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**CO-REACH  
Intellectual Property Rights in the New Media  
Environment (IPRNME)  
VIENNA WORKSHOP 2010**

Perspectives on European Harmonisation in  
Copyright Law

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## A. INTRODUCTION (1)

- **No Existing EU Copyright Law**
- EU law so far has not produced a Community-wide copyright law
- EU member states have their own national copyright law based on the national principle of territoriality (*i.e.* the geographic scope of the economic rights granted under the laws of the Member States coincides with their national borders, mitigated in its effect by the ECJ applying the exhaustion principle to the distribution of copyright works)



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## A. INTRODUCTION (2)

- **Legislative Competence**
- EU does not have a direct legislative competence in the field of copyright law (but see also Articles 295, 308 TEC *jo* Article 118 TFEU *jo* ECJ *Promusicae*-decision 2008)
- Any Community legislative action must comply with the principles of attribution, subsidiarity and proportionality (see Protocol on Subsidiarity and Proportionality annexed to the Lisbon Reform Treaty 2007)
- EU has based its legal instruments on EC Treaty provisions on free movement of goods and services (Articles 45, 47(2), 55) and on internal market (Article 95)



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## A. INTRODUCTION (3)

- **Possible Harmonisation Methods and Procedures EU Copyright Law**
  - Regulations, Directives, Recommendations
  - ECJ-decisions (interpretation of existing legal instruments, e.g. *Infopaq*-decision 2009 on originality)
  - national courts asking questions to ECJ and/or taking regard of each others decisions



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## A. INTRODUCTION (4)

- **Speech EC Vice-President Neelie Kroes, A Digital World of Opportunities – Forum d'Avignon, 5th November 2010**
  - *If there is one thing that defines and elevates Europe, it is culture. (...)*
  - *My goal, in promoting cultural diversity and content adapted to the digital age, is for European creativity to be even stronger. (...) But for that, we need to have the right building blocks. (...)*
  - *Take for instance copyright. (...) But copyright is not an end in itself. (...) Yet we see more and more that*



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## A. INTRODUCTION (5)

*continued*

*it is not respected. (...) We must ensure that copyright serves as a building block, not a stumbling block. (...)*

- *Today our fragmented copyright system is ill-adapted to the real essence of art, which has no frontiers. (...) And copyright enforcement is often entangled in sensitive questions about privacy, data protection or even net neutrality. (...)*
- *My position is that we must look beyond national and corporatist self-interest to establish a new approach to copyright. We want “une Europe des cultures” and for this we need a debate at European level.*



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## A. INTRODUCTION (6)

*continued*

- *The Commission will soon make legislative proposals on orphan works and on the transparency and governance of the collective management societies. We will examine again the problem of divergent national private copy levies. We will also look into multi-territorial and pan-European licensing. And we will not stop exploring ideas for as long as the system is not working.*



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## A. INTRODUCTION (7)

- **Acquis Communautaire (AC) EU Copyright Law**
- AC is the accumulation of legislation and court decisions which constitute the body of EU copyright law
- AC is regularly reviewed aiming at two objectives
  - \* first objective is to improve the operation of the legal framework and its coherence, particularly in light of the Information Society Directive 2001
  - \* second objective is to safeguard the good functioning of the internal market



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## B. EU HARMONISATION LEGAL FRAMEWORK (1)

- **Some Key Documents**
- Green Paper on Copyright and the Challenge of Technology 1988 (*COM (88) 172 final*)
- Green Paper on Copyright and Related Rights in the Information Society 1995 (*COM (95) 382 final*)
- Follow-up to the Green Paper on Copyright and Related Rights in the Information Society 1996 (*COM (96) 586 final*)



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## B. EU HARMONISATION LEGAL FRAMEWORK (2)

*continued*

- Information Society Directive 2001 (*Directive 2001/29/EC*)
- Green Paper on Copyright in the Knowledge Economy 2008 (*COM (2008) 466/3*)
- Communication on Copyright in the Knowledge Economy 2009 (*COM (2009) 532 final*)



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## B. EU HARMONISATION LEGAL FRAMEWORK (3)

- **Green Paper on Copyright and the Challenge of Technology 1988, first generation of harmonisation concerning**
  - to eliminate obstacles and divergences of approach in copyright laws at the national level
  - to develop policies that improve the competitiveness of EU's economy in relation to its global partners
  - to prevent others outside the EU of misappropriating EU intellectual property
  - to remove negative effects of national copyright protection (e.g. in the domain of software)



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## B. EU HARMONISATION LEGAL FRAMEWORK (4)

- **Information Society Directive 2001, second generation of harmonisation aiming at**
  - adapting legislation on copyright and related rights to reflect technological developments and to transpose into Community law the main international obligations arising from the WIPO treaties 1996
  - providing an essential building block for the Information Society by harmonising to a certain extent the essential copyright prerogatives, *i.e.* the reproduction right, the right of communication to the public and the distribution right as well as the exceptions and limitations



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## B. EU HARMONISATION LEGAL FRAMEWORK (5)

- not aiming at**
  - wholesale harmonisation, regarding many issues of copyright law as not requiring specific action by the EU, however identifying certain issues requiring urgent attention at Community level *e.g.*
    - \* piracy
    - \* home copying of sound and audio-visual material
    - \* distribution and rental rights for certain classes of works
    - \* protection of software and databases
    - \* limitations on the protection



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## B. EU HARMONISATION LEGAL FRAMEWORK (6)

- **Green Paper on Copyright in the Knowledge Economy 2008 focussing on**
  - the role of copyright in fostering dissemination of knowledge for research, science and education
  - intending to be the starting point for a structured debate on the long-term future of copyright policy in these fields
  - pointing at future challenges in fields that have not been a focal point up to now, *e.g.* scientific and scholarly publishing, and the role of libraries, researchers and persons with a disability



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## B. EU HARMONISATION LEGAL FRAMEWORK (7)

- **Communication on Copyright in the Knowledge Economy 2009 aiming at**
  - tackling the important cultural and legal challenges of mass-scale digitisation and dissemination of books (EU library collections *e.g.* Europeana) finding to that aim a solution for orphan works
  - improving the distribution and availability of works for persons with disabilities *e.g.* the visually impaired





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## B. EU HARMONISATION LEGAL FRAMEWORK (8)

- **Actual State of EU Copyright Law Harmonisation**
- haphazardly shaped body of law constituted by the agenda's of the various respective stakeholder groups
- apart from some lipservice, no attention is paid to the fundamentals of the law, instead the focus is on legal technique, as is evidenced lastly by the Preamble of the Information Society Directive 2001, e.g. recitals 3 and 4
  - \* *3. The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellec-*

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## B. EU HARMONISATION LEGAL FRAMEWORK (9)

*tual property, and freedom of expression and the public interest*

*\* A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across wide range of industrial*

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## B. EU HARMONISATION LEGAL FRAMEWORK (10)

*continued*

and cable retransmission; term (duration); databases, prerogatives, limitations and exceptions; resale right

- in essence the AC by striving for a strong protection of the economic rights of the copyright owners is fostering the objectives of free competition in the internal market resulting in seven Directives
  - \* covering in chronological order computer programs (software); rental and lending rights; satellite



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## B. EU HARMONISATION LEGAL FRAMEWORK (11)

*continued*

and cable retransmission; term (duration); databases, prerogatives, limitations and exceptions; resale right

- \* providing a patchwork of legislative measures dealing with seemingly unrelated, sometimes rather unimportant areas of copyright law, not touching upon central areas such as the relation to fundamental rights, moral rights, the requirement of originality, the subject matter of copyright, the main infringing acts, fair use exceptions, copyright contracts (transfer), conflict of laws (private international law)



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## C. EC HARMONISATION AGENDA (1)

### - Agenda Setting

- Working Paper on the Review of the EC Legal Framework 2004 (Brussels 19 July 2007, SEC (2004) 995, 14: no further harmonisation measures are envisaged
  - \* since in practice there are no indications of any problems as a consequence of lack of harmonisation with regard to the internal market (e.g. with regard to the originality requirement: in practice (as set off against theory) there seems to be no convincing evidence that divergent requirements pose barriers to



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## C. EC HARMONISATION AGENDA (2)

*continued*

intra-Community trade

- Communication on Copyright in Knowledge Economy 2009; Speech EC Vice-President Kroes on Digital Agenda 2010: harmonisation activities envisaged in the following domains
  - \* copyright levies
  - \* communication of content online
  - \* digital copying and electronic dissemination for libraries and archives
  - \* orphan works



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### C. EC HARMONISATION AGENDA (3)

*continued*

- \* processing in scientific publishing and publishing for literary and artistic aims
- \* equal access to information products c.a. for disabled persons
- \* collective management
- \* pan-European licensing



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### C. EC HARMONISATION AGENDA (4)

- **Areas for prospective (needed?) harmonisation**
  - territoriality principle (abolition?)
  - fundamental rights (codification?)
  - moral rights (leniency towards waivers? perpetual?)
  - subject-matter
    - \* characters, databases, perfumes, software, technical objects, titles (categorisation?)
    - \* protectability test (originality requirement? ECJ *Infopaq*-decision 2009?)
    - \* formalities (fixation?)



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## C. EC HARMONISATION AGENDA (5)

*Continued*

- prerogatives (codification economic rights?)
- exceptions and limitations (temporary reproduction?)
- transfer (assignment and licensing)
- conflict of laws (private international law)



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## D. EC HARMONISATION AGENDA (6)

- **Areas for possible prospective (not needed?) adjustment**
- computer programs (only one back up copy? no exhaustion of downloads/uploads? definition lawful user? anti-circumvention leniency?)



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## D. EC HARMONISATION AGENDA (7)

- **Best Harmonisation Method and Procedure**
  - Regulation, Directive, Recommendation?
  - ECJ decisions (e.g. *BHB/Hill* 2004; *Infopaq* 2009)?
  - Questions by national courts to ECJ; national courts taking regard of each others decisions?
  - Private initiatives?  
(see Wittem Project [www.copyrightcode.eu](http://www.copyrightcode.eu) )



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## D. PERSPECTIVES (1)

- **No Prospective EU Copyright Law**
  - a fully harmonised Community-copyright law is not to be expected in the coming years
  - the best that can be expected to that end is a categorical (vertical) adjustment of existing Directives and Recommendations and a similar introduction of new such legal instruments in combination with other harmonisation procedures such as ECJ decisions and questioning by national courts
  - whether this development will be detrimental to either



*continued*

the internal market and/or Member-States interests is difficult to forecast



## D. READING SUGGESTIONS

- Mireille van Eechoud *et al.*, **Harmonizing European Copyright Law (Kluwer Law International 2009)**
- Estelle Derclaye (ed.), **Research Handbook on the Future of EU Copyright (Edward Elgar 2009)**