The Future of Copyright Protection in the European Union

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Received 12 February 2013

National laws within the EU as to copyright and related rights have been extensively harmonised over time. One of the main drivers for this harmonisation has been the aim of establishing a single European market in goods and services. But harmonisation alone can only achieve so much, and its limits are now being experienced. This article discusses the degree to which harmonisation alone has not been able to achieve a single market in products and services that are the subject of copyright and related rights, and what further legislative responses could seek to address this.

Keywords: Copyright, related rights, harmonisation, sui generis, exhaustion of rights

As emphasised in several previous articles in this series on EU Intellectual Property Developments, national laws as to copyright and related rights in the EU, as with most other intellectual property rights, have been extensively harmonised over time. One of the main drivers for this harmonisation process has been the ongoing attempt to establish a single European market in goods and services. In some areas of intellectual property, this process has been supplemented with the establishment of unitary rights having EU wide effect, such as the Community design and the Community trademark. The harmonisation process for copyright and related rights started late in the 1980s and is still continuing, although in terms of black letter law there is not much more left to harmonise in these areas. But harmonisation alone can only achieve so much, and its limits are now being experienced, which is a particular problem for copyright and related rights as opposed to other types of intellectual property because of the ease of delivery of copyright works, or other material protected by related rights, across borders because of the Internet. This article discusses the degree to which harmonisation alone has not been able to achieve a single market in the EU in products and services that are the subject of copyright and related rights, and how such deficiencies might be cured in a future EU copyright law system.

National Copyright Laws –A Barrier to the Single Market in the EU

The earliest case law of the Court of Justice concerning copyright and related rights in the EU established the principle of exhaustion of rights for physical articles protected by copyright, such as books and sound carriers, whereby the 'specific subject matter' of the restricted act of distribution for such works and other matter is limited to the right to place them first on the market and such rights are ‘exhausted’ within the EU in such an article once it is placed on the market anywhere within the EU by or with the consent of the rights owner. The result is that neither that rights owner, nor its licensor nor licensee, can then assert such rights against such article anywhere in the EU and thereby impede trade in it across borders within the EU.

But the doctrine of exhaustion of rights can only go so far in facilitating free trade within the EU. Thus it is limited to the distribution (but not rental) of physical articles, and it has not proved possible generally to apply it to other means of delivery across borders of works and other material the subject of copyright or related rights, such as, historically broadcasting, but now Internet transmission generally.

One legislative approach to such cross-border transmission is in effect to extend the exhaustion concept from trade in goods to trade in services by establishing a ‘country of origin’ principle whereby there is no scope to infringe at the point of reception. The satellite broadcasting Directive achieved this, but only as to the limited case of satellite broadcasts where the signal was introduced into the transmission chain from an EU Member State, and to avoid ‘copyright havens’ mandated certain minimum standards of protection. The right of communication to the public of copyright works, introduced into EU

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copyright law by the 2001 Directive on copyright in the information society in order to implement the 1996 WIPO Copyright Treaty, has brought this issue back into prominence as neither the Treaty nor the Directive provide any guidance as to where the infringement of such rights takes place in a cross border context: is it only where the infringing material is introduced into the chain of transmission, or is it also where it is, or can be, received, which in the case of the Internet means anywhere in the world?\textsuperscript{6}

The answer to this particular question in an EU context is probably a qualified version of the latter of these two alternatives, as the Court of Justice recently held in Case C-173/11, 

\textit{Football Dataco v Sportradar}\textsuperscript{7} in relation to the sui generis database right\textsuperscript{8} that ‘the sending by one person, by means of a web server located in Member State A, of data previously uploaded by that person from a database protected by the sui generis right ... to the computer of another person located in Member State B, at that person's request, for the purpose of storage in that computer’s memory and display on its screen, constitutes an act of ‘re-utilisation’ of the data by the person sending it' and that ‘that act takes place, at least, in Member State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess.’ The guidance provided by the CJEU as to where the act of reutilisation takes place is of potential relevance to copyright and to the restricted act of communication to the public in the context of allegedly infringing material available on a website. As to the qualification that it made as to intention the CJEU observed that given the ubiquitous nature of the content of a website, one must take into account that such a method of making material available to the public differs from traditional methods of distribution because websites can be consulted instantly by an unlimited number of Internet users throughout the world and thus, the mere fact that website content is accessible in a particular country does not necessarily mean that the website operator is performing acts of reutilisation (or in the context of copyright communicating to the public) in that country.

A rather different approach to the issue of Internet downloads was taken by the CJEU in another decision from 2012, but only as to computer programs, in Case C-128/11 \textit{UsedSoft GmbH v Oracle International Corp.}\textsuperscript{9} Here the CJEU held that ‘the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the Internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period.’ It went on to hold in consequence of this that ‘in the event of the resale of a user licence entailing the resale of a copy of a computer program downloaded from the copyright holder’s website, that licence having originally been granted by that right holder to the first acquirer for an unlimited period in return for payment of a fee intended to enable the right holder to obtain a remuneration corresponding to the economic value of that copy of his work, the second acquirer of the licence, as well as any subsequent acquirer of it, will be able to rely on the exhaustion of the distribution right ..., and hence be regarded as lawful acquirers of a copy of a computer program … and benefit from the right of reproduction ...’ This decision thus permits a ‘second hand’ market in computer software even where the software has never been distributed on a physical carrier and has only ever been downloaded to an authorised user. However, the wider effect on other areas of copyright is limited because the CJEU observed that the Directive harmonising copyright law as to computer programs was a \emph{lex specialis} so that they did not need to determine whether or not there was a communication to the public. However the CJEU also observed more generally that a transfer of ownership (leaving open quite what this meant) changed an act of communication to the public into an act of distribution.

\textbf{Incomplete Harmonisation of National Copyright Laws}

But even conceptually equating certain transmissions or Internet downloads with the placing on the market of physical carriers is no answer to the wider cross border issues encountered with copyright in the EU. Thus, even with physical articles exhaustion of rights could not be used to address the situation in which, because of national disparities in the term of protection, copyright in a work or a related right in other material no longer subsisted in the EU member state in which an article was first marketed but not another EU member state into which it was
imported. In such a case the rights owner could use its rights in the EU member state of import to prevent the import of an article lawfully marketed by a third party in another EU member state. The harmonisation of term Directive was a response to this particular situation, and other harmonisation measures have addressed other disparities that have fragmented the market in the EU.

Neither is harmonisation of copyright even now entirely complete, as evidenced by another CJEU decision from 2012, that in Case C-5/11 In the criminal proceedings against Titus Alexander Jochen Donner. Here the CJEU addressed the scope of the restricted act of distribution in the context of criminal proceedings brought in Germany against Mr Donner for aiding and abetting a third party in supplying members of public with furniture which infringed copyright in the state of import (Germany) but which did not do so in the state of export (Italy). The CJEU held that a ‘trader who directs his advertising at members of the public residing in a given Member State and creates or makes available to them a specific delivery system and payment method, or allows a third party to do so, thereby enabling those members of the public to receive delivery of copies of works protected by copyright in that same Member State, makes, in the Member State where the delivery takes place, a ‘distribution to the public’ ….’ The Court went on to hold that those Articles of the EU Treaties that mandated the free movement of goods within the EU provided no defence in that these ‘did not preclude a Member State from bringing a prosecution under national criminal law for the offence of aiding and abetting the prohibited distribution of copyright-protected works where such works are distributed to the public on the territory of that Member State in the context of a sale, aimed specifically at the public of that State, concluded in another Member State where those works are not protected by copyright or the protection conferred on them is not enforceable as against third parties.’ The decision is entirely sensible, but the fact that such an issue could even arise in the first place shows what variations in protection still remain.

One current such problem that does not admit of such an easy answer concerns copyright levies on recording media capable of being used for the private recording of copyright works and other matter protected by related rights. Here EU Member States are free to determine the levels of levy and the nature of the recording media (including hard disks) on which it is to be payable, and there are wide disparities as to national implementation, which distort the internal market.

The Future

Although, and despite the extensive harmonisation that has taken place to date, there remain several areas of copyright and related rights law that could be further harmonised within the EU, any such legislative action can only further the single market in such rights to a limited extent, especially as the predominant mode of exploiting such rights migrates from physical carriers to electronic downloads and the principle of exhaustion of rights as traditionally understood and applied only to physical carriers thus becomes even less relevant. Neither do legislative responses that would conceptually equate certain transmissions or Internet downloads with the placing on the market of physical carriers provide a complete answer, even in the unlikely event of such legislation being regarded as feasible, either under the international legal framework that governs copyright, or politically.

Thus, there is probably only one ultimate response to the limitations inherent in the existing framework, which would be to replace national copyright laws within the EU by a single, unitary, EU wide copyright law, and there are noises now emanating from the Commission which could be interpreted as promoting such a view. But this is something that is very much easier said than done. The approach adopted in other areas of intellectual property, namely that of introducing new unitary rights (as with the Community trademark and the Community design) cannot in and of itself address the problems of fragmentation of the internal market for copyright and related rights as long as such national rights still remain, which they would, for the remainder of their respective terms of up to life plus 70 years, even if no rights under national laws were to come into existence after the introduction of the Community ones. But no introduction of an EU intellectual property right has ever been associated with the abolition of national rights for the future, let alone the severe curtailment of the exercise of national rights that have already arisen, and which raises issues as to expropriation under human rights laws. Against this background the law of copyright and related rights in the EU will continue to struggle to try to minimise the distortion
of the internal market associated with Internet transmissions across borders of copyright works and other material protected by related rights.

References


2 Case 78/70 Deutsche Grammophon v Metro-SB-Grossmakte GmbH & Co KG [1971] CMLR 631 (ECJ) and Cases 55/80 and 57/80 Musik-Vertrieb Membran v GEMA [1981] 2 CMLR 44 (ECJ). Such rights are not however exhausted in such goods when they are first placed on the market outside the EU by or with the consent of the rights owner, and thus the import of such goods into the EU is capable of infringing. For a history of exhaustion of rights see Cook Trevor, Exhaustion, A casualty of the borderless digital era in Global Copyright, Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace edited by L Bently, U Suthersanen and P Torremans (Edward Elgar Publishing Ltd, UK), 2010.

3 Indeed Recital 29 of the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society would appear wholly to exclude its application to Internet transmissions in stating ‘The question of exhaustion does not arise in the case of services and on-line services in particular…’ For earlier case law to similar effect in the context of broadcasting see Cases 52/79 Procureur du Roy v Marc Debaue & anr and 62/79 SA Compagnie General pour la Diffusion de la Television, Coditel & ors v SA Cine Vog Films & ors [1981] 2 CMLR 362, although much more recently some doubt has been cast on the general applicability of the principles apparently established in Cases 52/79 and 62/79 in joined cases C-403/08 and C-429/06 Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd (CJEU 4 October 2011), concerning trade within the EU of decoder cards that allow encrypted broadcasts to be decrypted and which vary considerably in price as between different national markets within the EU in an effort to maximise revenues given the differences in demand as between such markets. For a fuller discussion of the development of this area of the law before the CJEU decision in joined cases C-403/08 and C-429/06 see Cook Trevor, Exhaustion, A casualty of the borderless digital era in Global Copyright, Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace edited by L Bently, U Suthersanen and P Torremans (Edward Elgar Publishing Ltd, UK), 2010.


5 Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

6 The former in the context of broadcasting is characterised as the ‘emission theory’ and the latter as the ‘communication theory’ or the ‘Bogusch theory’ after Arpad Bogusch, the first Director General of WIPO, who supported it. For cases consistent with the Bogusch theory, see as to the USA National Football League v PrimeTime 24 Joint Venture, 211 F.3d 10 (2nd Cir. 2000) in relation to signals directed lawfully at Canada but with overspill in the USA and, as to Germany 2002 - I ZR 175/00 Sender Felsberg, GRUR Int. 470, 473 (2003) (Federal Supreme Court 7 November 2002) in relation to signals transmitted from Germany but received only in France.

7 Case C-173/11 Football Dataco Ltd and ors v Sportradar GmbH and anr, (CJEU 18 October 2012). The claimants between them administered football competitions in certain English and Scottish leagues and marketed the data (i.e. goals, red cards, yellow cards etc) in such matches. This data was compiled and maintained in the ‘Football Live’ database. The data was updated and provided to third parties while matches were taking place. The defendants were German and Swiss companies that provided data relating to sports events to customers, such as betting and media customers. The claimants brought proceedings in England against the defendants alleging infringement of database right by extracting data from ‘Football Live’ and providing it to their customers. The defendants challenged jurisdiction on the basis that their actions did not take place in the UK, which resulted in this reference to the CJEU.

8 The sui generis database right is a sort of related right that can subsist, by virtue of Directive 96/9/EC of 11 March 1996 on the legal protection of databases in certain databases in which a substantial investment has been made in either the obtaining, verification or presentation of data but which do not qualify for copyright by reason of their selection or arrangement. It is infringed by unauthorised acts of extraction (corresponding approximately to reproduction) and reutilisation (corresponding approximately to communication to the public).


10 Case C-341/87 EMI Electrola v Patricia (ECJ 24 January 1989).

12 Case C-5/11 In the criminal proceedings against Titus Alexander Jochen Donner (CJEU 21 June 2012).

13 The reason for this variation, and whether or not it is consistent with EU law, is discussed in Cook Trevor, The cumulative protection of designs in the European Union and the role in such protection of copyright, Journal of Intellectual Property Rights, 18 (1) (2013) 83-87.

14 For a recent summary of the problems and an outline of some suggested solutions see Vitorino, Antonio – Recommendations resulting from the Mediation on Private Copying and Reprography Levies (Brussels 31 January 2013).

15 Article 5 of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society permits national Member States to provide for such an exception and reservation but does not precisely specify its scope.