level, and the right is of very short duration. Even so, the complex and confusing pattern of overlapping design protection in the EU can hardly be characterised as ideal.
13Footnote 973 in “The Last Frontier: Territoriality” (see Footnote 6 above).
14As with the Directive on Harmonisation of Term.
15See for example Article 14(2) of the Database Directive. That is not however to suggest that legislation that restricted existing rights would necessarily be inconsistent with the ECHR. Some national measures have had a much more brutal effect on existing rights, such as in the UK the Copyright Designs and Patents Act 1988, which as from 1999 restricted the scope to assert pre-existing copyright in artistic works against three dimensional designs that copied such works, before which it had, as from 1989, limited the damages recoverable for such copying.
ECJ under these various Directives. It is certainly the case that these Directives have left untouched, either at all or in large part, some fundamental and difficult issues where there are clear differences as between Member States. These include:

- what can constitute a copyright work?  

- what copyright protection is available for works of applied art and industrial designs and models?

- what level of originality must apply for copyright to subsist in a work?

- who is the author and who is the first owner of copyright in a work, in particular as between an employee and his employer?

- are there special laws that apply to copyright contracts, for example as to the degree to which authors may renegotiate such contracts or the degree to which authors can waive moral rights in such contracts?

16For example, can a perfume be a copyright work, as the Dutch Supreme Court found in *Kecofa BV v Lancome Parfums* [2006] ECDR 26, in contrast to the French Cour de Cassation, which found it could not in *Bisri-Barbir v. Haarmann & Reimer* [2006] ECDR 28? Note that it has been suggested that the effect of the decision of the ECJ in Case C-5/08 *Infopaq* is that it is within the competence of the ECJ to interpret what constitutes a copyright work, despite there having been no ostensible attempt to harmonise its meaning in the Copyright in the Information Society Directive – see Christian Handig “*Is the Term “Work” of the CDPA 1988 in line with the European Directives?”* [2010] EIPR 53-56.

17Article 2(7) of Berne permits of considerable latitude in this respect, and such latitude is expressly preserved by Article 17 of the Designs Directive.

18The Computer Program Directive and Database Directives address this issue for computer programs and databases respectively, and the Harmonisation of Term Directive does so for photographs (albeit allowing member states also to protect photographs which do not meet such criteria, by what in effect are related rights) but apart from this there has been no explicit further harmonisation of the concept. Despite this, the ECJ assumed in Case C-5/08 *Infopaq* that the “author’s own intellectual creation” test applied also to copyright works other than computer programs and databases.

19So far, after more than 20 years of legislative activity, this issue has only been harmonised in the EU for copyright in computer programs. An attempt to do so in respect of copyright in databases was abandoned, and for copyright in films the “harmonisation” allows Member States considerable latitude in the types of person who can be designated as an author – see the Commission’s *Report ... on the question of authorship of cinematographic or audiovisual works in the Community* - COM (2002) 691 Final – 6 December 2002.

20This is not an issue in the regimes for existing unitary EU intellectual property rights, where there is more scope for effective freedom of contract as between commercial entities than there is in contracts as between authors and publishers in copyright, but as to which different Member States provide different types of protection for authors. Reflecting the absence of harmonisation of contract law in the EU the Community Designs Regulation for example provides, at Article 27(1) that “… a Community design as an object of property shall be dealt with in its entirety, and for the whole area of the Community, as a national design right of the Member State in which: (a) the holder has his seat or his domicile on the relevant date; or (b) where point (a) does not apply, the holder has an establishment on the relevant date.” Hugenholtz, who has also studied such contracts, (see Guibault and ors “*Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*” - IViR 2002) has however suggested, in “*The Last Frontier: Territoriality*” (see Footnote 6 above) that copyright contract law, along with moral rights and the governance of collective rights management societies, need not, on grounds or proportionality and subsidiarity, be harmonised.
what exceptions should apply, recognising that, except for copyright in computer programs, virtually none of the exceptions as currently provided for in the EU *acquis* are mandatory?

what approach should be taken to the variety of legal theories in the EU which address third party liability - ie what, under English law, would be characterised as “joint tortfeasance”? 21

what types of copyright infringement attract criminal penalties, and what penalties should be levied for such acts? 22

These are only a few examples of important areas of copyright law where there is as yet no harmonisation in the EU, or where the partial degree of the harmonisation that has been achieved to date evidences the depth of the problems that face any attempt to harmonise further. Such differences in “black letter” law are however only the “tip of the iceberg”. They mask fundamental differences in approach as between different national copyright systems in the EU, differences that are all too apparent to anyone who analyses how the same issue is in practice addressed in these different systems.

On any basis, very much more work on harmonisation will be needed, either as preparatory to, or as part of, any attempt to introduce a unitary EU copyright regime. Such work will make the hard work done to date on harmonisation of copyright since the first Commission Green Paper in this area in 1988 look extremely easy by comparison. That is not to say that work on such a “grand projet” should not be begun. But it should not start with the mindset of providing the “quick fix” for the issue of territoriality that the Commission seems to be looking for in its “Creative Content” paper. Moreover, the issue of territoriality is hardly likely to prove an aspirational motivation for such work in the eyes of the sort of experts who should be involved with formulating with a unitary EU copyright regime, if it is to be done properly. Indeed the Commission has already, for the short and medium term, chosen to fall back on its old standby, EU competition law, in seeking to deal with the issue of territoriality, having apparently abandoned “country of origin” and exhaustion type approaches as apt to address this in the context of cross border transmissions such as on-line services. 23

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21 This is not just a question of what sort of acts constitute what English law characterises as “joint tortfeasance,” and which is a general legal concept under English law, not limited to copyright or even intellectual property rights. These days its highest profile is in the issue of ISP liability, and the relationship between ISPs and their customers, as to which the ECJ held in Case C-275/06 *Promusicae* that the specific balance to be struck between the protection of intellectual property and the protection of privacy was a matter for national law and which, as demonstrated by the controversy over Amendment 138 to the “Telecoms package” in 2009, is highly controversial. It also applies to issues such as the degree to which a director may also be liable for the acts of his company, although this is in theory can also arise with other unitary intellectual property rights and does not seem so far to have given rise to any untoward problems with them.

22 Under the TFEU there is a sounder basis than previously to legislate as to criminal penalties for intellectual property infringement, and drafts of Directives aimed at harmonising the use of criminal penalties for intellectual property infringement have been in existence for some time. The expected further initiatives at an EU level as to this promise however to be controversial.