

KLUWER LAW INTERNATIONAL

INFORMATION LAW SERIES

**HARMONIZING EUROPEAN
COPYRIGHT LAW**
The Challenges of Better Lawmaking

**Mireille van Eechoud
P. Bernt Hugenholtz
Stef van Gompel
Lucie Guibault
Natali Helberger**



Wolters Kluwer
Law & Business

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AUSTIN

BOSTON

CHICAGO

NEW YORK

THE NETHERLANDS

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3130-0

© 2009 Mireille van Eechoud, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault & Natali Helberger, c/o Kluwer Law International.

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Printed in Great Britain.

Harmonizing European Copyright Law

Information Law Series

VOLUME 19

General Editor

Prof. P. Bernt Hugenholtz
Institute for Information Law
University of Amsterdam

The titles published in this series are listed at the back of this volume.

List of Abbreviations

AEPO-ARTIS	Association of European Performer's Organisations
AIPJ	<i>Australian Intellectual Property Journal</i>
ALAI	Association littéraire et artistique internationale
A&R	Artist and Repertoire
ARMT	Autorité de régulation des mesures techniques
AUSFTA	Australian-United States Free Trade Agreement
BC	Berne Convention for the Protection of Literary and Artistic Works
BEUC	Bureau Européen des Unions de Consommateurs
BGH	Bundesgerichtshof (Germany)
BIE	<i>Bijblad bij de Industriële Eigendom</i>
BPI	British Phonographic Industry
BSAC	British Screen Advisory Council
BTLJ	<i>Berkeley Technology Law Journal</i>
Cass.	Cour de Cassation (France, Belgium)
CFI	Court of First Instance (European Court of Justice)
CIPIL	Centre for Intellectual Property and Information Law
CLSR	<i>Computer Law & Security Report</i>
COSAC	Conference of Community and European Affairs Committees of Parliaments of the European Union
CRi	<i>Computer und Recht International/Computer Review International</i>
CRMOs	Collective Rights Management Organizations
CSPLA	Conseil Supérieur de la Propriété Littéraire et Artistique
DMCA	Digital Millennium Copyright Act
EBU	European Broadcasting Union
EC	European Community

ECDR	<i>European Copyright and Design Reports</i>
ECJ	European Court of Justice
ECL	Extended Collective Licensing
ECR	<i>European Court of Justice Reporter</i>
EDRI	European Digital Rights
EIPR	<i>European Intellectual Property Review</i>
EJIL	<i>European Journal of International Law</i>
EPLA	European Patent Litigation Agreement
EU	European Union
EUConst	<i>European Constitutional Law Review</i>
GESAC	Groupement Européen des Sociétés d'Auteurs et Compositeurs
GRUR	<i>Gewerblicher Rechtsschutz und Urheberrecht</i>
GRUR Int.	<i>Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil</i>
HLEG	High Level Expert Group
HR	Hoge Raad (Netherlands)
ICMP	International Confederation of Music Publishers
ICT	Information and Communication Technologies
IFPI	International Federation of the Phonographic Industry
IIC	<i>International Review of Industrial Property and Copyright Law</i>
IMMF	International Music Manager's Forum
Int'l J. Comm. L. & Pol'y	<i>International Journal of Communications Law & Policy</i>
IPI	Interested Parties Information System
ISWC	International Standard Musical Works Code
IPI	International Press Institute
IPTV	Internet Protocol Television
IRDI	<i>Intellectuele rechten/Droits intellectuels</i>
JIPL	<i>Journal of Intellectual Property Law and Practice</i>
JUCPL	Japanese Unfair Competition Prevention Law
K&R	<i>Kommunikation & Recht</i>
LAB	Legal Advisory Board (of the European Commission, former DGXIII)
LG	Landesgericht (Germany)
MMR	<i>Multimedia und Recht</i>
MPI	Max-Planck-Instituts für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht
OECD	Organization for Economic Cooperation and Development
OLG	Oberlandesgericht (Germany)
PEARLE	Performing Arts Employers Associations League Europe
PPD	Price Published to Dealer
RC	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)
RIDA	<i>Revue Internationale du Droit d'Auteur</i>

RMI	Rights Management Information
SARRA	Swiss Authors and Related Rights Act
SCCR	Standing Committee on Copyright and Related Rights (WIPO)
SCMS	Serial Copy Management System
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TGI	Tribunal de Grande Instance (France)
TMO	Technical Measures Observatory
TPM	Technological Protection Measure
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UFITA	<i>Archiv für Urheber-und Medienrecht</i>
UNESCO	United Nations Educational, Scientific and Cultural Organization
VOSN	Vereniging Open Source Nederland
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
ZEUP	<i>Zeitschrift für Europäisches Privatrecht</i>
ZUM	<i>Zeitschrift für Urheber-und Medienrecht</i>

Preface

This book is about the harmonization of the law of copyright and related rights in the European Union. It reviews and critically assesses the norms of the harmonization directives in this field, identifies inconsistencies and deficiencies, and generally assesses the quality of the *acquis communautaire*. As the subtitle of this book suggests, good lawmaking at the European level is indeed a challenge, particularly in the increasingly politicized field of copyright and related rights.

The renewed Lisbon agenda aims at fostering economic prosperity, jobs, and growth, in particular by boosting the knowledge-based economy and by enhancing the quality of Community regulation ('better regulation'). Clearly, a consistent and transparent legislative framework for copyright and related rights in the information society that fosters growth of the knowledge-based economy in the European Union is a crucial element in any strategy leading towards that goal. At present seven European Community directives in the field of copyright and related rights are in place. The first, on computer programs, was adopted as early as 1991, while the most recent ones, dealing with copyright and related rights and artists' resale rights date from 2001. Whereas most of these directives have been reviewed by the European Commission, as required by specific review clauses in the directives themselves, an integral review of all directives taken together has never taken place.

There are several good reasons to do so now. In the first place, except for the Information Society Directive, most directives have been designed to harmonize only distinct aspects of copyright or related rights law, without dealing with copyright or related rights across the board. Because each directive has experienced its own legislative history, and was adopted in a different era, this has inevitably led to fragmented and sometimes inconsistent solutions. In some cases, directives have been amended and updated by later ones, but in most cases the existing *acquis* was left untouched.

A second reason for a thorough evaluation lies in the passing of time itself. The Computer Programs Directive was designed in the late 1980s, in a time when the Internet was used primarily for sending email messages among engineers and academics, and software was published and distributed on disks that were really floppy. The Rental and Lending Rights Directive, adopted in 1992, was similarly conceived with a world of ‘hard copies’ in mind; electronic rental and lending were, at best, futuristic scenarios. The Satellite and Cable Directive of 1993 deals with satellite transmission and cable retransmission as two distinct media deserving completely different regulatory solutions. Nowadays satellite broadcasters have evolved into ‘platforms’ offering retransmission services in direct competition with cable operators, whereas the latter have reinvented themselves either as content providers or as providers of digital broadband services. This ongoing process of *convergence* – the merging of formerly distinct, separately regulated media – is in itself an important reason for a thorough re-examination of the acquis.

The dynamic nature of the ‘information society’ (i.e., the Internet) itself presents yet another reason for review. Since the adoption of the Copyright Directive in 2001, a directive that was specifically meant to deal with the challenges of the internet, the media landscape has dramatically changed again. Based on the Green Paper of 1995 on Copyright and Related Rights in the Information Society and the World Intellectual Property Organization Treaties of 1996, the Directive was designed to respond to the legal challenges posed by the information society as they were perceived in the mid-1990s. In ‘Internet time’ this is light years ago. Since 1995, and even after the final adoption of the Directive in 2001, numerous important technological and economical developments have once again changed the landscape of the information society. The new millennium has seen the spectacular rise, both in popularity and in performance, of peer-to-peer communications software allowing consumers to ‘share’, largely illegally, vast amounts of copyrighted content (music, video, software, images, and even books). Concurrently, the rollout of ‘legal’ online content services, such as iTunes, and the deployment of Digital Rights Management systems that existed only in theory when the Directive was adopted, have created a real, rapidly growing, and vibrant marketplace for digital content services in Europe and elsewhere.

A related development is the increasingly important role of the consumer in the copyright equation. In ‘analogue’ times the primary role of copyright was to regulate relationships between authors/content producers and intermediaries/producers. Consumers were end users that acted well outside the scope of copyright law. In the digital age, the result in large part of the expansion of the reproduction right in the digital domain, the copyright paradigm has shifted. Consumers have actually become ‘users’ within the traditional meaning of copyright law. Concomitantly, consumers and consumer organizations have become stakeholders and are becoming increasingly vocal in copyright debates at the national and supranational level.

Yet another valid reason for a critical examination of the process of harmonization lies in the burden this process has imposed, over the years, on the legislative machinery at the European Union and national levels. The step-by-step approach

towards harmonization that the European lawmaker has applied has placed an enormous burden on this legislative apparatus. Directives are adopted only after a complicated and often protracted process of consultation between the Commission, the European Parliament, and the Member States. Implementation (transposition) requires yet another round of sometimes complex legislation at the national level. For national legislatures, the harmonization agenda of the European Union has resulted in an almost non-stop process of amending of the national laws on copyright and related rights.

This book is the combined result of two extensive studies that were commissioned by the European Commission. The Institute for Information Law completed the Study on the Recasting of Copyright for the Knowledge Economy in 2006 and the Study on the Implementation of the Information Society Directive in 2007. Although responding to calls for tender designed by the Commission, these studies were conceived and produced in complete academic independence. Indeed, as recent history has shown, the European Commission has chosen to wilfully ignore substantial parts of the Institute for Information Law of the University of Amsterdam (IViR) reports, apparently for reasons of political expediency. The present book is, however, much more than a mere 'recasting' of these reports. It integrates, consolidates, and updates the findings of both studies, while adding and further developing certain specific topics.

This book contains nine chapters. The first discusses institutional and exogenous issues relevant to the process of harmonization of copyright and related rights in Europe. Here we focus on the question of competence of the European Community legislature in the field of copyright and related rights and examine the legal instruments of harmonization and unification. The following two chapters critically review the *acquis* in a structured way, following traditional categories. Chapter 2 treats protected subject matter (works and subject matter protected by related rights), beneficiaries (authorship and ownership of rights), and terms of protection. Chapter 3 examines economic rights (rights of reproduction, communication to the public, and various related rights) and limitations. Obviously, the focus here is on the Information Society Directive that deals with rights and limitations extensively. This directive has also introduced the rules on the protection of technological protection measures and rights management information that are scrutinized in Chapter 4.

Chapters 5, 6, and 7 treat distinct current issues that are, or might soon be, featured on the European Union's legislative agenda. Chapter 5 discusses the controversial Commission proposal to extend the terms of protection for musical performances and phonograms. It examines the legal and economic arguments supporting such an extension and queries whether an extension is likely to promote the creative industries and Europe. The Term Extension initiative also proposes to harmonize the term of copyright protection of co-written musical works. Although the Term Directive in its present form provides special term calculation rules for joint works, it does not determine how to qualify, and deal with co-written musical works. As a consequence, terms of protection in respect to musical works containing lyrics ('songs') may differ from one Member State to the next. Chapter 6

queries whether there is indeed a need for amendment of the Term Directive in this respect.

Chapter 7 deals with another highly topical issue: orphan works. The emergence of the information society has created new markets for old ‘analogue’ content, such as archived newspaper articles, scientific publications and broadcast television programs. Re-use of such content often requires licenses from a multitude of rights owners. In some cases, right holders are difficult or even impossible to track and identify. Chapter 7 examines the validity of these concerns, refers to existing models in Member States and elsewhere, and proposes solutions.

Chapters 8 and 9 offer final analysis. Chapter 8 presents an overview of the main inconsistencies in the *acquis*, suggests repair where necessary, and assesses in a more general way the blessings and curses of the harmonization process. In the final chapter we will dwell on the long-term future of European copyright. Will territoriality continue to rule, or should this last frontier be finally conquered, paving the way for a truly unified European Copyright Law?

This study was written and produced by a team of researchers at the IViR, under the supervision of Prof. P. Bernt Hugenholtz. Mireille van Eechoud authored Chapters 1, 2, and 6, co-authored Chapters 3 and 9, and is the main editor of the entire volume. Lucie Guibault is the co-author of Chapter 3, and author of Chapter 4, which draws upon the previous research for the abovementioned European Community study by Thomas Rieber-Mohn (Oslo University). Guido Westkamp (Queen Mary, University of London) produced an extensive report on the implementation of the Information Society Directive that served as input to Chapters 3 and 4. Stef van Gompel and Natali Helberger co-wrote Chapter 5. Nicole Dufft and Philipp Bohn of Berlecon Research (Berlin) provided the economic analysis on which that chapter is partly based. Stef van Gompel wrote Chapter 7 and Bernt Hugenholtz the final two chapters of this book.

The authors wish to thank Lennert Steijger, Mara Rossini, Brenda van der Wal, Ewoud Swart, Joost Gerritsen, Stefan Kulk, Catie Austin and Kim de Beer for invaluable research assistance. With a few exceptions, research for this study was completed on 1 September 2008.

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