

Chapter 1

Introduction

Nowadays, the European Union (EU) can proudly advocate that it has dealt with copyright law at the EU level. But does it have reasons to be proud? The Union has, in the past 20-odd years, passed legislation that addresses some features of copyright law. These legislative measures, also known as directives, have supposedly harmonized or approximated the copyright laws of the now 28 Member States.

However, the EU has not acted in a comprehensive fashion. It has touched upon some areas of copyright, while leaving others unharmonized. The choice of targets of harmonization has much to do with the powers of the Union. Because there is no explicit competence to approximate national copyright laws, the EU had to rely on other powers—namely, its competence to harmonize national laws for purposes of building an internal market. The choice of subject matter to harmonize is thus dependent on a notion foreign to copyright law: the “internal market.”

The connection between the substantive aspects of copyright and the concept of internal market is not apparent to the naked eye, nor is it clear how the building of an internal market should steer copyright’s wheel. The uncertainty surrounding these questions opens the door to private interests influencing the legislative process, which can in turn potentially damage the quality of copyright legislation if such influence is one-sided and devoid of any normative guidelines.

This is the starting point of this book, which analyses the European Union’s competence to harmonize national copyright laws while standing at the intersection between European Union law and copyright law. In particular, I will examine whether the internal market-based harmonization of national copyright laws has resulted in a normative gap and, if so, how the EU legislator ought to address that gap. The aim of this book is therefore to contribute to building a normative framework for copyright lawmaking, as such normative framework is, I believe, key to a sound, scientifically-guided EU copyright legislation.

In order to present the research topic and the concrete research questions, this chapter first provides the background of copyright harmonization in the European Union (Sect. 1.1). It goes on to explain the underlying problem definition

(Sect. 1.2), and to describe the outline and general methodology of the book (Sect. 1.3).

1.1 Background

Harmonizing copyright law at the EU level implies focusing on substantive aspects of national copyright laws, while following certain procedures established by the EU Treaties and developed by EU law. An analysis of the EU legislative competence in copyright therefore draws on both the fields of EU law and copyright law. As mentioned in Sect. 1.3 below, this research is undertaken primarily from an EU law perspective. This means that it examines the harmonization of national copyright laws mainly taking into account EU law principles and objectives. Nevertheless, such process needs to work having the copyright system as a backdrop, since that is, in the end, the subject matter of harmonization. While the EU law framework provides a roadmap for harmonization, it is therefore necessary to bear in mind copyright goals and rationales as well.

The main challenge with this approach, however, is that national copyright laws differ from one another not only in their particular rules, but also in their vision of the copyright system. Moreover, the challenge grows bigger as the EU also does. The first directive in the field of copyright, the Computer Programs Directive, was adopted in 1991 and aimed at harmonizing the laws of 12 Member States; the last one, the Collective Management Directive, dates from 2014 and had the daunting task of harmonizing 28 national laws. Proposing a unitary copyright vision as a basis for harmonization is thus a complex task, due to the growing diversity of national copyright systems. In addition, the harmonization program of the EU has tackled not only copyright but also so-called related or neighbouring rights. This adds up to the disparity between Member States. Not all countries of the EU recognize related rights as a separate category, and the goals and rationales of copyright and related rights are not entirely coincidental.

This section gives an overview of that diverse landscape. It explains the background of copyright and related rights harmonization in the EU. It does not, however, present a detailed account of each national legal order, as such endeavour is outside the scope of this book. Instead, it describes the main copyright theories and systems that provide the basis from where most EU copyright laws developed. Section 1.1.1 suggests that the goals and rationales of copyright are rooted in two main theories—the natural rights theory and the utilitarian theory—and briefly describes them. Traditionally, these two theories or doctrines correspond roughly to two systems of copyright, the *droit d’auteur* and the copyright systems respectively, under which most EU national laws operate. Section 1.1.2 follows suit and elaborates on the differences between the systems of copyright and *droit d’auteur*, as such differences constitute one of the difficulties in harmonizing the copyright laws of the Member States. Next, Sect. 1.1.3. explains the basis for the competence of the EU to legislate in the field of copyright, which is exactly connected to the

disparities between national copyright laws. Finally, Sect. 1.1.4. provides an historical perspective on how the EU legislator made use of that competence to adopt the so far eight directives that have harmonized particular aspects of national copyright laws.

1.1.1 Copyright Goals and Rationales

Many authors have focused on the topic of copyright's goals and rationales. The literature is vast, and the number and classification of the different justifications is not unanimous.¹ For the purposes of this book, a rough distinction will be made between two major lines of argument: the natural rights justification and the utilitarian justification.²

The natural rights argument comes down to equating copyright to a natural right. This implies that the legislature does not *create* the right, but instead merely *recognizes* its existence.³ Natural law is responsible for two main theories of copyright rationales: Locke's labour theory and Hegel's personality rights theory.

The labour theory was formulated in the late seventeenth century by the British philosopher John Locke, and it implies that every man should be the proprietor of the product of his labour. According to Locke, if one puts one's labour and efforts into something which is either common property or nobody's property, then the result of such endeavour should be one's to take. Arguably, and even though Locke never applied his theory to intellectual property, his thought is relevant in that field to the extent that the underlying material of an intellectual property right—an idea or a concept—belongs to the commons. Consequently, if one's intellectual labour contributes to shaping an idea or concept so that it turns into an intellectual good, then one should be entitled to have some kind of proprietary right over the result.⁴ This suggests the idea of “reward”: the intellectual labour invested in creation should be rewarded.⁵ The right to property derived therefrom, however, should

¹ See, for example, Yen (1990), Strowel (1993), pp. 173 ff. Friedman (1994), Fisher (2001), Guibault (2002), pp. 7 ff. Geiger (2004), pp. 22 ff. Derclaye (2008), pp. 11 ff. Bently and Sherman (2009), pp. 34–39.

² Some authors break copyright rationales into more justifications, such as, e.g., the human rights justification (see for instance Derclaye 2008, pp. 13 ff. or the economic justification (which in any case is seen by some authors as derived from the utilitarian argument—see for an account Guibault 2002, pp. 12 ff).

³ Ginsburg (1994), p. 132; Guibault (2002), pp. 8–9; van Gompel (2011), pp. 217–218.

⁴ Fisher (2001), p. 170.

⁵ Guibault (2002), pp. 8–9; Hughes (1988), pp. 296 ff. discussing the several interpretations of “reward” in the context of the labour theory).

not be absolute; Locke's theory comprised limitations dictated by the need to preserve the commons.⁶

The personality rights theory, on the other hand, was first approached by Immanuel Kant in the eighteenth century and picked up by the German philosopher Georg Hegel in the early nineteenth century. As its name indicates, this theory is based on the concept of personality, stating that an intellectual work embodies its creator's personality or will. Therefore, said work is worthy of protection because it is an expression of the personality or self of its creator.⁷ According to this conception, property is an extension of personality, providing a means for self-actualization and personal expression.⁸ Not surprisingly, then, the personality rights theory finds its ultimate expression in the recognition of moral rights.⁹

The two natural rights theories are not necessarily incompatible or self-excludable, not least since both focus on the relation between the author and his work, and not on the link between such relation and society.¹⁰ Indeed, many authors consider copyright to be a mix of property and personality interests, being therefore based on both theories.¹¹ This question is closely connected to the discussion about copyright's nature, and namely whether it is a property right or a personality right.¹²

In contrast to the natural rights theory, the utilitarian justification, originally developed by British philosophers Jeremy Bentham and John Stuart Mill, considers that the main goal of copyright is to promote social welfare, which is achieved by granting incentives to creation and supporting the dissemination of intellectual

⁶ See Locke (1924) §27, p. 130. Ramello (2005), pp. 134–135, points out that Locke formulated two limitations: the “sufficiency proviso” (where appropriability would be acceptable when “*there is enough and as good left for others*”) and the “spoilage proviso” (according to which it is necessary to preserve the integrity of common resources from “*impoverishment and depletion*”). Hughes (1988), pp. 298 ff. stresses the importance of the “non-waste condition” in the context of Locke's limitations to acquisition of property—this condition would not allow the collection of property to such extent that some of it would be destroyed without being used, since that would imply an “*unjustified diminution of the common stock of potential property*.” See also Locke (1924) §37, pp. 134–135.

⁷ Hughes (1988), p. 330; Fisher (2001), Kretschmer and Kawohl (2004), pp. 31ff.

⁸ Hughes (1988), p. 330.

⁹ van Gompel (2011), p. 218.

¹⁰ Lacey (1989), p. 1564 and Guibault (2002), p. 8.

¹¹ See, e.g., Hughes (1988), pp. 329–330 and 365–366; van Gompel (2011), p. 218 and references cited therein.

¹² An argument can be made, however, that at the EU level the controversy around copyright's nature seems to be settled. The Charter of Fundamental Rights of the European Union (“the Charter”), which has the same legal value as the EU Treaties, states that “intellectual property shall be protected” in paragraph 2 of a provision dedicated to the general right to property (Article 17 of the Charter). In 2001, the EU legislator has expressly adhered to this theory by stating, in recital 9 of the Information Society Directive, that “intellectual property has therefore been recognised as an integral part of property.” The Court of Justice of the European Union (“CJEU”) has also treated copyright as a property right (see, e.g., case C-200/96—*Metronome Musik*), and the European Court of Human Rights explicitly recognized intellectual property to be protected by the fundamental right to property (in case *Anheuser-Busch Inc. v. Portugal* (2007), p. 72).

goods to the public.¹³ This “incentive” element can sometimes be confused with the “reward” argument presented by the natural rights theory; however, while both concern the economic interests of creators, their objective is not the same: the “incentive” is granted with society’s interests in view, and the “reward” aims at compensating the creators for their intellectual effort.¹⁴ Moreover, unlike the advocates of the natural rights theory, utilitarians do not understand copyright as something that stems from natural law and is merely recognized by the legislator. Instead, the utilitarian theory views copyright as a positive right that is granted with the aim of furthering societal goals. The emphasis here is then on the benefits to society that can come from the creation of intellectual goods, rather than on the self-standing protection of creators. As a result, the rights granted to creators are instrumental to society’s interests, causing them to be carefully delineated; their limitation, conversely, is much less restrained, due to the socially desirable outcome of access to creative works.¹⁵

The natural rights theory and the utilitarian theory, though differently grounded, are not necessarily incompatible. Several authors have pointed out that both have their merits and neither seem to be capable of being a stand-alone justification for the existence of copyright and some of its features. For instance, some authors have defended that the view that natural rights theory can justify the existence of copyright, but it does not give any guidance regarding the scope or duration of the right, elements which are based on utilitarian considerations.¹⁶ Others are of the opinion that a number of copyright doctrines, such as for example the idea/expression dichotomy, can actually be explained by either theory—arguably, the expression would be the fruit of the labour that the creator applies to something common (the idea); and, at the same time, it is economically more efficient to grant rights over the expression only, leaving the idea free for others to produce creative works.¹⁷

¹³ Guibault (2002), p. 10; Derclaye (2008), p. 12; Fisher (2001), Geiger (2004), pp. 27–35; Friedman (1994), p. 176.

¹⁴ Guibault (2002), p. 11.

¹⁵ Ginsburg (1994), pp. 132–133; Senftleben (2004), pp. 6–7.

¹⁶ Geiger (2004), pp. 38–39. Along similar lines, see Lacey (1989), pp. 1564 and 1595–1596: the author points out that some aspects of the positive copyright law are not explainable by the natural rights theory, while the incentive justification “does not reflect the complexity of the world of artists and their real needs and motives.” Also suggesting the reconciliation of both theories, see Yen (1990), especially 558–559 (“Copyright has undeniable economic consequences.[...] However, we must also remind ourselves that the economic effects of copyright must, in the end, be justified by principles beyond the realm of economics. We must identify the natural law insights which guide how the economic institution of copyright should be shaped”); and Brown (1986), especially, p. 607 (“*Droit d’auteur* theory gives authors an advantage. They need one because they are so often confronted by giant users with more monopoly power than the copyright system gives the author. On the other hand, the rhetoric of rights can be cooled off by the cold bath of economic analysis.”)

¹⁷ Yen (1990), pp. 531 ff.

It should also be noted that the natural rights theory and the utilitarian theory have been mainly used to justify copyright. Related or neighbouring rights have their own goals and rationales. To begin with, related rights are heterogeneous, covering different groups of right holders—namely, performers, film and phonogram producers or broadcasters—whose protection has different rationales.¹⁸ It has been generally acknowledged that at least the objectives of protection of performers differ from those of the other related rights—the position of performers seems closer to that of authors than to the other related rights’ owners, since they are individuals and their personality is often reflected in their artistic performances.¹⁹ This is to a great extent linked to natural law arguments applicable to copyright, and in particular to the need to protect the expression of one’s personality. As a consequence, it has been pointed out that performers are not all that different from authors of derivative works who adapt the original work, such as translators.²⁰ Conversely, the activity of producers and broadcasters has a commercial or technical nature and protection is based on investment. The rights granted to these entities aim therefore at securing that investment.²¹

1.1.2 Systems of Copyright Protection

Connected to the different copyright justifications are the two major systems or traditions of copyright: the civil law or *droit d’auteur* system (adopted, e.g., in Germany and France), and the common law or copyright system (followed by such countries as the UK and Ireland). These are not the only systems of copyright protection—for example, the so-called socialist system existed in certain Eastern and Central European countries that are now part of the EU, although these countries have evolved towards a *droit d’auteur* system today.²² Moreover, each country within each of the two systems has adapted it to its own legal order, resulting in differences from one country to another even if they share a common tradition. This means that contrasting the *droit d’auteur* with the copyright system is only a first step in approaching the question of diversity between the several EU Member States, and how that question influences harmonization efforts.

In addition, the boundaries between those two main systems are not always clear-cut. It is true that, on the one hand, each of these systems privileges different justifications. The conception of copyright as a natural right (either a property or a

¹⁸ Kerever (1991), pp. 5–6; van Echoud et al. (2009), p. 186.

¹⁹ See Kerever (1991), pp. 6–7; Cohen Jehoram (1990–1991), p. 78; van Echoud et al. (2009), pp. 186–190 and references cited therein.

²⁰ Ricketson and Ginsburg (2006), pp. 1206 and 1208; Cohen Jehoram (1990–1991), *id.*; van Echoud et al. (2009), p. 186.

²¹ Kerever (1991), pp. 7–8; van Echoud et al. (2009), pp. 190–191.

²² Von Lewinski (2008), p. 34. See, at length, Rajan (2006), pp. 72–88.

personality right, or both) is more dominant in the *droit d'auteur* system, while the copyright tradition is primarily based on utilitarian arguments. On the other hand, however, this divide is not completely rigid, in the sense that each system is not completely oblivious to the other's justifications.²³ There are also some common traits to them—for instance, they both recognize a few basic exclusive rights that cover a broad range of acts of exploitation.²⁴

Nevertheless, despite some similarities, the parallelism between each system and its more predominant rationale still explains certain differences between national laws, according to the tradition they are rooted in.²⁵ These differences can represent an extra challenge for the EU harmonization program, not least because each system also stands for particular cultures and identities.²⁶ This might bring about added difficulties in finding a common ground and a compromise between EU Member States in the context of harmonization. Some relevant differences between the two systems are briefly outlined below.

A first point of discrepancy is the fact that *droit d'auteur* systems traditionally set a higher threshold in terms of originality and degree of creativity for a work to qualify for copyright protection. As shall be seen in Chap. 6, there has been a convergence of the different thresholds operated by both the EU legislator and the CJEU; however, *droit d'auteur* systems originally required that the work reflected its author personality, while copyright systems valued the skill, labour and judgment invested in creating the work.²⁷

As a consequence of these different thresholds for protection, the type of works that can be protected by copyright also differs. Certain kinds of subject matter do not qualify for copyright protection in *droit d'auteur* countries, where they will instead be protected by related or neighbouring rights. Conversely, such subject matter will be considered as a copyright protected work in countries following the copyright system. It is the case, for example, of phonograms and broadcasts.²⁸

Moreover, because in the *droit d'auteur* countries the work reflects the author's personality, the initial author will usually be a natural person,²⁹ while copyright countries comprise significant exceptions to this rule. An example of these

²³ See Strowel (1993), pp. 177–178, noting that each system does not completely overlook the other's justifications. See in addition, along similar lines, Davies (1995), pp. 964–965; Dreier (2001), pp. 298–303; Guibault (2002), p. 12 and references cited therein; Senftleben (2004), pp. 7–10; Nocella (2008), p. 151; von Lewinski (2008), pp. 40–41; Goldstein and Hugenholtz (2010), pp. 14 ff.

²⁴ Ohly (2009), pp. 212–213.

²⁵ Goldstein and Hugenholtz (2010), p. 6.

²⁶ Von Lewinski (2008), pp. 34 and 63.

²⁷ Strowel (1993), pp. 391 ff. especially 468–469; Davies (1995), pp. 969–970; von Lewinski (2008), pp. 45–46; Torremans (2010), pp. 180 ff.

²⁸ Von Lewinski (2008) *id.*

²⁹ There are however exceptions to this rule, such as for example the case of collective works in France—see Strowel (1993), pp. 383–386; Davies (1995), p. 971; and von Lewinski (2008), pp. 47–48.

differences can be seen in the regime of authorship in films. *Droit d'auteur* countries will in principle recognize as authors the director and/or other natural persons whose creativity is somehow comprised in the film; copyright countries, on the other hand, will normally consider the film producer as its author.³⁰ The same goes for matters of initial ownership. In countries following the copyright system, legal persons can be the initial owners of copyright, e.g., in the context of an employer/employee relationship, if the latter creates the work in the context of his employment contract. Conversely, most *droit d'auteur* countries will allocate initial ownership to the individual author (i.e., the employee).³¹

Also derived from the link between the author and his work is the issue of transferability of rights. In a contract where the author transfers his exploitation rights to a producer or other similar entity, he is often deemed to be the weaker party, as he has less bargaining power. *Droit d'auteur* legislations are usually more prone to counterbalance this situation, for example by establishing interpretation rules that favour authors in case of unclear contractual clauses. Common law countries give more weight to freedom of contract and usually refrain from intervening through legislation.³²

As regards economic rights, as mentioned above, both systems recognize a few exclusive rights. Such rights differ in scope from country to country, but usually not because of the distinction between the two systems, as demonstrated by differences between countries within the same system of protection.³³ However, remuneration rights—such as the remuneration right for private reproductions, also called private copy levy—are more common in *droit d'auteur* countries.³⁴

In addition, one key difference between both systems is the treatment afforded to moral rights. These are broader and stronger in *droit d'auteur* jurisdictions, with many of those countries providing for an unlimited duration of moral rights, and/or their unwaivability, non-transferability or inalienability. Most countries that follow the copyright system have some sort of protection for moral rights. However, there will still be many cases where moral rights do not apply or can be waived in copyright countries, weakening their position in such system.³⁵

The regime of exceptions and limitations to the exclusive rights also differs from one system to another. The two systems traditionally do not give equal weight to exceptions or limitations vis-à-vis the exclusive rights, with *droit d'auteur*

³⁰ Although it is now a requirement for EU Member States to recognize at least the principal director as one of the authors of a cinematographic or audiovisual work—see Article 2 paragraph 2 of the Rental and Lending Rights Directive (2006), Article 2 paragraph 1 of the Term of Protection Directive (2006), and Article 1 paragraph 5 of the Satellite and Cable Directive.

³¹ Davies (1995), p. 971; Cornish et al. (2010), pp. 530 ff.

³² Cornish et al. (2010), p. 530; Von Lewinski (2008), pp. 59–60.

³³ Von Lewinski (2008), pp. 54–55, giving the example of *droit d'auteur* countries Germany (where transfers of ownership are covered by the distribution right) and France (where transfers of ownership are covered by a *droit de destination* developed from the reproduction right).

³⁴ Von Lewinski (2008) *id.*; Geiger (2010), p. 520.

³⁵ See Vaver (1999), pp. 272 ff. Nocella (2008), pp. 153 ff. see also Strowel (1993), pp. 481 ff.

countries tending to interpret the limitations restrictively when compared to copyright countries.³⁶

Finally, a last difference worth mentioning is the approach taken to collective management organizations (“CMOs”) and their regulation. Copyright countries normally keep the regulations of CMOs to a minimum, covering mainly economic-related functions such as the collection of royalties. *Droit d’auteur* countries extend this regulation to other aspects, namely the relation with right owners or the social and cultural roles of CMOs.³⁷

Some of the disparities between the two systems were ironed out by the EU harmonization program, as shall be seen later on in Chap. 6. The remaining differences can, however, still constitute a challenge for harmonization endeavours.

1.1.3 EU Competence in Copyright

In order to legislate in any given area, the EU needs to have the necessary legislative competence. The EU will be granted legislative competence whenever the Treaties empower it to act, in order to achieve the objectives set therein.³⁸ It follows that any legislative act must be based on a Treaty provision that justifies an action by the European legislator. In other words, legislative acts must have a legal basis.

The Treaties do not contain any reference to competence in the field of copyright. The Treaty of Lisbon, which entered into force on 1 December 2009, amends the previous EC and EU Treaties and comprises a new article that allows the EU to create European intellectual property rights³⁹—that is, intellectual property titles valid in the 28 EU Member States, much like the current Community Trade Mark⁴⁰

³⁶ Von Lewinski (2008), pp. 56–57; Geiger (2010), pp. 519–520.

³⁷ Dietz (2002), pp. 899–904; von Lewinski (2008), pp. 61–62.

³⁸ This is the so-called principle of conferral, enshrined in Article 5 paragraph 2 TEU: “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”

³⁹ Article 118 of the Treaty on the Functioning of the European Union (“TFEU”): “In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.”

⁴⁰ Instituted by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

or Community Design.⁴¹ The provision thus opens the door for the creation of a European unitary copyright title, valid in all European Member States. The process and the end result of this “unification” are different from the harmonization of pre-existing national laws: the creation of a new, pan-European copyright title adds a new form of right to the legal order (regardless of whether or not it replaces national copyright entitlements), whereas harmonization of national copyright laws arguably adjusts existing national laws by approximating them. Several authors have pointed out the difficulties inherent to the creation of a unitary copyright title, which, for the most part, amount to its interaction with existing national copyrights.⁴² Whether the unified copyright title will ever become a reality is hard to predict, but even in the case that it does, it has been argued that working towards such an endeavour should run parallel to the improvement of the current copyright legal framework, namely through further harmonization.⁴³ In other words, harmonization of national copyright laws is most likely here to stay, and will probably be carried out in the same way as it has been until now, since Treaty provisions granting the EU power to harmonize national laws have not changed much in that regard.

Since there is no specific clause in the Treaties that bestows upon the EU the competence to harmonize national copyright laws, that harmonization has not been based on copyright-related concerns. Instead, legislative activity in this field is linked to the building of an internal market, i.e., “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”⁴⁴ This is because cross-border trade of copyright goods and services can be effectively impeded by national legislative differences. The copyright laws of the Member States differed—and still do in many aspects—from one another, in such fundamental features as the type and scope of the rights granted. For example, a difference in the term of protection of copyright could mean that distribution of a copyright good would be free in one country but would depend on the authorization of the right owner in another country where the protection had not yet expired.

Therefore, most harmonization measures in the field of copyright have so far been adopted following Article 114 of the Treaty on the Functioning of the European Union (“TFEU”)—formerly Article 95 of the EC Treaty—which grants the EU competence to approximate national laws with the purpose of establishing

⁴¹ Instituted by Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

⁴² See van Eechoud et al. (2009), pp. 317 ff.; Cook and Derclaye (2011), pp. 261–263; Hilty (2012), pp. 360–361.

⁴³ Hugenholtz (2013), p. 291. For a more skeptical view on combining unification with further harmonization, see Hilty (2012), pp. 360–361.

⁴⁴ Article 26 paragraph 2 TFEU.

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