The competence of the European Union in copyright lawmaking: A normative perspective of EU powers for copyright harmonization

Quintela Ribeiro Neves Ramalho, A.B.

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THE COMPETENCE OF THE EUROPEAN UNION
IN COPYRIGHT LAWMAKING

A NORMATIVE PERSPECTIVE OF EU POWERS FOR COPYRIGHT HARMONIZATION
Promotor: Prof. dr. P.B. Hugenholtz
Copromotor: Prof. dr. D.M. Curtin

Overige leden:
Prof. dr. M.M.M. van Eechoud
Prof. dr. L.F.M. Besselink
Prof. dr. B. de Witte
Prof. dr. L. Bently
Dr. L. Guibault

Faculteit der Rechtsgeleerdheid
THE COMPETENCE OF THE EUROPEAN UNION IN COPYRIGHT LAWMAKING
A NORMATIVE PERSPECTIVE OF EU POWERS FOR COPYRIGHT HARMONIZATION

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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 research, 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 (1.1.). It goes on to explain the underlying problem definition (1.2.), and to describe the outline and general methodology of the book (1.3.).
1. INTRODUCTION

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 section 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 Orphan Works Directive, came into force in 2012 and had the daunting task of harmonizing 27 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. Subsection 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. Subsection 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, subsection 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, subsection 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. 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.

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. 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. This suggests the idea of “reward”: the intellectual labour invested in creation should be rewarded. The right to property derived therefrom, however, should not be absolute; Locke’s theory comprised limitations dictated by the need to preserve the commons.

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1 See, for example, Yen 1990; Strowel 1993 at 173 ff; Friedman 1994; Fisher 2001; Guibault 2002 at 7 ff; Geiger 2004 at 22 ff; Derclaye 2008 at 11 ff; Bently & Sherman 2009 at 34-39.
2 Some authors break copyright rationales into more justifications, such as, e.g., the human rights justification (see for instance Derclaye 2008 at 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 at 12 ff).
4 Fisher 2001 at 170.
5 Guibault 2002 at 8-9; Hughes 1988 at 296 ff, discussing the several interpretations of “reward” in the context of the labour theory).
6 See Locke 1924 §27 at 130. Ramello 2005, at 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, at 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
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. According to this conception, property is an extension of personality, providing a means for self-actualization and personal expression. Not surprisingly, then, the personality rights theory finds its ultimate expression in the recognition of moral rights.

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. Indeed, many authors consider copyright to be a mix of property and personality interests, being therefore based on both theories. This question is closely connected to the discussion about copyright’s nature, and namely whether it is a property right or a personality right.

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 goods to the public. 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.

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.

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7 Hughes 1988 at 330; Fisher 2001; Kretschmer & Kawohl 2004 at 31ff.
8 Hughes 1988 at 330.
9 Van Gompel 2011 at 218.
10 Lacey 1989 at 1564 and Guibault 2002 at 8.
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 (in case Anheuser-Busch Inc. v. Portugal (2007), at 72)
13 Guibault 2002 at 10; Derclaye 2008 at 12; Fisher 2001; Geiger 2004 at 27-35; Friedman 1994 at 176.
14 Guibault 2002 at11.
1. INTRODUCTION

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

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

16 Geiger 2004 at 38-39. Along similar lines, see Lacey 1989 at 1564, 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 at 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 at 531 ff.
18 Kerever 1991 at 5-6; van Eechoud et al. 2009 at 186.
performances.\textsuperscript{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 derivate works who adapt the original work, such as translators.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 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.\textsuperscript{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.\textsuperscript{24}

\textsuperscript{19} See Kerever 1991 at 6-7; Cohen Jehoram 1990 at 78; van Eechoud et al. 2009 at 186-190 and references cited therein.
\textsuperscript{21} Kerever 1991 at 7-8; van Eechoud et al. 2009 at 190-191.
\textsuperscript{22} von Lewinski 2008 at 34. See, at length, Rajan 2006 at 72-88.
\textsuperscript{23} See Strowel 1993 at 177-178, noting that each system does not completely overlook the other’s justifications. See in addition, along similar lines, Davies 1995 at 964-965; Dreier 2001 at 298-303; Guibault 2002 at 12 and references cited therein; Senfflieben 2004 at 7-10; Nocella 2008 at 151; von Lewinski 2008 at 40-41; Goldstein & Hugen holtz 2010 at 14 ff.
\textsuperscript{24} Ohly 2009 at 212-213.
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. These differences can represent an extra challenge for the EU harmonization program, not least because each system also stands for particular cultures and identities. 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 chapter 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.

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.

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

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25 Goldstein & Hugenholtz 2010 at 6.
26 Von Lewinski 2008 at 34,63.
27 Strowel 1993 at 391 ff, especially 468-469; Davies 1995 at 969-970; von Lewinski 2008 at 45-46; Torremans 2010 at 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 at 383-386; Davies 1995 at 971; and von Lewinski 2008 at 47-48.
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.
employment contract. Conversely, most droit d’auteur countries will allocate initial ownership to the individual author (i.e., the employee).  

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.

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. However, remuneration rights – such as the remuneration right for private reproductions, also called private copy levy - are more common in droit d’auteur countries.

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.

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

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.

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31 Davies 1995 at 971; Cornish et al. 2010 at 530 ff.
32 Cornish et al. 2010 at 530; Von Lewinski 2008 at 59-60.
33 Von Lewinski 2008 at 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 at 520.
35 See Vaver 1999 at 272 ff; Nocella 2008 at 153 ff; see also Strowel 1993 at 481 ff.
36 Von Lewinski 2008 at 56-57; Geiger 2010 at 519-520.
1. INTRODUCTION

Some of the disparities between the two systems were ironed out by the EU harmonization program, as shall be seen later on in chapter 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 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

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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.”


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towards such an endeavour should run parallel to the improvement of the current copyright legal framework, namely through further harmonization. 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.” 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, 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 or furthering the functioning of the internal market. However, while conferring the EU competence to harmonize national laws, Article 114 TFEU does not give any guidance regarding what the substantive content of harmonization measures ought to be. The purpose of the granted competences is to enable the establishment and functioning of the internal market, independently of the subject matter that constitutes the direct object of EU legislation. Article 114 TFEU is thus also called a functional competence, since the Treaties grant the EU powers to achieve an objective (the establishment and functioning of the internal market), but leave the substantive choices to the legislator’s discretion. In the field of copyright, for example, differences in the term of protection can hinder cross-border trade and can

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43 Hugenholtz 2013 at 291. For a more skeptical view on combining unification with further harmonization, see Hilty 2012 at 360-361.
44 Article 26 paragraph 2 TFEU.
45 Article 114 paragraph 1 TFEU: “Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26 [on the aim of establishing an internal market]. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”
46 Quadra-Salcedo Janini 2006 at 68 ff.; Weatherill 2004 at 6-7.
thus fall under the competence of Article 114 TFEU. The provision, however, gives no indication as to how the legislator should decide on the optimal harmonized term of copyright protection.

Due to its functional character, Article 114 TFEU has no normative content. This also makes it a rather flexible competence norm, in the sense that it enables the EU to harmonize a wide range of subjects, so long as there is a point of connection to the building of an internal market.47 But it can in addition make harmonization greatly dependent on the legislator’s discretion – in what concerns, e.g., the choice of the specific subjects to harmonize and their respective regime –, which in turn might lead to a situation of "competence creep."48

The CJEU has partly addressed this problem, although it has done so by focusing on the definition of the norm’s objective, rather than by infusing normative content into Article 114 TFEU. The Court has ruled that, for a measure to be validly based on Article 114 TFEU, it must have as a genuine goal the establishment or functioning of the internal market. According to the Court, the internal market is a genuine goal if obstacles to free movement exist or are likely to occur, and the measure in question is designed to prevent them.49 As the Court made clear, however, this does not mean that a legislative measure cannot have an impact on other fields or pursue other aims, as long as its main goal is in fact the building of an internal market.50 The Court seems thus to imply that it is admissible to build up normative content in the context of Article 114 TFEU, even though it gives no indication regarding what that content ought to be in any given policy area.51

It should also be noted that the achievement of an internal market serves as more than a legal basis for the legislator to act. In fact, the building of an internal market is one of the main objectives of the EU.52 Legislative measures aimed at harmonizing divergent national laws are just one way to achieve that objective;

47 It can be argued that the same problem exists in relation to Article 118 TFEU, since the creation of a EU-wide copyright title is also dependent on the "context of the establishment and functioning of the internal market." The attachment of the competence of Article 118 TFEU to the building of an internal market was confirmed by the CJEU in joined cases C-274-295/11 – Spain v. Council at 21.

48 Weatherill 2004a at 639 and references cited therein.

49 See case C-376/98 – Tobacco Advertising I, at 84, and case C-380/03 - Tobacco Advertising II at 41.

50 See case C-376/98 – Tobacco Advertising I, at 78, and joined cases C-465/00, C-138/01 and 139/01 - Österreichischer Rundfunk, at 41.

51 This was too hinted by Advocate General Fennelly in case C-376/98 – Tobacco Advertising, at 64. His opinion points to the need of a functional competence like that of Article 114 TFEU being "influenced by substantive concerns" ("If the condition of having as its object the establishment or functioning of the internal market, or that of addressing national provisions on the taking up or pursuit of activities as service providers, is satisfied, the content of an approximating or coordinating measure - the level of regulation, the type of scheme, etc. - must also, in principle, be influenced by substantive concerns (…)").

52 Article 3 paragraph 3 TEU reads: "The Union shall establish an internal market”. Additionally, article 26 paragraph 1 TFEU states that “the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.” On the subject of the internal market as an objective of the EU, see infra chapter 4.
another one is abolishing national rules that constitute barriers to cross-border trade where they cannot be justified in individual situations, which is done by the CJEU. The difference between both methods is usually referred to as positive and negative integration respectively. Therefore, for example, any decision of the CJEU that establishes that a national measure cannot be maintained because it hinders cross-border trade amounts to negative integration. Positive integration, on the other hand, consists of supranational measures that promote the internal market. Such measures are typically legislative acts (e.g., directives or regulations) that are effective throughout the EU. Unlike negative integration – that develops on a case-by-case basis –, positive integration has a broader effect, since one legislative measure will in principle cover all EU Member States.

Doctrinal views on this matter generally agree that both types of integration are complementary. CJEU decisions might in some cases prompt the EU legislator to act, for example by referring to the lack of harmonization of a certain field that is causing a hindrance to cross-border trade. Moreover, the Court might establish some principles, guidelines or concepts that are then used by the EU legislator in positive integration measures. This is related to what has been called “judicial activism” – a term used to refer to the case law of the CJEU as “creative”, granting the Court a quasi-legislative role.

The interplay between negative and positive integration means that an analysis of the legislative competence of the EU to harmonize national copyright laws has to take into account the activity of the CJEU. This is particularly true for the field of copyright, which has first been tackled in the context of negative integration – concrete national copyright rules were impeding cross-border trade in certain cases, which were brought before the CJEU. This matter is developed further in chapters 3 and 6 of this book. For now, suffice it to say, the activity of the CJEU has, to a certain extent, influenced the development of the EU copyright legislation. An overview of that legislative development is provided in the next section.

1.1.4. DEVELOPMENT OF THE COPYRIGHT ACQUIS

In the field of copyright, eight directives have so far been adopted, all of which are based on the need to further an internal market for copyright goods and services.

53 The terms positive and negative integration were first coined by Tinbergen, who defined them in the following terms: negative integration would be the “measures consisting of the abolition of a number of impediments to the proper operation of an integrated area”; positive integration could be defined as “the creation of new institutions and their instruments or the modification of existing instruments” (Tinbergen 1965 at 76). In what concerns subsequent literature on this subject, see inter alia Scharpf 1996 at 15; Steiner et al. 2006 at 324; Pelkmans 1984 at 4; Lohse 2011 at 293 ff.

54 See e.g. Weatherill 2010 at 484, Kurecz 2001 at 288 ff.; de Vries 2006 at 319; Jarvis 1998 at 328 ff.

Their goal is thus to eliminate or at least even out the differences between national laws that hinder the cross-border trade of those goods and services. As a consequence, the main legal basis used to harmonize national copyright laws is current Article 114 TFEU (formerly Article 95 of the EC Treaty). These directives together form part of the copyright *acquis communautaire*, which has been defined as “the body of common rights and obligations which bind all the Member States together within the European Union,” thereby comprising “the legislation adopted in application of the treaties and the case law of the Court of Justice.” The *acquis* therefore represents what was “acquired” – something that should not be challenged, binding the European Union and the Member States – and can refer to either secondary legislation or decisions issued by the CJEU.


57 It has been widely accepted that the *acquis communautaire*, as the European legal patrimony, comprises a “judicial *acquis*” as well: see Pescatore 1981 at 619 ff. and Gialdino 1995 at 1098. The latter points out that the Court contributes to the *acquis* in two different ways: “on the one hand, the Court cooperates in consolidating the Community patrimony, while also acting as a catalyst for new developments in the definition of a concept which is evolutionary by its very nature; on the other, the Court is called upon to ensure respect of the *acquis*, thus playing the typical role of garantor.” See however Tridimas 2012, noting that, even though CJEU decisions are generally followed in subsequent decisions, there is formally no true doctrine of judicial precedence in the EU.


cover specific features of copyright, such as protected subject matter or exclusive
rights. In fact, the only directive so far that has had a more horizontal approach is
the Information Society Directive, as it covers the main rights in copyright and
exceptions thereof. But there is no truly horizontal instrument regulating copyright
in a holistic fashion in the EU. Arguably, one of the reasons for this is the fact that
the main legal basis to harmonize the field of copyright has been the establishment
and functioning of the internal market. Thus, only copyright aspects that have, or
threaten to have, an impact on the internal market have supposedly been addressed
by the legislature.66

However, the EU legislative history in copyright is not originally connected to
internal market goals only. The first reference to a legislative intervention in the
field of copyright – a resolution approved unanimously by the European Parliament
in 1974 – was indeed marked by cultural, rather than internal market,
considerations. The main focus of that resolution was the protection of Europe’s
cultural heritage, and not the attainment of internal market goals. In order to
achieve protection for Europe’s cultural heritage, the Parliament called on the
European Commission to harmonize a number of areas, including “the protection of
the cultural heritage, royalties and other related intellectual property - rights.”67 On
22 November 1977, the Commission followed suit and sent a Communication to the
Council entitled “Community action in the cultural sector.” There, it set forth
guidelines concerning the harmonization of laws on copyright, indicating specific
aspects that should be dealt with – namely, the duration of copyright, the public
lending right or the resale right.68 It also assumed that Community action in the
cultural sector was justified by the mere application of the Treaty to this sector. It
considered that cultural matters were somehow connected to freedom of trade and
freedom of movement, and that therefore the legal basis for action was “the Treaty
itself.”69

This was later confirmed in the Commission Communication to the Parliament
and the Council, named “Stronger Community action in the cultural sector”, from
16 October 1982. The Communication states that “the EEC Treaty covers cultural
activities,” even though it is likely that such a statement derives from an
understanding of the cultural realm as something that is intertwined with common
market considerations.70 Importantly, the duration of copyright and the resale right,
but also piracy, are listed there as preferred targets of legislative measures.

69 Ibid. at 5. Nevertheless, in relation to the harmonization of the resale right in particular, the
Communication indicates Article 100 of the EEC Treaty (current Article 114 TFEU) as a specific
legal basis for action – see Communication at 14-16.
70 See Commission Communication on stronger Community action in the cultural sector (1982),
specifically at 2 (i), that reads: “Works produced by cultural workers and services supplied by them
are products and services covered by the rules of the common market in the same way as other
The pursuit of a more market-driven approach in the field of copyright was further noticeable two years later, with the Green Paper on Television Without Frontiers (1984). The Green Paper mentioned inter alia the problem of copyright in trans-frontier broadcasts, in the context of promoting the common market. However, the Directive enacted directly in connection with that Green Paper – the Television without Frontiers Directive (1989) – did not deal with copyright at all. Surely, one of the reasons for this must have been the resistance shown by both right holders and Member States to the Commission’s suggestion of including a statutory license for the simultaneous and unaltered cable retransmission of programs broadcasted in another Member State. Copyright in the satellite and cable context was thus dealt with later on, with the Discussion Paper on Broadcasting and Copyright in the Internal Market, which subsequently resulted in the Satellite and Cable Directive.

The impact of copyright on the internal market was expressly acknowledged by the Green Paper on Copyright and the Challenge of Technology (1988). Importantly, the Green Paper clearly mentioned that Article 100a (later Article 95 EC Treaty and now Article 114 TFEU) was the provision the EC should rely on to “remove the obstacles and distortions” caused by different national copyright laws. Moreover, the Green Paper also suggests that Article 57 (later Article 47 EC Treaty, now Article 53 TFEU) could be an appropriate legal basis for directives that focus on the provision of services subject to copyright. Finally, Article 235 (later Article 308 EC Treaty, now Article 352 TFEU) is also mentioned as a

products and services and can obtain the maximum practical benefit through the application of those rules.”

74 See Dreier & Hugenholzt 2006 at 263 and Seville 2009 at 34 ff.
75 See Green Paper on Copyright and the Challenge of Technology (1988) at 1.5.10.
76 Article 53 paragraph 1 TFEU: “In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.”
77 Green Paper on Copyright and the Challenge of Technology (1988) at 1.5.11.
78 Article 352 TFEU paragraph 1: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.”
supplementary yet relevant means of action in the field of copyright, should harmonization measures fail to provide an adequate solution.\textsuperscript{79}

The Green Paper on Copyright and the Challenge of Technology also enumerated the subject matter that should be the object of harmonization measures. It included piracy, home copying of sound and audio-visual material, protection of databases and protection of computer programs. The last two were in fact addressed by the Database (1996) and the Computer Programs (1991) Directives, respectively, while the Rental and Lending Rights Directive (1992) partially tackled piracy-related issues by harmonizing the rental and lending rights and by granting a distribution right to certain related rights owners.\textsuperscript{80}

The harmonization program proceeded with the adoption of the Term of Protection Directive (1993), a subject that was already targeted in the Commission’s Communication on Community action in the cultural sector (1977). The decision to take action followed the CJEU’s decision in the \textit{EMI Electrola v. Patricia} case, where the Court had hinted that the lack of harmonization of copyright duration was an obstacle to the internal market.\textsuperscript{81}

In 1995, the Commission adopted another Green Paper – the Green Paper on Copyright and Related Rights in the Information Society –, which identified some areas in need of harmonization, namely the applicable law; the rights of reproduction, communication to the public and digital dissemination and broadcasting; moral rights; management of rights; and technical systems of identification and protection.\textsuperscript{82} Later on, in the Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society (1996), this list was narrowed down to the rights of reproduction, distribution and communication to the public, and the legal protection of systems of technical identification and protection. It was conceded that the applicable law, broadcasting rights, management of rights and moral rights were issues requiring further evaluation (and thus their harmonization ought to be considered at a later stage).

The Information Society Directive (2001) came about as a consequence of this Green Paper and, among others, deals with the prioritized subjects referred to above. Also in 2001, another directive was passed – the Resale Right Directive –, the subject of which had been initially broached in the Commission’s Communication concerning Community action in the cultural section, in 1977. The last directive in the field of copyright is the Orphan Works Directive, adopted in 2012 following discussions on digitization and online accessibility to cultural

\textsuperscript{79} Green Paper on Copyright and the Challenge of Technology (1988) at 1.5.17.
\textsuperscript{80} The Rental and Lending Rights Directive was also partially based on case 158/86 – Warner, where differences in national regimes concerning rental rights were an obstacle to trade that was deemed acceptable by the CJEU (thus prompting the EU legislator to harmonize rental rights).
\textsuperscript{81} See case 341/87 – EMI Electrola v. Patricia at 10-12 and Explanatory Memorandum to the Term of Protection Proposal (1992) at 14-15. See also Dreier & Hugenholtz 2006 at 287, Bently & Sherman 2009 at 51, and Seville 2009 at 38. For the details of the case, see chapter 3.
material. Because orphan works are protected works whose right owners cannot be identified or found, the clearance of rights in such works is imperilled, with negative consequences to the broad digitization of works. Action was therefore considered necessary in relation to this particular subject.

The evolution of copyright legislation in the EU briefly sketched above shows that, although the subject of copyright first stemmed from a cultural context in the EU, internal market aims took the lead and served as a legal basis for the current copyright directives.

1.2. Problem definition

Article 95 EC Treaty, which is now Article 114 TFEU, has been the main competence norm used so far to harmonize national copyright laws. As already mentioned, Article 114 TFEU is a functional competence and does not give much normative guidance regarding what the substantive content of copyright legislation ought to be. Because there seems to be no mandatory content for copyright legislation at the EU level, the outcome of the legislative process is largely dependent on the legislator’s discretion and permeable to the influence of private interests.

In the field of copyright, an added problem is the diversity of national copyright laws and their respective foundations. Even if the copyright systems of the Member States are grouped into two main traditions, the differences between them would always represent a challenge for harmonization endeavors, but all the more so given the thin normative content of the competence norm.

This book aims at answering two main research questions: (i) whether the functional character of Article 114 TFEU has resulted in a normative gap in copyright lawmaking and (ii) if so, how the EU legislator ought to address that gap.

I will only deal with the internal competence of the EU to harmonize national copyright laws. The external competence of the EU in the field of copyright – an interesting topic on its own – remains outside the scope of this book. Likewise, the competence to create an EU copyright title as now allowed by Article 118 TFEU will not be examined – this book concerns harmonization competences alone. Furthermore, because the focus of the research is the legislative activity at the EU level, I will not cover issues of national implementation of directives. Finally, it should be underlined that this is a purely legal research. Matters of political science


84 See at length van Gompel 2007 at 670 ff.
1. INTRODUCTION

(such as the intricacies of lobbying) although relevant in the context of lawmaking, will not be approached either.

1.3. Outline and methodology

The answer to the research questions presented above is provided primarily from a EU law perspective. The general methodology used is both analytical and normative. In addition, each chapter follows a specific methodology to reach certain findings that are relevant to answering the research questions.

Chapter 2 carries out a survey of the existing directives and their legislative history to determine the underlying objectives of legislative activity in the field of copyright. The results of that exercise demonstrate that Article 114 TFEU allowed the EU legislator to pursue various goals, which in turn hints that there is a normative gap in copyright lawmaking. These findings set the stage for the rest of this research. The solution proposed to bridge that normative gap is to establish benchmarks of legislative activity that can provide normative content to the main competence norm.

The question then arises of how to define and choose the adequate benchmarks. The research is undertaken from an internal legal perspective, and therefore it is based exclusively on legal sources. The methodology developed is founded on the rule of law – a principle that binds the EU legislator to act consistently with the law and that is linked to the question of hierarchy of legal sources.

As a result, benchmarks of legislative activity should be derived from the highest possible source, which is also known as the “principle of constitutional legality.” According to this principle, every act of legislation must be based on a higher source of law.85 The Treaties are silent on this matter. Nevertheless, it has been generally accepted that the so-called “primary EU law” is at the top of that hierarchy, while “secondary EU law” – directives, regulations and the like - is subordinate to it.86

If, within the EU legal order, the highest source is primary law, then primary law ought to bind the legislator, as it amounts to the constitutional basis of the EU.87 It consists of the Treaties (i.e., the TEU and the TFEU), the fundamental rights, and the general principles of law (including the ones developed by the CJEU).88 The Treaties can thus be seen as a formal constitution for Europe, forming the basis for

85 Von Bogdandy & Bast 2002 at 229 ff.
86 See inter alia Lenaerts & Van Nuffel 2011 at 817 ff. See also decision from the General Court in case T-144/99 – Institute of Professional Representatives EPO v. Commission, at 50.
88 Lenaerts & van Nuffel 2011 at 818; Tridimas 2006 at 50-51.
In what concerns the general principles of EU law, they usually perform a gap-filling function. But the CJEU has ruled that they too have constitutional status. They thus have equivalent standing to that of the Treaties. As for fundamental rights, their express recognition as primary law of the EU came with the Treaty of Lisbon — Article 6 paragraph 1 TEU states that the Charter of Fundamental Rights has the same legal value as the Treaties.

Moreover, the case law of the CJEU is also an important source of law: not only are the general principles developed by the CJEU part of the EU primary law, but the Court also interprets and applies the other sources. In so doing, the Court determines the meaning and scope of norms, including norms of primary law.

The result of this breakdown of sources is that benchmarks of legislative activity ought to be derived from primary law, on the one hand, and from the relevant case law of the CJEU, on the other hand. Accordingly, and because copyright matters at the EU level were first tackled through negative integration, chapter 3 analyses the relevant case law of the CJEU. In particular, the chapter examines how the Court has dealt with the conflict between national copyright laws and Treaty provisions. Next, chapter 4 focuses on primary law and defines an operative framework of legislative activity, which is comprised of EU objectives and legal principles. While the chapter provides a brief overview of the evolution of such objectives and principles, the final framework is built considering EU law as it currently stands. The current Treaty norms that define the relevant objectives of the EU and certain principles inherent to competence matters are analysed, in order to complete the normative basis from which benchmarks of legislative activity should be derived.

The formulation of concrete benchmarks from that normative basis is carried out in chapter 5. The answer to the question of how the EU legislator ought to address the normative gap in copyright lawmaking is thus provided in this chapter. The benchmarks suggested there are based on the findings of chapter 3 and 4, and are therefore adequate for infusing normative content into the functional competence of Article 114 TFEU. In other words, in order to bridge the normative gap, EU copyright legislation ought to meet the proposed benchmarks.

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89 See Möllers 2010 at 189.
90 Tridimas 2006 at 19.
91 See case C-101/08 – Audiolux, at 63, and case C-174/08 – NCC Construction Denmark at 42. See also Tridimas 2006 id., holding that, besides the gap-filling function, general principles also amount to constitutional standards.
92 Tridimas 2006, 5-7, 50-51.
93 Nevertheless, several years before the Lisbon reform, fundamental rights were already considered as general principles of EU law by the CJEU, enjoying therefore a constitutional character then, with equivalent standing to the Treaties – see case 11/70– Internationale Handelsgesellschaft at 4, and Tridimas 2006, 5-7, 50-51.
94 Lenaerts & Van Nuffel 2011 at 793-794 and Kaczorowska 2013 at 109-110. See also in particular Article 267 TFEU, establishing that the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts other institutions.
95 Lenaerts & Van Nuffel 2011 id.
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It is important to remember that, for the part that is based on primary law, the benchmarks are established taking into account EU law as it currently stands. To a certain extent, such methodological choice is an anachronism in the context of the following chapter (chapter 6), which applies the benchmarks to the *acquis*. This means that current tools – that is, benchmarks based on the current version of the Treaties - are field-tested in the context of past directives, which were enacted under previous versions. Yet, while this approach might fall short of historical perspective, it provides a better view of how certain aspects of the *acquis* stand now vis-à-vis the current EU law framework. This is in turn useful for purposes of updating EU copyright legislation and bringing it in line with such framework.

In terms of specific methodology, the findings of each chapter are reached either by resorting to legal theories, namely the principle of constitutional legality (chapter 4), or by using content analysis techniques (chapters 2, 3, 5 and 6). It should be noted that, while the use of legal theories is common in legal research, the same does not hold true for content analysis techniques. These are widely employed in social sciences to analyse and interpret documents and data in general. Usually, they entail a selection of documents (also called sampling of data), their systematic reading, identification of patterns in the documents, consolidation or categorization of those patterns, and finally the formulation of inferences or conclusions based thereon. But it is exactly due to this structure that it has been defended that, although not commonly used by legal scholars, content analysis as a research method comes naturally to them, with the added value of bringing in social science rigor.

The mentioned chapters 2, 3, 5 and 6 follow the usual steps of content analysis. I therefore start by sampling relevant data and going through it systematically by doing several reading iterations. This allows me to identify certain patterns, which are features that appear recurrently throughout the data. After reading the documents and performing this pattern-finding, I categorize those patterns. Depending on the objective of the research, the categorization of patterns can be made inductively or deductively.

The inductive categorization of patterns (which I use in chapters 2, 3 and 5) is done by resorting to clustering. Clustering is an analytical technique that can be used in the context of content analysis to examine and define patterns of information - clusters aggregate concepts that are so similar or interrelated that they can be grouped under one single notion. In other words, the same or similar features that are repeated throughout a certain data set are then aggregated

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96 See Berg 2007 at 303-304, defining content analysis as a “careful, detailed, systematic examination of a particular body of material in an effort to identify patterns, themes, biases and meanings.” Krippendorff 1982 at 21 defines it as “a research technique for making replicable and valid inferences from data to their context.”

97 Krippendorff 1982 at 52, Hall & Wright 2008 at 63-64.

98 Hall & Wright 2008 at 63-64.

99 Krippendorff 1982 at 115-117.
conceptually to form a category. So, for example, in chapter 2, the grant of several economic rights to authors and/or performers — which is mentioned often in legislative documents — is factored in under a category that I named “protection of authors/performers.”

By contrast, deductive reasoning (which I use in chapter 6) requires the application of pre-established propositions (in this case, the benchmarks of legislative activity) to selected data (i.e., the directives), through the suggestion of empirical indicators of concepts. Empirical indicators are certain features that are visible throughout the *acquis* and that can serve as pointers as to whether each benchmark is met in existing directives.

The method of applying the benchmarks to the *acquis* as performed in chapter 6 reveals some of the flaws of EU copyright legislation and paves the way for the conclusions and recommendations presented in chapter 7, where I discuss how these benchmarks should reflect on future EU copyright legislation.

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100 Berg 2007 at 315.
2. A normative gap in copyright lawmaking?

2.1. Introduction

As stated by the CJEU, Article 114 TFEU allows for the consideration of other goals, so long as internal market objectives remain central to harmonizing measures. However, in the field of copyright, it is unclear which ancillary goals the legislature can legitimately pursue, and which content should copyright legislation have as a result of such goals.

This chapter sets the groundwork for addressing that question. The objective here is to demonstrate that the EU legislator has had a considerable amount of discretion to choose which goals to pursue due to the functional character of Article 114 TFEU, goals which will then reflect upon the substantive provisions of a measure. Accordingly, the chapter identifies the actual underlying goals of EU copyright legislation. By mapping those goals, it is possible to discuss whether a normative gap exists in the context of copyright lawmaking. That assessment will be done at the end of the chapter.

The next section (2.2.) describes the specific methodology employed to extract the objectives or goals of past legislative activity. Following that methodology, three main categories of goals are defined. The first are Treaty-related objectives (2.3.), which include policy goals that are, at least to a certain degree, accommodated by the Treaties: the establishment and functioning of the internal market (2.3.1.) and the fostering of culture (2.3.2.). The second category is the protection of a specific interest and is divided into four different types of interests that the EU copyright legislation has aimed at protecting: those of authors and performers (2.4.1.); of content industries (2.4.2.); of intermediaries (2.4.3.); and of end users (2.4.4.). The third category is the compliance with the international framework (2.5.). The last section (2.6.) draws conclusions from the goal-mapping of the previous sections.
2.2. Specific methodology

In order to determine the goals of legislative activity in copyright, this chapter employs a content analysis technique. I therefore proceeded to the sampling of data, which entailed a selection of the documents from which the goals of the EU legislator could be inferred. This includes, first, all directives in the field of copyright. In particular, because the objective of a legislative act is usually deduced from its preamble, the subsequent survey focused on the directives’ recitals rather than on their substantive provisions, without detriment to occasional references to specific articles where relevant. The legislative history of directives - i.e., the explanatory memoranda in the initial proposals and the ensuing amended proposals - is the second element of the selected data. In this connection, it should be noted that each of the directives has been generated due to and in the framework of a certain background, which includes social, political or economic reasons that existed at a certain moment in time. Therefore, where a directive has a more recent codified version – as in the case of the Computer Programs Directive, the Rental and Lending Rights Directive and the Term of Protection Directive - references will still be made to the original directive and its legislative history. Since the aim of the chapter is to reach fact-based findings, I isolated the data collected from legislative documents from secondary sources such as doctrinal opinions. Several commentators have written about the directives’ aims, but the analysis carried out here will not be based on doctrine, although I will make sporadic references to doctrinal views where relevant.

After the selection of data, I proceeded to read systematically the directives, explanatory memoranda in the initial proposals and amended proposals, with the aim of identifying patterns – in this case, recurrent goals of legislative activity. I identified both surface patterns and structural patterns. The surface patterns amount to expressly stated goals of legislative activity – such as, for example, express declarations that the objective of the legislative measure is the establishment of the internal market. Structural patterns amount to latent content that is conveyed by the data – e.g., where a document states that a directive grants exclusive rights to authors, I interpret that statement as the directive having as a goal the protection of authors.

The classification of objectives and categories of objectives was made inductively: after reading the documents and performing the pattern-finding, I categorized those patterns by resorting to clustering. I aggregated the data extracted from the materials under the following specific objectives: establishing of an internal market; fostering culture; protection of authors and/or performers; protection of content industries; protection of intermediaries; protection of end

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101 St Clair Bradley 2011 at 91.
102 Surface patterns and structural patterns are also known as manifest or latent content respectively - see Berg 2007 at 308-309.
users; compliance with the international framework. From these objectives, I created broader categories: Treaty-related objectives (which include the establishment of an internal market and fostering culture); protection of a specific interest (aggregating the protection of authors and/or performers, content industries, intermediaries and end users); and compliance with the international framework (comprising one single element with the same name).

Other important considerations were not outlined as objectives in this typology, even though it is admitted that they play a role in copyright lawmaking. This is the case of competition concerns. This is because it was considered here that competition aims are not actually sought by copyright legislation in a direct fashion; rather, several other goals address competition issues — for example, the establishment of an internal market is incompatible with certain practices prohibited by competition rules, such as concerted practices affecting trade; or the protection of users’ interests is at odds with some situations that amount to an abuse of dominant position.

The classification of objectives as performed above entails however certain methodological challenges, which had to be addressed. First, several goals overlap in some cases. For example, a measure directed at building an internal market for creative content might also be beneficial to creative industries, as it facilitates cross-border trade of such content and consequently fosters industry’s growth and development. Similarly, the goal of fostering culture can be achieved by protecting certain culture-oriented bodies, such as museums and public libraries, which, to a certain extent, are also intermediaries in the sense that they carry content from the right holders to the end users. As a result, where a measure pursues more than one goal, all of them will be factored in.

Second, many directives have umbrella concepts that account for a few different (and sometimes opposing) interests. It is the case, notably, of the notion of “right holder”, which often can refer to individual creators as well as to content industries. The use of these umbrella concepts will be taken into account in relation to all protected interests involved. So, for instance, where a directive refers to the protection of right holders, this reference will be figured in as one which relates to both content industries and authors/performers.

Third, some actors whose interests are protected belong to more than one category – broadcasters, in particular, are intermediaries, but they also hold rights vis-à-vis their broadcasts, which makes them neighbouring rights owners as well. In those cases, only references to the protection of their function as intermediaries will be taken into account. The goal of protecting a specific interest is defined from a functionalist point of view, rather than counting in references to the name of specific actors.

103 See Article 101 TFEU.
104 See for example Article 102 TFEU (b), prohibiting the limitation of production, markets or technical development to the prejudice of consumers.
Each of the subchapters corresponding to a category of objectives or policy goals will provide evidence of where a particular objective is found in the legislative history of EU copyright, quoting the respective source where justified, and interpreting such quotations where necessary. The summary table below shows where the policy goals are found per directive, proposal and amended proposal, and constitutes the basis for the analysis carried out in this chapter.
2. A NORMATIVE GAP IN COPYRIGHT LAWMAKING?

### Categories of Objectives

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### Treaty-related goals

- Establishment of an Internal Market
- Fostering culture
- Protect authors and/or performers
- Protect content industries
- Protect intermediaries
- Protect end users
- Compliance with international framework

### Objectives

| D Recital 4, 5 | Rectal 1, 2, 3, 7, 10, 13, 30 |
| D Recital 4, 5 | Rectal 1, 2, 3, 7, 10, 13, 30 |
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### Treaty-related Goals

- Establish an Internal Market
- Fostering Culture
- Protect Authors and/or Performers
- Protect Content Industries
- Protect Intermediaries
- Protect End Users
- Compliance with International Framework

### Objectives

| D Recital 4, 5, 7, 10, 13, 30 | Rectal 1, 2, 3, 7, 10, 13, 30 |
| D Recital 4, 5, 7, 10, 13, 30 | Rectal 1, 2, 3, 7, 10, 13, 30 |
| F Part 1:1-4, 2, 10, 21, 34 | Part 1:5, 7 |
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| F Part 1:1-4, 2, 10, 21, 34 | Part 1:5, 7 |
| F Part 1:1-4, 2, 10, 21, 34 | Part 1:5, 7 |

### Table 2.1.

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*D=Directive; AP=Amended Proposal; P=Proposal (Explanatory memorandum, references made to paragraphs unless otherwise indicated); Ch=Chapter; Pg=Page*
2.3. Treaty-related objectives

Treaty-related objectives are the first category of goals of legislative activity. The first goal in this category, the establishment and functioning of the internal market (2.3.1.), is a general objective of the EU, which has a specific mandate to pursue it. The second goal analysed is fostering culture (2.3.2.). Although not mentioned as such in the Treaties, cultural aims are embedded therein in various forms: either as the general objective of the EU to respect cultural diversity or as a supporting competence of the EU.

2.3.1. ESTABLISHMENT AND FUNCTIONING OF THE INTERNAL MARKET

Most of the directives give both as a main objective and legal basis the establishment and functioning of the internal market. All of the proposals for directives in the field of copyright emphasize the need to ensure a genuine internal market. This is linked to the fact that the establishment and functioning of the internal market has been set as an objective of the EU’s legislative activity in copyright from an early stage. The first Green Paper in the field (Green Paper on Copyright and the Challenge of Technology (1988)) referred specifically to market-making as a fundamental concern of the Community.

The rationale for this is that different national copyright laws hinder cross border trade. Due to those diverging national regimes, it can happen that the goods cannot

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105 See Article 3 paragraph 3 TEU, Article 26 paragraph 1 TFEU and Article 114 TFEU. See also infra, chapter 4.
106 Article 3 paragraph 3 TEU.
107 Articles 6 (c) and 167 TFEU.
108 See Computer Programs Directive, Recitals 4 and 5; Rental and Lending Rights Directive, Recitals 1-3; Satellite and Cable Directive, Recitals 1-3, 5, 14 and 33; Term of Protection Directive, Recitals 2, 9, 17, 18 and 25; Database Directive, Recitals 2-4; Information Society Directive, Recitals 3, 6, 7, 31, 32, 47 and 56; Resale Right Directive, Recitals 9-15 and 23; Orphan Works Directive, Recitals 8, 14 and 25. The only directive not using the internal market as a legal basis is the Satellite and Cable Directive, which had only the freedom to provide services and the right of establishment as its express legal basis. However, this difference is not material, as the free movement of services is in any case part of the notion of internal market (cf. Article 26 paragraph 2 TFEU).
110 See Green Paper, paragraph 1.3.2.: “[T]he Community must ensure the proper functioning of the internal market. To the maximum extent possible, creators and providers of copyright goods and services should be able to treat the Community as a single internal market. This requires the elimination of obstacles and legal differences that substantially disrupt the functioning of the market (…)."
move freely across the EU – because, for example, differences in the scope of protection dictate that a good is protected in some countries but not in others, which is at odds with the making of an internal market. The building of an internal market as a goal of copyright legislation was also confirmed by the CJEU in a number of decisions, in relation to specific directives.\footnote{See, in relation to the Rental and Lending Rights Directive, case C-200/96 – Metronome Musik, at 22, and case C-245/00 – SENA, at 4; in relation to the Term of Protection Directive, case C-240/07 – Sony v Falcon, at 23; and in relation to the Information Society Directive, case C-479/04 – Laserdisken, at 31-34.}

Details on how certain features of national legal regimes may partition the internal market can be found throughout the acquis, especially in the legislative proposals. These usually note how the specific aspects of national copyright regimes being harmonized are a hindrance to cross-border trade of copyright goods or services. This is the case, for example, with the definition of the reproduction right and respective exceptions, the relevance of which becomes “crucial” as the cross-border exploitation of works also increases;\footnote{See Explanatory Memorandum to the Information Society Proposal, chapter 3.I.13.} or of the harmonization of the renting and lending rights and certain related rights, which was deemed “necessary in order to proceed to the elimination of trade barriers created by differences in protection.”\footnote{Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 39.}

The establishment and functioning of the internal market as a policy goal rests on several premises. First, it legitimizes the EU legislator to intervene in order to prevent the Member States from adopting different legal approaches to the same subject. In other words, the objective of having an internal market for copyright goods and services includes so-called “preventive harmonization”, which entails putting harmonized legislation in place before the Member States have the opportunity to enact national laws on a particular matter. A case in point is the protection of technological measures and digital rights management, harmonized by the Information Society Directive. In both cases, it was recognized that no material disparities between national laws really existed.\footnote{See Explanatory Memorandum to the Information Society Proposal, chapter 3.III.3.} Still, harmonizing measures were needed, probably because it was foreseeable that Member States would start taking different approaches on the subject, in view of the new technological developments.\footnote{See Information Society Directive, Recitals 47 and 56, both stating that it was necessary to “avoid fragmented legal approaches that could potentially hinder the functioning of the internal market.” See also Explanatory Memorandum to the Information Society Proposal, chapter 3.III.5.}

Second, the goal of having an operative internal market implies some differentiation among the matters that are supposed to be harmonized. The EU legislature has at times pointed out that different features of national copyright regimes impact differently on the internal market, hence calling for different degrees of harmonization. The Information Society Proposal makes the need for...
differentiation patently clear in its comments to Article 5: after asserting that the harmonization of limitations and exceptions is “indispensable for the smooth functioning of the internal market” (paragraph 1), the Proposal clarifies that it is necessary to take a “differentiating approach” that will make the degree of harmonization of the exceptions “dependent on their impact on the smooth functioning of the internal market” (paragraph 2). This is the reason for the provision of both optional and mandatory exceptions, the latter being the ones that arguably have a greater impact on the internal market. The intention, then, was to preserve the balance between internal market needs and the principle of subsidiarity (paragraph 2). 116

Third, and by the same token, having an internal market goal means that those aspects of national copyright laws which do not affect cross-border trade of goods and services, or that affect it only to a negligible extent, ought to be left aside. It was established from the beginning of the harmonization program that only those aspects capable of hindering the internal market should be targeted. 117 Therefore, the EU legislator deliberately did not address certain aspects of national copyright law. This is expressly acknowledged, for instance, in the Explanatory Memorandum to Term of Protection Proposal, which specifically refers to rights not covered by it due to its marginal importance to the internal market: namely, the copyright of government departments or of the state, and the granting of a related right to publishers in certain cases (as in relation to posthumous works). 118

2.3.2. FOSTERING CULTURE

There are several references to culture in the acquis. The language of such references is not uniform, but for the most part it can be said that they stand for a common objective of fostering EU culture: the Rental and Lending Rights Directive stresses the importance of copyright for the “Community’s economic and cultural development”; 119 the Information Society Directive mentions in a few Recitals the need to promote, support and disseminate culture; 120 the Resale Right Directive

116 See Information Society Proposal, comments to Article 5.
117 See Green Paper on Copyright and the Challenge of Technology (1988), paragraph 1.4.9.: “(…) Community legislation should be restricted to what is needed to carry out the tasks of the Community. Many issues of copyright law do not need to be subject of action at Community level.”
118 See Explanatory Memorandum to the Term of Protection Proposal, Part 1, paragraph 56. Note however that Article 4 of the Term of Protection Directive, following an amendment by the European Parliament, ended up recognizing the right of the publisher of a previously unpublished work, who now benefits from a protection equivalent to the economic rights of the author for a period of 25 years.
119 Rental and Lending Rights Directive, Recital 5.
120 Information Society Directive, Recitals 11 (“A rigorous and effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources (…)”), 12 (“Adequate protection of copyright works and
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refers to “the process of internationalization of the Community market in modern and contemporary art;”\textsuperscript{121} and the Orphan Works Directive highlights the need for preservation, protection, promotion and dissemination of European cultural heritage.\textsuperscript{122}

The aim of fostering culture as an objective or policy goal is apparent from the legislative history of the directives as well, namely from their explanatory memoranda. For instance, the Rental and Lending Rights Proposal, when listing its main justifications, indicates the “strengthening of the position of European culture;”\textsuperscript{123} the Explanatory Memorandum to the Orphan Works Proposal mentions that the directive’s provisions will allow for the making available of orphan works online, “for cultural and educational purposes.”\textsuperscript{124}

Apart from express references to cultural aims, it is also possible to identify the goal of fostering culture where the EU legislator seeks to protect certain culture-disseminating bodies, such as public libraries, archives or museums. As the Explanatory Memorandum to the Rental and Lending Rights Proposal puts it, the activity of public libraries has, by its very nature, a cultural dimension.\textsuperscript{125} The same argument can also be made in relation to archives and museums, which mainly perform a cultural public service. Therefore, it is arguable that norms directed at protecting this type of institutions aim at fostering culture as well.

It is of course defensible that measures protecting other interests - chiefly, those of authors and performers – also play a role in fostering culture. In a way, this too is related to the overlapping of policy goals. However, the link between protecting authors and performers and fostering culture is weaker than in the case of culture-oriented institutions. Measures that protect authors and performers may perhaps have a positive impact on cultural matters, but the latter is not necessarily their main or direct goal. Authors and performers are at the very centre of copyright and related rights respectively. While it is possible to adopt a utilitarian view of their protection, it is also true that natural rights theories, which place the emphasis on the protection of the individual authors, are material to many copyright legislations. As a result, authors and performers enjoy a positive protection, in that they are granted a cluster of exclusive rights.

\textsuperscript{121} Resale Right Directive, Recital 7.
\textsuperscript{122} Orphan Works Directive, Recitals 1, 5, 20 and 22.
\textsuperscript{123} See Section “Effect on competitiveness and employment”, Rental and Lending Rights Proposal page 71. The same reference is found in the Satellite and Cable Proposal, page 63, even though such reference never made it to the final version of the Satellite and Cable Directive.
\textsuperscript{124} Explanatory Memorandum to the Orphan Works Proposal, paragraph 1.
\textsuperscript{125} Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 44. See also in the same Proposal the comments to Article 4, where it is stated that “the availability and accessibility of, for example, books in public libraries, must be guaranteed for cultural reasons.”
Nevertheless, as mentioned in section 2.2. above, should a measure consider both goals equally, that data is duly noted and inserted in Table 2.1. The Information Society Proposal provides an example: its Explanatory Memorandum emphasizes that lack of protection could make right holders “hesitant to authorize the exploitation of their material online,” which would presumably have a negative impact on the cultural goods available, or at least, as the Proposal phrases it, on the “healthy development of the Information Society in Europe.”126

In relation to the protection of libraries, archives, museums and the like as a tool to foster culture, there are a few examples in the *acquis*. It is the case, for instance, of the Orphan Works Directive, which lays down an exception to the exclusive rights that permits certain culture-oriented organizations to reproduce and make available orphan works in the context of their public interest missions.127 The Directive also aims at making it easier for such organizations to perform the mandatory search for right holders, which must be done before a work can acquire the orphan work status.128 Moreover, the Directive allows those institutions to benefit from certain commercial advantages with a view to fostering digitisation.129

The Information Society Directive is another example. It allows Member States to provide for exceptions or limitations to the exclusive rights that benefit certain categories of culture-related institutions, such as libraries and archives.130 Recital 40 further mandates that contracts be promoted that favour publicly accessible libraries and equivalent institutions.

The Rental and Lending Rights Directive, in its Article 5, also contains a derogation from the exclusive public lending right (provided that at least authors receive a remuneration);131 and even “certain categories of establishments” might be exempted from paying the remuneration.132 The Rental and Lending Rights Proposal makes it clear that this derogation from the lending right is intended to benefit public libraries, which perform a cultural role.133

Similarly, the Resale Right Directive reduces the scope of the resale right so as to “not extend to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public.”134 This facilitates the acquisition of works of art by museums, which, as mentioned, fulfil a cultural function.

There is a particular variation of the goal of fostering culture, which is expressed as the need to protect cultural diversity. This is seen specifically in the Rental and

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126 Explanatory Memorandum to the Information Society Proposal, chapter 2.2.
130 Information Society Directive, Recital 34.
131 See Rental and Lending Rights Directive, Article 5, paragraphs 1 and 2.
132 Rental and Lending Rights Directive, Article 5, paragraph 3.
133 See comments to Article 4 in the Rental and Lending Rights Proposal.
Lending Rights Proposal, where it is explained that, by protecting the investment in creation, producers will be likely to invest in less known artists, thereby contributing to the “increasingly threatened diversity of culture.”

The same Proposal expresses concerns about the “variety of supply of cultural goods and services.” It establishes that measures relating to public lending “are a necessary means to maintain and support European culture in its variety” and advocates that “the variety of European culture is not only deserving of protection, but it is also in need of a high level of protection for the maintenance of its identity.”

Finally, adding to the specific goal of protecting cultural diversity, another cultural dimension shows up in the acquis, which is the obligation of the EU to take cultural aspects into account according to the previous Article 151 paragraph 4 EC Treaty (now Article 167 paragraph 4 TFEU). This duty is expressly referred to in Recital 12 of the Information Society Directive and in Recital 5 of the Resale Right Directive. The obligation to take cultural aspects into account seems to be connected to the goal of fostering culture— for example, in the Information Society Directive the requirement to take cultural aspects into account comes after the affirmation that the adequate protection of copyright is of great importance from a cultural standpoint, in the same Recital 12. An argument could therefore be made that the obligation to take cultural aspects into account is used in support of the goal of fostering culture.

2.4. Protection of a specific interest

Copyright legislation has often sought to meet specific interests. The analysis of the directives and their background shows that there are four different types of special interests that the EU copyright legislation has regularly aimed at protecting: those of authors and performers (2.4.1.); of content industries (2.4.2.); of intermediaries (2.4.3.); and of end users (2.4.4.).

The classification of the different interests was made based on references found throughout the acquis following the methodology explained in section 2.2., but it is also supported by well-established, known concepts of the relevant stakeholders in the field of copyright. Authors and performers are the creators, that is, the individuals who are the original source of a creative outcome or activity. The content industries, as the name indicates, are businesses or enterprises that provide

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135 Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 7.
136 Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 8.
137 Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 9.
138 Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 39.
139 Also sharing this view, Van Eechoud 2007 at 116 and Dreier 2010 at 51. See Cohen Jehoram 2001 at 539, holding that the Commission did not act exclusively to promote free movement. On a similar account, noting in addition the intense lobbying by different interest groups in the context of the debate over the Information Society Directive, see Seville 2009 at 50.
content. They are frequently named cultural or creative industries, as they play an ancillary role in the creative process.140 They might not always participate in the creation act itself, but they contribute to the final creative result in some way, usually financially. Examples include record companies, publishers, database companies or producers. Conversely, intermediaries do not participate in the elaboration of content, but rather convey the copyright content from the right holder to the end user – these include, for instance, Internet Service Providers (ISPs), broadcasting organizations or cable operators. The fourth interest that the EU legislator has at times sought to protect is that of end users. Here, the term is employed to designate the individual who is at the other extreme of the creation process. End users are thus the individual persons who utilize or consume copyright works.

2.4.1. AUTHORS AND PERFORMERS

The protection of the interests of authors and performers has always been one of the primary goals of the EU legislator. The meaning of authors and performers in this context amounts to the concept of “individual.” Authors or performers are therefore to be understood here as the natural persons who ultimately create or perform. They are the original source of a creative outcome or activity. It follows that the notion of author and performer used here is independent of legal questions of initial authorship and ownership of rights.141

The acquis contains various references to the general need of protecting creators, authors and/or performers,142 although the use of the umbrella terms “right holder”

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140 According to Hartley, the meaning of “creative industries” varies geographically, but in general it can be said that it “combines – but then radically transforms – two older terms: the creative arts and the cultural industries” – see Hartley 2005 at 6. Along similar lines, see also Neuwirth 2008 at 242 ff;UNCTAD 2008 at iii-iv; Towse 2011 at 125 ff; European Competitiveness Report (2010) at 11; Green Paper on Unlocking the Potential of Cultural and Creative Industries (2010), at 5-6.

141 Some countries vest authorship and/or initial ownership in legal persons in some situations (e.g., in the framework of an employment contract). For a more detailed explanation of initial authorship and ownership, see Goldstein & Hugenholtz 2010 at 245 ff.

142 See e.g. Rental and Lending Rights Proposal, comment 3.1.1. to Article 3; Rental Rights Directive, Recital 18; Explanatory Memorandum to the Database Proposal, Part 1, paragraphs 3.1.11 and 4.2.1.; Term of Protection Directive, Recital 5; Explanatory Memorandum to the Information Society Proposal, chapter 2.1. and Information Society Directive, Recital 10.
or “right owner” is common as well. Some legislative documents further stress the need to set that protection at a high level. It is also noticeable that some concrete measures are specifically aimed at protecting authors and performers in particular. Many if not all of those protective measures have the same basis, which is to secure income to, or in any case reward, authors and/or performers. The aim of rewarding them is expressly recognized throughout the acquis. A case in point is the Rental and Lending Rights Directive, which introduced an unwaivable remuneration right for authors and performers. As the Rental and Lending Rights Proposal makes clear, this remuneration right is different from the exclusive rental right itself and it guarantees that “at the end of the day authors and performing artists actually obtain an adequate share.”

The Resale Right Directive is another example. It provides for a right to a share in the successive sales of an original work of graphic or plastic art. According to the Resale Right Proposal, eleven of the then fifteen Member States recognized the resale right in principle, but only eight really applied it in practice. It is particularly significant that the Directive allows Member States to apply the resale right to sales where the price is lower than the threshold established in the Directive “so as to promote the interests of new artists.” This appears to stand for a goal of protecting the individual authors, and in this case even internal market considerations give in to that protection.

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143 See e.g. Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 43; Rental and Lending Rights Directive, Recitals 7 and 11; Explanatory Memorandum to the Satellite and Cable Proposal, Part 1, paragraph 57; Satellite and Cable Directive, Recital 5; Explatory Memorandum to the Term of Protection Proposal, Part 1, paragraph 60; Database Directive, Recitals 26 and 33; Information Society Directive, Recital 35, 44, 47 and 59; Orphan Works Directive, Recitals 12, 13, 15, 16, 17, 18, 20.
144 Satellite and Cable Directive, Recital 24; Term of Protection Directive, Recitals 10 and 11; Information Society Directive, Recital 9. The CJEU came to confirm that the Information Society Directive has the aim of introducing a high level of protection for authors in case C-5/08 – Infopaq, at 40 and in case C-393/09 – BSA, at 54.
145 See e.g. Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 7; Rental and Lending Rights Directive, Recitals 7 and 15; Explatory Memorandum to the Satellite and Cable Proposal, Part 1, paragraph 4; Satellite and Cable Directive, Recitals 5 and 25; Explanatory Memorandum to the Term of Protection Proposal, Part 1, paragraph 49; Explanatory Memorandum to the Resale Right Proposal, paragraph I.4. The CJEU also established the link between protecting authors and “enabling them to receive an appropriate reward for the use of their works” – see Case C-5/08 – Infopaq, at 40. Further, the Court has stated repeatedly that one of the objectives of the Rental and Lending Rights Directive is to guarantee that authors and performers receive an adequate income (see case C-200/96 – Metronome Musik, at 22; case C-36/05 – Commission v. Spain, at 26; and case C-175/05 – Commission v. Ireland, at 20).
146 Rental and Lending Rights Proposal, comment 3.1.2. to Article 3.
147 Explanatory Memorandum to the Resale Right Proposal, paragraph I.6.
149 See Explanatory Memorandum to the Resale Right Proposal, paragraph V.8: “The Commission considers it appropriate that Member States should be given the option of applying the artist’s resale
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On the other hand, moral rights – which are rights that traditionally have a strong link to the author as an individual – have so far been left outside of the harmonization program. Several directives expressly state that moral rights are outside of their scope.

In addition to measures directed specifically at benefiting the individual authors and performers, some directives expressly mention several categories of right holders, making it clear that such measures aim at benefiting both the industry and the individual creators. For instance, the Rental and Lending Rights Directive refers jointly to authors, performers and producers, stressing the “increasingly important role” that rental and lending rights have for all of them. The Directive also mentions that harmonization is a way to make “creative, artistic and entrepreneurial activities” easier to pursue. In similar terms, the Satellite and Cable Proposal also stresses that the Directive is intended to make it easier for performers, producers of phonograms, broadcasting organizations and cable operators to work in a single audiovisual area.

Moreover, many directives establish concrete measures to the benefit of the umbrella category of right holders. It is the case, for instance, of the Term of Protection Directive, which sets the duration of copyright at 70 years after the death of the author (the longest term of protection available within the EU Member States), and the duration of related rights at 50 years from the relevant event (which, in the case of performers, is the date of the performance). Directive 2011/77/EU, amending the Term of Protection Directive, reinforces the protection of performers, producers of phonograms and producers of the first fixation of a film by extending the period of protection from 50 to 70 years. 

right from a threshold lower than the Community threshold, despite the fact that this derogation is not a unifying factor.” Nevertheless, Recital 22 of the Directive clarifies that “given the small amounts involved, this derogation is not likely to have a significant effect on the proper functioning of the internal market.”

On the significance of moral rights to the author as an individual, see Rigamonti 2010 at 355 ff and Lucas & Lucas 2001 at 307.

Term of Protection Directive, Recital 21; Database Directive, Recital 28; Information Society Directive, Recital 19. Note however that, as pointed out by Walter & von Lewinski 2010 at 1472-1474, some substantive provisions – notably, Article 6 paragraph 2(b) of the Database Directive and Article 5 paragraph 3(a), (c), (d) and (f) of the Information Society Directive – show some concern for the moral right to claim authorship by mandating that the exercise of some exceptions be accompanied by an indication of the source.

Rental and Lending Rights Directive, Recitals 8 and 9.

Explanatory Memorandum to the Satellite and Cable Proposal, Part 1, paragraph 54. Along similar lines, see also paragraphs 57-60, 62 and 64.


See Recital 10 and Article 3 paragraph 1 of the Term of Protection Directive.
amending Directive had protection goals, namely concerning performers, as is expressly recognized in many of its Recitals.158

The problem, however, is that the duration of copyright and related rights is established regardless of who the owner of the rights actually is. This makes it difficult to assess whether an extension of the term of protection benefits individual creators or the industry (or both). For example, it has been pointed out that, in practice, many authors and performers assign their rights to industries such as publishers or record producers,159 in which case a lengthy protection or extensions thereof would benefit creators only in so far as the assignment or transfer is made against the payment of a fee; the industries, however, would arguably benefit more than the actual creators.160 In other words, in the absence of regulation of contracts, such measures reinforcing the positive rights might be directed at primarily benefiting industries and not the individual creators. Because contractual practice might dictate who the ultimate beneficiary of legislation is, this type of authors’ and performers’ protection has to be taken with a grain of salt.161

The lack of regulation of the relationship between creators and industry is a factor that also influences the protection of authors and performers even in cases where rights are originally granted to them. So, for instance, the exclusive rights given to authors and performers in the Information Society Directive, which are admittedly broad,162 can freely be transferred or assigned (as is expressly recognized by the Directive itself).163 As a result, aims of protecting authors and performers might lose strength and should in any case be seen against contractual practice. The same argument is applicable in the context of the Rental and Lending Rights Directive, which grants to performers the exclusive rights of fixation, reproduction, broadcasting, communication to the public and distribution.164 The Directive contains no rules dealing with the assignment or transfer of such rights.

Moreover, it should be recalled that the notion of authorship is not harmonized, which means that rights originally granted to “authors” can end up benefiting, not

161 See however the three provisions in Term of Protection Amending Directive that balance out the advantage of producers vis-à-vis performers: the “use it or lose it” clause, allowing performers to regain control over their performances (Recital 8 and newly introduced Article 3 paragraph 2a); the unwaivable remuneration right granted to performers in case of transfer or assignment of rights against a one-off payment (Recitals 11 and 12 and newly introduced Article 3 paragraph 2b); and the “clean slate” provision, preventing producers from making any deductions from the contractual royalties during the extended term (Recital 14 and newly introduced Article 3 paragraph 2e).
164 Rental and Lending Rights Directive, Recital 11. See also Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 10.
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the individual creator, but the legal person who is deemed the initial author under some national laws.165

Finally, rules on the reciprocity of treatment vis-à-vis non-Member States also show a concern for the protection of EU authors and/or performers. Contrary to the principle of national treatment, which requires a country to grant foreigners the same treatment as it does to nationals,166 reciprocity normally amounts to a country conferring to foreigners the same rights only to the extent that their country of origin affords the same treatment to that country’s nationals. The ability of the EU legislator to introduce reciprocity rules is limited, since international treaties to which either the EU, its Member States, or both, are parties, use national treatment as a rule and only allow reciprocity in limited cases.167 Nevertheless, where international treaties give such leeway to parties, reciprocity clauses act as protective measures. In the case of the EU, reciprocity can thus place EU creators on equal footing with non-EU ones, often serving as a form of pressuring third countries to enact similar rules. As a result of reciprocity rules, non-EU authors and performers have the same rights as EU nationals only to the extent that those third countries give the same treatment to EU authors and performers. The acquis has reciprocity clauses in the Term of Protection Directive,168 the Resale Right Directive169 and the Database Directive,170 the first two being of relevance to authors and performers (as the reciprocity clause in the Database Directive relates to the sui generis right of the database maker, and therefore benefits the industry rather than the individual creator).

2.4.2. CONTENT INDUSTRIES

The legislative history of copyright in the EU reveals that the protection of the interests of content industries has been a very prominent part of the EU’s policy agenda. The term “content industries” is used here in a broad sense: these are

165 On the lack of harmonization of the concept of authorship, see generally Quaedvlieg 2012 at 197-232, noting however that the approach of the Computer Programs Directive (2009) (Article 2 paragraph 1) and the Database Directive (Article 4 paragraphs 1 and 2) shows a preference for allocating authorship to the original creators.


168 Recitals 22-23. See also the explanation of these Recitals in the Explanatory Memorandum to the Proposal, Part 1, paragraph 60.

169 Recital 29.

170 Recital 56.
industries that contribute in some way (e.g., financially) to the creative process, such as record companies, publishers, database companies or producers of phonograms and films.

Similar to what happens with authors and performers, the main rationale for protecting the interests of content industries is securing them income and the return on investment. Examples abound in the acquis.\(^{171}\) However, the interests of content industries may or may not run parallel to the ones of authors and performers. On the one hand, as mentioned in the previous section, many provisions in the acquis group the protection of content industries with those of individual creators as a common goal. Several directives refer to the need to have a high level of protection for both individual creators and creative industries.\(^ {172}\) Therefore, part of the protective measures mentioned in the previous section are applicable to the goal of protecting content industries as well. More than that, the individual creators are traditionally the weaker party in contracts that they enter into with industry, and there is no regulation of such contracts in the acquis.\(^ {173}\) As a result, it can be argued that several measures that protect the interests of authors and performers, be it together with content industries or even in cases where protection is granted to authors and performers only, end up benefiting, for the most part, the interests of the industry. For instance, the Term of Protection Directive, as already described, sets the duration of copyright at 70 years p.m.a., independently of who the right owner actually is. Since many creators transfer or assign their rights to content industries, lengthy terms of protection might be more favourable to the latter than to the former, depending on the contractual arrangements specific to each case.\(^ {174}\)

Moreover, the Term of Protection Proposal refers expressly to industry protection, stressing the need to safeguard the investment of certain sectors in the publication or creation of works, giving as an example the publishing of difficult or serious musical works.\(^ {175}\)

On the other hand, the acquis has separate measures the aim of which is to protect industry interests alone, i.e., independently of authors and/or performers. Two examples of this stand out. The first is the Computer Programs Directive,

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\(^{173}\) There are some imperative norms in the acquis that apply to existing contracts – such as the unwaivable remuneration right of performers in case of transfer or assignment of rights against a one-off payment, established by Term of Protection Amending Directive –, but these do not regulate the substantive provisions of such contracts. See also footnote 161 above.

\(^{174}\) See however the three provisions in Term of Protection Amending Directive mentioned in footnote 161 above, that give some leverage to performers.

\(^{175}\) Explanatory Memorandum to the Term of Protection Proposal, Part 1, paragraph 49.
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which grants copyright protection to computer programs as literary works. Recitals 2 and 3 of the Directive stress the investment needed to develop computer programs, and how these play an “important role in a broad range of industries.” These ideas are further developed in the Computer Programs Proposal, which acknowledges the “size and growth of the computer industry.” The Proposal goes on to state that “protection must therefore be strengthened and made uniform throughout the Community as much in the interests of the specialized small and medium sized software firms (…) as in the interests of the existing major producers.”

Along similar lines, the Proposal also makes clear that differences between national regimes “may affect the growth of the Community software industry.”

The choice of protection to be granted was not entirely straightforward when the debate around computer programs and their protection started. Opinions as to the preferred form of protection were not unanimous: some commentators, from both the EU and the US, viewed the protection of software by copyright as a mistake. The Computer Programs Proposal reflects this conflict. It discusses other forms of intellectual property protection and their adequateness. However, the advantages and drawbacks of each form of protection are mainly presented from the point of view of effectiveness of protection for right holders of computer programs, rather than focusing on other policy goals. This indicates that the protection of the computer industry was indeed a fundamental driver.

The second example of a clear objective to protect industry interests is the Database Directive. It creates a sui generis right for makers of databases, so long as the database maker has made a substantial investment in either the obtaining, verification or presentation of the contents of the database. This sui generis right is not a copyright but it can be argued that, due to its purpose to protect investment, it is similar to certain neighbouring rights (namely those of film and phonogram producers).

The database makers are defined as those who “take the initiative and the risk of investing” - a definition more closely related to industry than to any notion of

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176 See Computer Programs Directive, Article 1 paragraph 1.
177 Explanatory Memorandum to the Computer Programs Proposal, Part 1, paragraph 1.2.
178 Explanatory Memorandum to the Computer Programs Proposal, Part 1, paragraph 1.3.
179 Explanatory Memorandum to the Computer Programs Proposal, Part 1, paragraph 5.4.
180 See Samuelson 1984 at 732 ff; Soltysinski 1990 at 15ff; Toeniskoetter 2005 at 65, 75 ff.
181 See in particular Explanatory Memorandum to the Computer Programs Proposal, Part 1, paragraph 3.
182 See in particular Explanatory Memorandum to the Computer Programs Proposal, Part 1, paragraphs 3.2. to 3.4.
183 Clearly endorsing this view, see also Vandenberghe 1989 at 409: “The Proposal overemphasises the interest of the maker/owner to the disadvantage of the competitor and the user.”
184 Database Directive, Article 7 paragraph 1.
185 Goldstein & Hugenholtz 2010 at 239 ff. The authors point out that some countries transposed the sui generis right as a special neighbouring right.
186 Database Directive, Recital 41.
creation. The Directive highlights in several Recitals the investment in making a database and the importance of its protection, putting in evidence the objective of protecting the European database industry as a sector of growing economic importance.\(^{187}\) This goal was also expressly recognized by the Evaluation Report of the DG Internal Market and Services, whose aim was namely to assess whether the policy goals of the Directive had been achieved.\(^{188}\)

The protection of the database industry as a policy goal also clearly results from the Opinion of the Commission on the European Parliament Amendments to the Council’s Common Position (1996), where it is stated that one of the objectives of the proposal for a Directive is “to introduce a new economic right, a sui generis right protecting the substantial investments associated with the production of databases.”\(^{189}\) Similarly, the case law of the CJEU confirms that the protection of the investment of database makers is one of the objectives of the Database Directive.\(^{190}\)

Other less explicit examples of the objective of protecting content industries are scattered throughout the acquis. Recital 4 of the Information Society Directive refers specifically to content industries, linking harmonization to the promotion of “substantial investment in creativity and innovation”, which “will lead in turn to growth and increased competitiveness of the European industry, both in the area of content provision and information technology.”

Furthermore, the Rental and Lending Rights Directive attempts to secure the interests of content industries by establishing a rebuttable presumption of assignment of rights from performers to film producers.\(^{191}\) This is based on the respective Amended Proposal, as a response to the “concerns of the film industry” and due to “considerations of practicability.”\(^{192}\) The Rental and Lending Rights Proposal also points out that it is “necessary that an industry of cultural products, which would be competitive throughout the Community and throughout the world, should be created.”\(^{193}\) The Directive therefore grants certain neighbouring rights to content industries, such as phonogram and film producers.\(^{194}\)

\(^{187}\) See Recitals 7 to 12, 39, 40-44 and 48 of the Database Directive. The Explanatory Memorandum to the Database Proposal contains the same arguments – see in Part 1 paragraphs 1.2.; 1.4.; 2.2.11.; 3.2.8.; 4.1.1.; 4.2.10.; and 7.1.5.


\(^{190}\) See Case C-203/02 – BHB v. William Hill, at 30 and 45; Case C-46/02 – Fixtures Marketing I, at 33; Case C-338/02 – Fixtures Marketing II, at 23; Case C-444/02 – Fixtures Marketing III, at 39; Case C-304/07 – Directmedia Publishing, at 33.

\(^{191}\) See Recital 19 of the Rental and Lending Rights Directive. The same presumption is also applicable in the context of the Satellite and Cable Directive – see Recital 26 of the Satellite and Cable Directive.

\(^{192}\) See Rental and Lending Rights Amended Proposal, at 2, (c).

\(^{193}\) Explanatory Memorandum to the Rental and Lending Rights Proposal, Part 1, paragraph 1.

\(^{194}\) See Articles 7 to 9 of the Rental and Lending Rights Directive.
Finally, just as in the case of authors and performers, reciprocity clauses also play a role in defending industry interests. The relevant reciprocity clauses for industry purposes are found in the Term of Protection Directive, which inter alia applies the reciprocity clause to the term of protection of rights of phonogram producers,\textsuperscript{195} and in the Database Directive, where reciprocity is valid in relation to the right of the database maker to prevent unauthorized extraction and/or re-utilization of the contents of the database.\textsuperscript{196}

2.4.3. INTERMEDIARIES

A third interest that the EU copyright legislation has regularly aimed at protecting is that of intermediaries, which are content-carriers rather than content-generators or content-supporters. These are actors that do not play a central role in the creation of content. Instead, they typically convey copyright content from the right holder to the end user. Included in this category are ISPs, broadcasting organizations, cable operators and telecommunications companies, but also, to a certain extent, museums or public libraries.

The protection of intermediaries is of a negative nature, in the sense that it is usually done not by granting those industries positive rights, but instead by ensuring that the positive rights of others (e.g., copyright and neighbouring rights owners) do not stand in the way of their intermediary activities. In other words, one of the goals of the EU legislator was to protect the interests of certain intermediaries by making it easier for them to perform their activity without infringing any copyrights or related rights.

Nevertheless, some intermediaries do have positive rights. This is the case for broadcasting organizations, which are granted rights over their broadcasts. The Rental and Lending Rights Directive, for example, grants broadcasters a fixation right, a reproduction right, rights of rebroadcasting and communication to the public, and a distribution right (see Articles 7 to 9 of that Directive). However, this bestowal of positive rights is done while considering that broadcasting organizations are also neighbouring rights holders. Broadcasters act as intermediaries, but in this case they also have rights over specific content (their broadcasts). They are therefore right owners and intermediaries at the same time.

As clarified in the methodology section, only intermediaries \textit{stricto sensu} will be considered here. Where a stakeholder – such as broadcasters – has more than one role in the realm of copyright, only their intermediary activities will be referred to.

Taking into consideration the definitions of intermediaries and their respective protection, there are three Directives in the \textit{acquis} that aim specifically at securing

\textsuperscript{195} Term of Protection Directive, Recital 23 and Article 7 paragraph 2.
\textsuperscript{196} Database Directive, Recital 56.

The Satellite and Cable Directive deals in particular with broadcasting organizations and cable network operators. The Directive intends to facilitate their activities by simplifying licensing procedures. 197 In relation to cable operators, this is done by establishing a system of compulsory collective management for cable retransmission rights. 198 Recital 10 refers to the legal uncertainty that cable operators have to face due to lack of harmonization, as they could not be sure that they had actually acquired all the rights involved in a retransmission (the adverse effects of such legal uncertainty on the cable operators’ activity is discussed at length in the Explanatory Memorandum to the Satellite and Cable Proposal, paragraphs 40 and 42).

In what concerns broadcasting organizations, the Directive introduces a rule whereby the act of communicating a copyright work to the public by satellite is deemed to have occurred in the country where the program-carrying signal was introduced (the so-called “country of origin rule”). 199 This means that satellite broadcasters only need to obtain licenses from the copyright owners in the country of origin (i.e., the country of uplink).

The Information Society Directive, on the other hand, emphasizes how harmonization will “foster substantial investment in creativity and innovation, including network infrastructure (…) and will lead in turn to growth and increased competitiveness of the European industry, both in the area of content provision and information technology.” 200 Recital 27 of the Directive exempts intermediaries from potential infringement of the right of communication to the public. It is directed at any intermediary that provides the physical facilities where a communication to the public is carried out. The Recital protects intermediaries in general by reducing the scope of the right: the provision of such facilities for enabling or making a communication are outside of the definition of communication to the public. 201 But the Directive protects specific types of intermediaries as well, namely broadcasters and ISPs. Recital 26 encourages the negotiation of collective licensing agreements to facilitate the clearance of rights by broadcasters; and Recital 33, in tandem with article 5 paragraph 1, exempts temporary reproductions such as

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197 See Recital 33 of the Directive and Explanatory Memorandum to the Satellite and Cable Proposal, Part 1, paragraphs 54 and 64.
198 See Articles 9 and 10 and Recital 28 of the Directive.
199 See Articles 1 paragraph 2(b) and 2 of the Directive.
200 Recital 4.
201 This Recital is in line with the Agreed Statement on Article 8 of the WIPO Copyright Treaty (“WCT”), which provides that the provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the WCT or the Berne Convention. As noted by Ficsor 2002 at 509, this Agreed Statement was included “as a result of an intense lobbying campaign for non-governmental organizations representing Internet service providers and telecommunication companies.”
browsing and caching to the benefit of ISPs, provided inter alia that the intermediary does not modify the information – which highlights the difference between content industries and intermediaries.\textsuperscript{202}

Finally, the Orphan Works Directive recognizes the role that publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions, play in the “preservation and dissemination of European cultural heritage.”\textsuperscript{203} The Directive intends to “ensure legal certainty” with respect to the use that these organizations make of orphan works,\textsuperscript{204} such use amounting to conveying those works to the public (therefore being an intermediary-type of activity). For that purpose, the Directive establishes two main lines of action: first, it regulates the circumstances under which a copyright work can acquire the orphan work status. The conditions include the need to perform a diligent search for the right holders of the work or phonogram,\textsuperscript{205} although some measures are set forth to avoid that search being too cumbersome for the intermediaries.\textsuperscript{206} Second, the Directive defines the use that the latter can make of orphan works, which come down to reproducing and making them available to the public, so long as such use fulfils their public interest missions.\textsuperscript{207} Still to the benefit of this type of intermediaries, the Directive allows them to generate revenues from the use of orphan works and to conclude agreements with commercial partners for the digitisation and making available to the public of orphan works, even if such agreements include financial contribution by those partners.\textsuperscript{208}

2.4.4. END USERS

The fourth interest inherent to the EU legislative activity is the one of end users, who utilize or consume copyright works.

The protection of the interests of end users is also done by restricting the rights of others – it is therefore a negative protection as well. Copyright is traditionally more concerned with protecting right holders and/or creators of works. Probably because of that, references to the objective of protecting the end users of those works are relatively scarce. The ones that do exist reveal the aim of protecting end users’ interests vis-à-vis right holders’ interests. Hence, the policy goal of

\textsuperscript{202} Recital 33 states that the intermediary shall not “modify the information [nor] interfere with the lawful use of technology,” while Article 5 paragraph 1 only exempts the acts of reproduction made by intermediaries if those are transient, essential to the technological process and have as their sole purpose to enable a transmission between third parties or a lawful use.
\textsuperscript{203} Orphan Works Directive, Recital 1.
\textsuperscript{204} Orphan Works Directive, Recital 9.
\textsuperscript{205} Orphan Works Directive, Recital 13.
\textsuperscript{206} Orphan Works Directive, Recitals 15 and 16.
\textsuperscript{207} Orphan Works Directive, Recital 20.
\textsuperscript{208} Orphan Works Directive, Recitals 21 and 22.
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protecting the interests of end users often manifests itself in the form of limitations or exceptions to the exclusive rights of the copyright owner.

This policy goal is visible mainly in the Computer Programs Directive, the Database Directive, the Information Society Directive and the Orphan Works Directive. The Computer Programs Proposal advances that “certain rights to use the property” should not require authorization by the right holder. The Amended Proposal, following the European Parliament’s suggestions, further reinforces the position of end users, by allowing them to perform certain acts without prior permission (e.g., the making of back-up copies of a computer program).

The Computer Programs Directive reflects these concerns for the end users’ position. It grants a “limited exception” to allow the “reproduction technically necessary for the use” of the program by the “lawful acquirer.” Furthermore, some exceptions favouring the end users are supplemented by their mandatory status, which means that they cannot be overridden by contract. This is referred to in the original Proposal, which elucidates that the balance of power between producers and users may not allow the latter to enjoy equitable conditions, being therefore necessary to put forth “basic principles of protection.”

The Database Proposal, on the other hand, stresses that users should be “able to use the contents [of the database] for their own private purposes.” The Database Directive refers to the “lawful user”, who should be allowed to benefit from certain exceptions to both copyright and the sui generis right. Similar to the Computer Programs Directive, some exceptions are made mandatory and cannot be overridden by contract.

The Information Society Directive also tries to safeguard the position of end users by introducing some exceptions or limitations to the exclusive rights in its Article 5. In particular, it exempts certain temporary acts of reproduction and private copying. Furthermore, it protects the end user where the right holder employs technological protection measures and rights-management information systems. On the one hand, Recital 51 states that Member States should ensure that the beneficiaries of exceptions or limitations are provided with means of benefiting

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209 Explanatory Memorandum to the Computer Programs Proposal, Part 2, comment 5.1. to Article 5.
210 Computer Programs Amended Proposal, at 7-8 (comments on Article 5).
211 See Computer Programs Directive Recital 17. See also the explanation of this exception in Recital 18. Although the concepts of “lawful acquirer” and “user” might not always coincide, there are cases where a lawful acquirer is also an end user. For further discussion on the differences between the two notions, see van Eechoud et al. 2009, at 114-116.
213 Explanatory Memorandum to the Computer Programs Proposal, Part 1, paragraph 3.3.
214 Explanatory Memorandum to the Database Proposal, Part 1, paragraph 5.3.7. See also Part 2, paragraph 8.5.
216 Database Directive, Recitals 34 and 49 and Article 15.
218 Information Society Directive, Recitals 38 and 52.
from them when technological protection measures are used. On the other hand, Recital 57 requires rights-management information systems to incorporate privacy safeguards.

Finally, the Orphan Works Directive shows some concern about the end users’ position by mentioning how the preservation and dissemination of the European cultural heritage benefits them: on the one hand, it brings advantages to certain categories of end users such as researchers and academics by “opening up new sources of discovery”; on the other hand, it underlines the need to foster cross-border access of EU citizens to that cultural heritage.

2.5. Compliance with the international framework

The compliance of EU copyright legislation with the international legal framework was also a goal of the EU legislator. This goal is characterized here in a narrow fashion. It includes only the cases where the compliance with the international framework was an a priori objective of the legislator or a reason that prompted the EU to act – for example, where it was necessary to carry out the implementation of international treaties.

In the acquis there is only one directive that has the compliance with the international legal framework as an objective proper: the Information Society Directive. Recital 15 of that Directive sets clearly that one of its goals is to implement new international obligations brought by the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). This was recognized at the outset in the original proposal by the Commission, which adds: “while the proposal originates in the internal market consultation exercise, it is in its present form closely linked to, if not based upon, international developments (…)”. The Proposal further recognizes that “action at community level is necessary to comply with the obligations arising from the two new WIPO Treaties.” This was also acknowledged by the CJEU.

More importantly, the Proposal expressly states that it has a “twofold objective”: to harmonize certain aspects of copyright and related rights to ensure a genuine internal market; and to implement the obligations of the WIPO Treaties at Community level in parallel with the ratification of these Treaties by the Community.

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221 See Explanatory Memorandum to the Information Society Proposal, Introduction, paragraph 5.
222 Explanatory Memorandum to the Information Society Proposal, chapter 3.I.14. See also, along similar lines, chapters 3.II.8, 3.III.6 and 3.IV.5.
223 Case C-456/06 – Peek & Cloppenburg, at 31.
224 Information Society Proposal, at 50, paragraph 1.
However, in addition to the policy goal of complying with the international legal framework, the EU legislator has also tried to make copyright legislation in line with international treaties when pursuing other policy goals. This is shown in general by several references to the international copyright instruments. Such references often imply the need to be aligned with the international copyright framework and/or to avoid a conflict between the latter and EU legislation.225

Moreover, specific international instruments are mentioned in several directives as a benchmark, again in the context of pursuing other policy goals. Directives and proposals mentioning the Berne Convention as a standard include the Term of Protection Directive,226 the Database Directive,227 the Information Society Proposal228 and the Resale Right Proposal.229 A similar technique of legislating according to international rules is applied in relation to the Rome Convention,230 the TRIPS Agreement,231 the WIPO treaties232 and even the Universal Declaration of Human Rights.233

2.6. Conclusion

The policy goals explored in this Chapter are drawn from the legislative history of copyright in the EU. It is possible to derive some conclusions regarding the objectives of the EU in the field of copyright from that history and from the resulting policy goals, and how these relate to the functional competence of Article 114 TFEU.


226 See Recital 14. The same reasoning is developed in the Explanatory Memorandum to the Term of Protection Proposal, Part 1, paragraph 31, and in the Term of Protection Amended Proposal, page 6, Article 5.

227 Recitals 35 and 37. See also Explanatory Memorandum to the Database Proposal, Part 1, paragraph 5.3.1.

228 Information Society Proposal, comments on Article 5, paragraphs 8-10.

229 See Recital 19 of the Rental and Lending Rights Directive; Recital 26 of Satellite and Cable Directive; Recital 14 of the Term of Protection Directive.

230 Explanatory Memorandum to the Database Proposal, Part 1, paragraphs 5.1.1. and 6.2., and Information Society Proposal, Part Two, comments on Article 8, paragraph 3.

231 Information Society Proposal, chapter 4, comments on Article 5, paragraph 10, and comments on Article 10, paragraphs 2 and 3.

232 See Rental and Lending Rights Proposal, Part Two, paragraph 2.1.3.: “the recognition of a rental and lending right specifically for authors and performing artists is in accordance with the Universal Declaration of Human Rights which has been signed by all Member States and which guarantees explicitly in its Article 27 the intellectual property of creators in their works.”
The results of the analysis carried out in this Chapter show a predominance of industry-protection objectives. The data gathered from the Directives alone (available in Table 2.1. above) provide sound evidence of such predominance from a quantitative point of view. The number of references to each one of the policy goals, taking the eight directives together and based on the data of Table 2.1., is displayed below:

Figure 2.1.

Figure 2.1. shows that the protection of content industries is the goal more commonly pursued (55 references), followed by the protection of authors and performers (46 references) and internal market-related goals (37 references). The total number of references in each category is of course only significant to a certain degree. Various factors may influence these results, such as the subject matter to be harmonized, the lack of regulation of copyright contracts and authorship rules, or the existence of a CJEU decision on the lack of harmonization that dispenses the legislator from demonstrating at length internal market needs. Also, the data refers solely to the original versions of directives, and therefore subsequent amendments
were not taken into account. This could alter the numbers slightly as well – for example, the Term of Protection Amending Directive had the protection of specific interests as a goal. Internal market needs were largely ignored.

Nevertheless, even though the exact margins may vary, the results show a EU copyright legislation that is partly industry-influenced, while other players seem to have fallen behind. Importantly, individual creators are among the latter. This appears to be at odds with at least the natural right justifications for copyright, which place the author at the very centre and origin of copyright protection.

In addition, if the quantitative data is treated per category of goals, the results show a predominance of the protection of a specific interest (136 references) vis-à-vis Treaty-related goals (58 references) - see Figure 2.2. below:

In short, the policy goals inherent to the copyright acquis relate more to protecting certain interests than to pursuing original Treaty-related objectives and, among the interests that EU copyright legislation has sought to protect, industry figures prominently. This scenario, it is submitted, shows that there is a normative gap in copyright lawmaking, since the protection of specific interests is not directly
grounded in Treaty norms. No rationalization of such protection is made according to the rule of law or the hierarchy of legal sources. Likewise, the hierarchy drawn in copyright legislation between the different interests does not derive from the Treaties either.

The normative gap, in turn, is due to the functional character of Article 114 TFEU, which is the main competence norm used to harmonize national copyright laws. By setting the building of an internal market as the objective of harmonization measures and leaving the choice of subject-matter to harmonize to the EU legislator, Article 114 does not give any indication regarding the normative content of harmonization measures. That normative content must be given by other Treaty norms or other sources of primary law. Because the EU legislator has not resorted to such sources, however, the lack of normative content of the competence norm has indeed resulted in a normative gap in the field of copyright.

The evidence of a lack of normative guidance in copyright constitutes the basis for the next chapters, which will carry out the rationalization that will allow for providing normative content to the main competence norm.
3. Colonizing the normative gap: The intervention of the Court of Justice

3.1. Introduction

This chapter analyses the relevant case law of the CJEU for purposes of building a normative basis from where benchmarks of legislative activity can be derived. In particular, the early case law of the CJEU – that is, the Court’s decisions that examined the conflict between Treaty provisions and national copyright laws – allowed the Court to formulate several theories to address that conflict. The Court’s analysis of the accommodation of national copyright laws within the scheme of the Treaties can therefore be of use in providing Article 114 TFEU with normative content.

The legitimacy of the Court’s case law to provide for normative inspiration is grounded in an argument of hierarchy of sources of law. The Court’s decisions on rules of primary law – the highest source of law in the EU legal order – determine the meaning and scope of those rules. In fact, in the context of the EU, the relevance of CJEU rulings should not be underestimated. While it can be pointed out that usually court decisions are more interpretative than normative in nature, this argument does not apply in its entirety to the CJEU’s case law. At the outset, the EU is a new legal order. It is unique in its nature, without many precedents or comparable legal orders. In addition, the EU Treaties – the highest source of law of that order – are drafted in general, and sometimes obscure, terms. The CJEU

234 Maduro 1998 at 16-25 and Tridimas 2012 at 310. See also Govaere 1996 at 60, pointing out that, in the field of intellectual property, the Court “has gradually elaborated general principles which give guidance on the extent to which Community rules (...) impinge upon national intellectual property rights to safeguard the objectives of the E.C. Treaty.”
235 Case 26/62 – Van Gend & Loos.
236 Bebr 1981 at 4-13 and Tridimas 2006 at 18.
237 Tridimas 2012 at 310.
3. Colonizing the normative gap: the intervention of the Court of Justice

plays therefore a particularly important role in filling in legislative gaps. This leaves room and legitimizes to a certain extent the “judicial creativity” of the CJEU.\(^{238}\)

Moreover, it should be kept in mind that until the Single European Act of 1987 – which amended the previous Treaties – harmonization measures could only be adopted by unanimity in the Council, instead of a qualified majority. Legislative consensus being hard to reach, then, the CJEU played a significant part in achieving European integration. It should also be recalled that negative and positive integration are normally seen as complementary: the negative integration performed by the Court can result in an indication to the EU legislator of the need to take action, but it can also suggest certain principles or guidelines that should be subjacent to such action.\(^{239}\)

In the field of copyright and neighbouring rights, the CJEU issued several decisions before the first directive (the Computer Programs Directive) was passed. These decisions focused on the norms of the Treaties and how they interplayed with national copyright laws. Section 3.2. explains the specific methodology that was followed to select the relevant case law and analyse the judicial solutions contained therein. Section 3.3. introduces the problem at stake. It illustrates the conflict between EU principles, enshrined in certain provisions of the Treaties, and the copyright legislation of the Member States. Section 3.4. follows to give an overview of the judicial solutions delivered to address that conflict. These solutions amount to the use of doctrines and principles aimed at conciliating EU law and national copyright laws. They are: the existence versus exercise doctrine (3.4.1.); the specific subject matter doctrine (3.4.2.); the principle of exhaustion of rights (3.4.3.); and the principle of non-discrimination on grounds of nationality (3.4.4.). Section 3.5. draws some conclusions regarding the normative basis that can be extracted from the CJEU’s case law.

3.2. Specific methodology

Following a content analysis technique, I collected all the CJEU cases that decided on the subject of copyright vis-à-vis the provisions of the Treaties. This means that cases on secondary legislation (namely, on the directives) were left aside, except where they were necessary to clarify theories that were established prior to the entry into force of directives. In other words, the analysed set of judicial decisions is comprised of (1) cases on copyright in relation to primary law, and (2) cases on secondary law (copyright directives) only to the extent that such cases add new elements to the cases examined in (1). The objective is to isolate the cases where

\(^{238}\) On the prominent role of the CJEU in the active development of EU law, see inter alia Deelen & Deelen 1996 at 81 ff; Meij 2010 at 88; Stone Sweet 2011 at 147; Scharpf 2012 at 128 ff.

\(^{239}\) See chapter 1 at 14-15 and references cited therein.
copyright was in conflict with norms of the Treaties and to see how the Court went about solving them.

The features of the cases that were considered after several reading iterations were only the manifest rather than also the latent ones. The judicial solutions pinned down were therefore expressly referred to and used by the CJEU. I categorized them conceptually (as opposed to chronologically), by resorting to clustering. The judicial solutions were thus found following an inductive method.

The particular classification was done by extracting from the set of cases the formulae commonly used therein, and then analysing such solutions separately by reference to the concrete cases that used them. Accordingly, the judicial solutions found as a result of pattern-finding were: the existence versus exercise doctrine; the specific subject matter doctrine; the principle of exhaustion; and the principle of non-discrimination. The qualification of a solution as a “doctrine” or a “principle” depends on whether it is currently included in positive law (principle)\(^{240}\) or whether it is only part of the CJEU case law (and/or doctrinal texts as a result).

### 3.3. Conflict between EU principles and copyright

Before the first directive in the field of copyright came into force, the CJEU had already handed down several decisions that dealt with copyright matters. The reason for the Court’s intervention was the conflict between EU principles and national copyright laws.

One of the cornerstones of the European Union, the establishment and functioning of an internal market, implies the free movement of goods and services between the Member States. As a result, the Treaty outlaws restrictions to these freedoms. In relation to the free movement of goods, Article 30 TFEU (formerly Article 25 EC Treaty) prohibits custom duties or charges having an equivalent effect.\(^{241}\) This provision prevents Member States from applying surcharges to foreign products, rendering them more expensive than national ones. Moreover, Article 34 TFEU (formerly Article 28 EC Treaty) further prohibits quantitative restrictions on imports and all measures having equivalent effect.\(^{242}\) This means that

\(^{240}\) The principle of non-discrimination is posited in Article 18 TFEU, while the principle of exhaustion of rights was codified by the Computer Programs Directive (Article 4 paragraph 2 of the codified version of 2009), the Rental and Lending Rights Directive (Article 9 paragraph 2 of the codified version of 2006), the Database Directive (Article 5 (c)), and the Information Society Directive (Article 4 paragraph 2).

\(^{241}\) Article 30 TFEU: “Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.”

\(^{242}\) Article 34 TFEU: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”
quotas or any other measure that can reduce the quantity of imported products should be banned as well.

However, while it was accepted that the expression “quantitative restrictions” referred to quotas or complete restrictions on the import or export of a given product,\(^{243}\) the definition and scope of the concept of “measures having an equivalent effect” to a quantitative restriction was unclear. The CJEU has interpreted this expression to mean that any national rule that was “capable of hindering, directly or indirectly, actually or potentially, intra-community trade” was forbidden.\(^{244}\) Due to its wide scope, this formulation covered measures that were indistinctly applicable to domestic and imported products, so long as they could have a minimum effect on the potential sale of the latter. Hence, even if a national law did not discriminate against foreign products, it could still be deemed incompatible with the Treaties if it negatively affected cross-border trade.

The Court further introduced the principle of mutual recognition: it ruled that, where a product had been lawfully produced and marketed in one Member State, it should be able to be legally sold in another Member State.\(^ {245}\) This principle implied that national laws, rules or standards remained the same, but Member States were obliged to recognize each other’s standards as valid. Together with the wide scope of the notion of “measures having equivalent effect,” the CJEU therefore endorsed a broad view of what restrictions to trade might amount to, with the aim of securing the free movement of goods across Europe.

Nevertheless, the Court underlined that some trade-restrictive measures can still be admissible if they are “necessary” to fulfil certain “mandatory requirements” relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer,\(^ {246}\) but also to cultural policies.\(^ {247}\) This list is not exhaustive – it is up to the Court to decide, on a case-by-case basis, if a given situation falls under the concept of “mandatory requirement,” and if the national law in question is necessary to fulfil it.\(^ {248}\) The “necessity” of national measures is a direct reference to the principle of proportionality, namely in the sense that the measure must be the least restrictive one to achieve the intended aim.\(^ {249}\) The concept of “mandatory requirements”, on the other hand, amounts to grounds of justification that allow for

\(^{243}\) See case 2/73 – Riseria Luigi Geddo, at 7.

\(^{244}\) See case 8/74 - Dassonville at 5. This is the so-called “Dassonville formula”, which was applied subsequently in a number of cases before the CJEU – see, e.g., case 65/75 – Tasca or joined cases 88-90/75 – SADAM. See also, on the Dassonville formula and its implications, Gormley 1985 at 20 ff; Steiner 1992, at 751 ff; Jarvis 1998 at 20 ff.

\(^{245}\) See case 120/78 – Cassis de Dijon at 14. See also Gormley 1985 at 51 ff; Oliver 2010 at 107 ff.

\(^{246}\) See case 120/78 – Cassis de Dijon at 8.

\(^{247}\) See case 8/74 - Dassonville at 5. This is the so-called “Dassonville formula”, which was applied subsequently in a number of cases before the CJEU – see, e.g., case 65/75 – Tasca or joined cases 88-90/75 – SADAM. See also, on the Dassonville formula and its implications, Gormley 1985 at 20 ff; Steiner 1992, at 751 ff; Jarvis 1998 at 20 ff.

\(^{248}\) See, for a list of examples of mandatory requirements that have been examined by the CJEU, Mortelmans 2008 at 667-668

\(^{249}\) Jarvis 1998 at 171; Mortelmans 2008 at 665-666.
the acceptance of trade-restrictive measures because of a public interest that should not be disregarded.\textsuperscript{250} In sum, even if it is established that national rules hinder trade between Member States, the Court accepts that in some cases such restrictions are acceptable if they are necessary to fulfil the said mandatory requirements. Those situations fall thus outside the scope of Article 34 TFEU (formerly Article 28 EC Treaty).

In what concerns the free movement of services, Article 56 TFEU prohibits barriers to the freedom of an EU national to provide cross-border services.\textsuperscript{251} Article 57 TFEU (formerly Article 50 EC Treaty) establishes that, for a service to be qualified as such, it should normally be provided for remuneration, although the CJEU has clarified that the payment does not have to be made directly\textsuperscript{252} and that profit is not a mandatory requisite within that context.\textsuperscript{253} The CJEU has furthermore considered that the notion of “cross-border” also comprised situations where there were only potential\textsuperscript{254} or future\textsuperscript{255} cross-border recipients of services. Hence, the case law of the Court on the freedom to provide services and on the prohibition of restrictions to that freedom has given it a wide scope, much like what happens in relation to the free movement of goods.

The Court has generally refused to transpose en bloc to the field of services the conclusions drawn in its case law regarding the free movement of goods,\textsuperscript{256} particularly its definition of measures that restrict cross-border trade. Still, in a formulation close to the “Dassonville formula”, it established that Article 49 EC Treaty (now Article 56 TFEU) required the elimination of discrimination on grounds of nationality and the abolition of any restriction, even if non-discriminatory, which was liable to prohibit or hinder trade in services.\textsuperscript{257} However, in a later case, it deemed acceptable a measure that applied without distinction to national and foreign service providers and that affected in the same way the provision of services within one Member State and the provision of services between Member States.\textsuperscript{258} The measure in question – a tax that made mobile phone tariffs more expensive – didn’t hinder cross border trade more than it did national trade, and therefore the Court considered it compatible with article 49 EC Treaty (Article 56 TFEU).

\textsuperscript{250} Gormley 1985 at 52 ff.

\textsuperscript{251} Article 56 TFEU: “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”

\textsuperscript{252} Joined cases C-51/96-C-191/97 – Deliège at 56.

\textsuperscript{253} Case C-157/99 – Smits and Peerbooms at 58.

\textsuperscript{254} Case C-384/93 – Alpine Investments.

\textsuperscript{255} Case C-36/02 – Omega.

\textsuperscript{256} See Hatzopoulos 2008 at 229 and case C-384/93 – Alpine Investments at 33 to 38.

\textsuperscript{257} See case C-76/90 – Säger at 12.

\textsuperscript{258} See joined cases C-544-545/03 – Mobistar at 35.
National copyright laws can in theory be among the barriers to trade that hinder the free movement of goods and services, and therefore can potentially come under the prohibition of Articles 34 and 56 TFEU respectively. Copyright comprises exclusive rights over certain works that are embedded in a good or a service. Such rights are granted on a national basis, and can thus be at odds with free movement provisions. The differences in the protection regimes may effectively impede cross-border trade, since the same work might be protected in one Member State but not in others, or it might be protected in different Member States to different degrees. Another consequence of exclusive rights granted on a territorial basis is the possibility it would give the right holder to partition the market, e.g. by practicing price discrimination between Member States and subsequently preventing parallel imports (that is, prevent the resale of the works across borders). Such division of markets also runs counter to the establishment of an EU internal market.

At first sight, then, the conflict between EU principles and copyright seemed easy to solve: to the extent that national copyright laws constitute barriers to cross-border trade, they should be removed. This is dictated by the principle of supremacy of EU law, which establishes the primacy of EU law over conflicting national law. However, the Treaty itself gives some legal coverage to national laws, even if they negatively impact the EU internal market. Some aspects of national laws that clash with free movement principles are recognized by the Treaty as well. Therefore, that conflict cannot be resolved by the principle of supremacy. Instead, the balance must be found in the context of the Treaty. Two sets of norms can accommodate national copyright laws within the Treaty.

First, Article 345 TFEU (formerly Article 295 EC Treaty) mandates that “the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.” The Treaty does not clarify the scope of this rule, although the history of the provision can support an interpretation according to which “system of property ownership” refers primarily to the national rules regulating public or private allocation of property. Still, it was not clear how this norm ought to be made compatible with the free movement of goods and services in cases where copyright as a form of property would be at odds with those freedoms.

Second, Article 36 TFEU (formerly Article 30 EC Treaty) permits certain derogations to the free movement of goods. Prohibitions of restrictions to the free

259 The principle of supremacy was developed by the CJEU in case 6/64 - Costa v. Enel. The CJEU has confirmed this principle in subsequent cases: see, inter alia, case 11/70 – Internationale Handelsgesellschaft, at 3: “The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. (…)” See also, for an analysis of this principle and relevant case law, Bebr 1981 at 634 ff, and Craig & De Búrca 2003 at 276 ff.

260 See Schwarze 2000, article 295, paragraph 1. The origins of this provision date back to article 83 of the Treaty constituting the European Coal and Steel Community (ECSC Treaty), the aim of which was to leave to Member States the choice of whether undertakings subject to the ECSC Treaty should be publicly or privately owned.
movement of goods and services are thus not absolute. Restrictions on imports and exports can be admitted in certain circumstances, namely when they are in force for the protection of industrial and commercial property, provided that such restrictions are not a means of arbitrary discrimination nor a disguised restriction on trade between Member States.\textsuperscript{261} The CJEU has determined that copyright is part of the notion of “commercial and industrial property” to the extent that it is prone to be exploited commercially.\textsuperscript{262} That is, the Court acknowledged that copyright could in certain cases consist of a justification to restrict trade. The question was however in what way and under which specific circumstances copyright could justify a restriction to the free movement of goods.

Similarly, in what concerns the free movement of services, the Treaty provides for exceptions to the prohibition of restrictions. The free movement of services can be restricted where an activity is connected with the exercise of an official authority (Article 51 TFEU\textsuperscript{263} – formerly Article 45 EC Treaty -, applicable via Article 62 TFEU/55 EC Treaty), as well as in cases where public policy, public security or public health are at stake (Article 52 paragraph 1 TFEU\textsuperscript{264} – formerly Article 46 EC Treaty – applicable via 62 TFEU/55 EC Treaty). There are no exceptions expressly granted with respect to industrial and commercial property. Still, the CJEU has considered that derogations from the free movement of services should also be accepted for reasons of “general interest,”\textsuperscript{265} and it has expressly established that intellectual property could be a justification to restrict trade in services.\textsuperscript{266}

\begin{itemize}
\item Article 36 TFEU: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”
\item Article 51 TFEU: “The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.”
\item Article 52 paragraph 1 TFEU: “The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”
\item See C-262/02 – Commission v. France, at 23: “the freedom to provide services may, however, in the absence of Community harmonization measures, be limited by national rules justified by the reasons mentioned in Article 56(1) of the EC Treaty, read together with article 66, or for overriding requirements of the general interest”; and case C-243/01 – Gambelli at 60: “(…) it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in articles 45 and 46 EC, or justified, in accordance with the case law of the Court, for reasons of overriding general interest.”
\item See case 62/79 – Coditel I at 15: “whilst article 59 of the Treaty [later article 49 EC Treaty, now article 56 TFEU] prohibits restrictions upon freedom to provide services, it does not thereby
\end{itemize}
Importantly, the CJEU made clear that the provisions that recognize a place for national copyright laws within the framework of the Treaties did not constitute any stronghold of Member States’ powers. Regarding Article 345 TFEU (formerly Article 295 EC Treaty), the Court stressed, in relation specifically to “industrial and commercial property”, that the provision could not be interpreted as reserving to Member States the power to adopt measures that would adversely affect the free movement of goods.\(^{267}\) In what concerns Article 36 TFEU (formerly Article 30 EC Treaty), on the exceptions to the free movement of goods, the CJEU determined that the provision was not intended to grant Member States an exclusive competence in the matters contained therein.\(^{268}\) The same argument should be applied to the exceptions to the free movement of services.

This means that these provisions do not amount to a question of competence allocation between the EU and its Member States; instead, the free movement provisions and their exceptions mediate the relationship between EU law and national legislation on given areas, without prejudice to future intervention of the EU legislator in such areas. In short, the problem faced by the Court was then how these two premises – the free movement of goods and services, on the one hand, and national copyright laws, on the other – could be conciliated. The next section will explore the judicial solutions offered by the CJEU.

### 3.4. Judicial solutions

The CJEU has delivered several decisions aimed at overcoming the conflict between the principles of free movement and national copyright laws. For that purpose, the Court has come up with several theories, applying them consistently throughout its case law: the existence versus exercise doctrine (3.4.1.); the specific subject matter doctrine (3.4.2.); the principle of exhaustion of rights (3.4.3.); and the principle of non-discrimination on grounds of nationality (3.4.4.). The next sections will look at these theories in turn.

#### 3.4.1. Existence versus exercise doctrine

The existence versus exercise doctrine was formulated to counteract possible restrictions to Community action derived from the rule stating that the Treaties encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

\(^{267}\) See case C-30/90 – Commission v. UK at 18 and case C-350/92 – Spain v. Council at 18.

\(^{268}\) Case 35/76 – Simmenthal at 14: “Article 36 [later article 30 EC Treaty and now 36 TFEU] is not designed to reserve certain matters to the exclusive jurisdiction of the Member States but permits national laws to derogate from the principle of free movement of goods (...).”
cannot prejudice the rules in Member States governing the system of property ownership.269

One of the first cases decided by the CJEU regarding this question concerned
trademark law and competition rules. The Court confirmed that intellectual property
fell under the property clause (Article 345 TFEU in the current version of the
Treaties) in the Consten and Grundig case.270 The case involved the firms Grundig
and Consten, which had an exclusive distribution agreement whereby Consten was
appointed by Grundig as the exclusive distributor of its products in France. Grundig
products were sold in France by Consten under the trademark “Gint”. When a third
company started to sell Grundig’s products having imported these products from
another Member State, Consten sued for unfair competition and trademark
infringement.

Despite the recognition that intellectual property fell under the property clause of
the Treaty, the Court considered that there was a difference between the existence
and the exercise of such rights. In the Court’s view, the Treaty’s provision meant
that the existence (“grant”) of an intellectual property right was a matter for
national law, but the Community could control the exercise of the right where
necessary to assure compliance with Treaty norms.271 Based on this reasoning, the
exclusive distribution agreement between the parties was annulled due to its
incompatibility with market competition rules.

The existence versus exercise doctrine was transposed to the field of copyright
and neighbouring rights in the Deutsche Grammophon v. Metro case,272 where the
Court admitted that the provisions referring to exceptions to the free movement of
goods and to competition (Articles 30, 81 and 82 EC Treaty, nowadays Articles 36,
101 and 102 TFEU respectively) could be relevant to a right related to copyright.273
The Court did not justify that assumption, but a possible explanation might be that
the right of a producer of phonograms (which was the right involved in the case)
has some similarities to industrial property rights due to its economic nature.274

The concrete problem at stake in Deutsche Grammophon v. Metro was related to
a sound recording that had been put on the market in France, where France, at that
point, did not afford protection to sound recordings. A German wholesaler had
acquired the sound recording in France and had subsequently tried to sell it in
Germany (where the sound recording was protected) at a lower price than the one
fixed by the German manufacturer. It was in this context that the CJEU restated
that, while the Treaty could not affect the existence of a right, it could nevertheless

269 Article 345 TFEU (formerly Article 295 EC Treaty). See Laddie 2001 at 404 and Lucas & Lucas
2001 at 990-991.
270 Joined cases 56-58/64 – Consten and Grundig.
271 See Consten and Grundig at 345. See also Loewenheim 1995 at 830 and Shaw 2009 at 62-63.
272 Case 78/70 - Deutsche Grammophon v. Metro.
273 See Deutsche Grammophon v. Metro at 11. For a detailed discussion of this case, see Bumbak 1984
at 415 ff. and Haynes 1995 at 122-123.
274 See Françon 1979 at 150-151.
 curtail its exercise\textsuperscript{275} - which meant that the German manufacturer was not allowed to prohibit the import of the said sound recording. The Court’s position was thus that, should there be a conflict between the use of a national (related) right and the free movement of goods, the former should be subject to Treaties’ rules and requirements, even though national legislation would still govern the existence or granting of the right.

Moreover, the Court has also resorted to the existence versus exercise doctrine in the context of the free movement of services. In \textit{Coditel II},\textsuperscript{276} a case which concerned the retransmission of a film’s broadcast, the CJEU expressly established that the distinction between existence and exercise of the right, developed in the framework of the free movement of goods, was applicable to the free movement of services as well.\textsuperscript{277}

The CJEU’s rulings thus show that a difference should be drawn between the concepts of existence and exercise of a right. Yet, the Court did not provide a general definition of what existence and exercise of rights amount to.\textsuperscript{278} The only indication that can be derived from case law is that the duration of copyright protection might be linked to the existence of rights, but there is no further clarification of the distinction between existence and exercise.\textsuperscript{279} The CJEU’s decisions on the property clause stemming from other fields of law cannot shed light on this question either, as intellectual property is the area where the existence versus exercise doctrine is usually employed.\textsuperscript{280} In other fields, the Court merely

\textsuperscript{275} See \textit{Deutsche Grammophon v. Metro} at 11: “(…) although the Treaty does not affect the existence of rights recognised by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. (…)”

\textsuperscript{276} Case 262/81 – \textit{Coditel II}.

\textsuperscript{277} Case 262/81 – \textit{Coditel II} at 13.

\textsuperscript{278} This was noted and criticized by several commentators - see inter alia Laddie 2001 at 404, referring to the distinction as a “contradiction in terms”; Keeling 1993, at 134, calls it “unhelpful” and “mysterious”; Korah 2006, at 3, states that in legal theory it is “impossible to draw the line between existence and exercise, except as extremes”, since the existence of a right includes “all the ways in which it can be exercised”; Tritton 1994, at 423, describes the distinction as a “rather empty and valueless” doctrine. See however Friden 1989 at 193-194, stating that the distinction between existence and exercise has an “exploitable theoretical content”, as both concepts, according to the author, have very clear meanings: existence refers to “the conditions which are to be fulfilled if the right is to be granted”, while exercise concerns “the effects that granting such rights will have.”

\textsuperscript{279} See joined cases C-92-326/92 – \textit{Phil Collins/EMI Electrola} at 12: “in so far as the disparity between national laws may give rise to restrictions on intra-Community trade in sound recordings, such restrictions are justified under article 36 of the Treaty if they are the result of differences between the rules governing the period of protection and this is inseparably linked to the very existence of the exclusive rights.” This was confirmed by case C-5/11 – \textit{Donner}, at 33.

\textsuperscript{280} Akkermans & Ramaekers 2010 at 311. See however case 44/79 – \textit{Hauer}, concerning a restriction on the use of the right of property in a land in the context of cultivation of vineyards, where the Court looked more closely to the question of the existence and exercise of the right to property and concluded that “the restriction imposed upon the use of property by the prohibition on the new planting of vines introduced for a limited period by Regulation No 1162/76 is justified by the
stated that the national systems of property ownership were subject to the fundamental rules of the Treaty.281

However, in a later copyright case, while acknowledging that the right to property was a general principle of Community law, the Court established that such principle was not absolute and had to be viewed in relation to its social function.282 The case dealt with the validity of the exclusive rental right (introduced by the Rental and Lending Rights Directive) vis-à-vis fundamental rights (namely, the fundamental right to property). The Court reasoned that, because of the social function of property, the exercise of that right could be restricted, “provided that any restrictions in fact correspond to objectives of general interest pursued by the European Community and do not infringe the substance of the rights guaranteed.”283

In other words, even though the CJEU did not define what the “exercise” of a right amounts to, it still set the conditions under which that exercise could be restricted. The reference to the social function of the right to property, together with proportionality considerations, indicates that the exercise of national exclusive rights is not without limitation - other interests ought to be weighed in according to the principle of proportionality.

The discussion on the social function of property, and more specifically of copyright as a form of intellectual property, brings to light the issue of copyright’s goals and rationales described in chapter 1. Admittedly, the recognition of that social function seems to fit better the utilitarian justification of copyright, which considers the general interest of society as a fundamental element of the copyright system. Nevertheless, the natural rights theories do not per se support an absolute conception of property either – e.g., Locke foresees that private property could be limited if needed to secure the commons.284 The notion of “social function” as a guidance for the exercise of copyright, and the balance of interests derived therefrom, seems thus to be compatible with both theories.

3.4.2. SPECIFIC SUBJECT MATTER DOCTRINE

The CJEU framed the specific subject matter doctrine in the context of the protection of industrial and commercial property as a justification to restrict the free movement of goods (current Article 36 TFEU, formerly Article 30 EC Treaty). The

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281 See case 182/83 – Fearon at 7 (regarding the compulsory acquisition of land by public bodies) and case C-302/97 – Klaus Konle at 38 (regarding administrative procedures for acquisition of land).

282 Case C-200/96 – Metronome Musik at 21.

283 Ibid.

284 See chapter 1, section 1.1.1. See also Geiger 2010 at 538-540.
The doctrine was initially put forth to clarify the circumstances under which national copyright laws were allowed to restrict trade.

The Court first mentioned this doctrine in the *Deutsche Grammophon v. Metro* case, which involved the related right of a phonogram producer. When interpreting what is now Article 36 TFEU, the Court said that restrictions to the free movement of goods based on the protection of industrial and commercial property were only justified when “safeguarding rights which constitute the specific subject matter of that property.” The Court did not explain then, however, what should be understood by “specific subject matter.”

The meaning of “specific subject matter” was developed later on by the Court. Following the Court’s reasoning in a string of cases, the “specific subject matter” seems to be linked to the protection of certain core rights inherent to copyright and related rights. These core rights, according to the CJEU, are of two kinds: moral and economic. While moral rights enable in particular authors and performers “to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation,” economic rights grant them “the right to exploit commercially the marketing of the protected work” (which can be done inter alia by conferring licenses in return for payment of royalties).

The CJEU has furthermore developed the definition of economic rights, by considering that commercial exploitation comprises “two essential rights” – the exclusive right of performance and the exclusive right of reproduction, which in the Court’s opinion “are not called in question by the rules of the Treaty.” That is to say, in the Court’s view, the commercial exploitation of works and other subject matter can be a valid justification to hinder the free movement of goods and services.

However, the CJEU has also hinted that the right to exploit commercially a work or protected subject matter is not unlimited, but should rather be confined to a “normal exploitation.” In addition, the Court has declared that the remuneration

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285 *Deutsche Grammophon v. Metro* at 11. See also along the same lines case 58/80 - Dansk Supermarked v. Imerco, at 11.

286 See joined cases C-92-326/92 – Phil Collins/EMI Electrola, at 20, where the CJEU held that the specific subject matter of copyright and related rights was to “ensure the protection of the moral and economic rights of their holders.”

287 *Phil Collins/EMI Electrola* at 20, later confirmed by joined cases C-403-429/08 – Premier League at 107, where the CJEU stated that the specific subject-matter of an intellectual property right (copyright thereby comprised) “is intended in particular to ensure for the right holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject-matter, by the grant of licences in return for payment of remuneration.”


289 This can be inferred from case 402/85 – Basset v. SACEM at 16: “(…) even if the charging of the fee in question were to be capable of having a restrictive effect on imports, it does not constitute a measure having equivalent effect prohibited under Article 30 of the Treaty [later Article 28 EC Treaty, now Article 34 TFEU] insomuch as it must be regarded as a normal exploitation of copyright and does not constitute a means of arbitrary discrimination or a disguised restriction on trade
derived from exploiting the work or protected subject matter ought to reflect the use made of it and secure to the respective right holder a “satisfactory share” of the market in question.\textsuperscript{290} In a more recent case (\textit{Premier League}), the Court also clarified that the specific subject matter of an intellectual property right does not guarantee the opportunity to demand the highest possible remuneration – the right holder is only ensured an “appropriate remuneration.”\textsuperscript{291}

All these concepts used by the CJEU – “normal exploitation”, “satisfactory share”, “appropriate remuneration” – point to the use of the principle of proportionality,\textsuperscript{292} which has also been applied extensively by the Court in areas other than intellectual property. In fact, as a general rule, even if a particular measure can in principle be justified under current Article 36 TFEU, it still has to abide by proportionality guidelines.\textsuperscript{293} In other words, national laws that hinder free trade in goods can be justified under Article 36 TFEU only in so far as they are proportionate. In the field of copyright, this goes back to the concepts referred to above. National laws should thus not prescribe an absolute protection of copyright, which means that the commercial exploitation of the rights granted to the right holders (and income derived therefrom) should be levelled according to proportionality considerations.

This in turn is also in line with copyright goals and rationales. The different theories present different justifications for the conferral of rights that form the subject matter of copyright. The grant of such rights is seen either as a reward, as a consequence of the extension of the author’s personality or as an incentive.\textsuperscript{294} However, those rights are not absolute. On the contrary, they must be seen in

\begin{itemize}
  \item \textsuperscript{290} Warner at 15-16 and case C-200/96 – Metronome Musik at 16, both stating that, in the absence of a rental right, it would be impossible “to guarantee to makers of films a remuneration which reflects the number of occasions on which the video-cassettes are actually hired out and which secures for them a satisfactory share of the rental market.”
  \item \textsuperscript{291} \textit{Premier League} at 108. This was also confirmed by case C-128/11 – UsedSoft at 63, where the Court considered that controlling each resale of downloaded software and demanding further remuneration for those acts of resale where the right holder had already received an appropriate remuneration for the first sale “would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned.”
  \item \textsuperscript{292} See Govaere 1996 at 74-75, citing Gormley 1985, at 126, who considers that the “specific subject matter” doctrine is the concretization of the principle of proportionality. The latter author states: “the proportionality principle has been developed most significantly in relation to industrial and commercial property, in which context the Court has chosen to express the concepts of necessity and action least onerous to intra-Community trade by limiting the permissible derogations under this heading to those necessary to give effect to the ‘specific object’ of the right relied upon.”
  \item \textsuperscript{293} See Gormley 1985 at 124; Enchelmaier 2010 at 222ff, and case law cited therein. Specifically, the national law has to be appropriate and necessary for the protection of the interest involved (see inter alia C-390/99 - Canal Satellite Digital at 33; case C-14/02 – ATRAL at 64; case C-432/03 - Commission v Portugal I at 42; case C-265/06 - Commission v. Portugal II at 37), taking account of the objective to be attained and the way to attain it (see case 7/68 – Commission v. Italy at 430).
  \item \textsuperscript{294} See chapter 1 section 1.1.1.
\end{itemize}
relation to their social function and take account of other general interests (namely, the interests of society).

In addition, this interpretation of the concept of “specific subject matter” also seems to be consistent with the existence versus exercise doctrine: the exercise of the rights that constitute the subject matter of copyright/related rights is not without limits and must be confined to a normal exploitation that grants the right holder an appropriate remuneration.

The same arguments should be applied to copyright as a justification to restrict the cross-border provision of services. The CJEU never phrased the specific subject matter doctrine as such to justify restrictions to the free movement of services. However, when evaluating whether a restriction to the freedom to provide services caused by national copyright laws was admissible, the Court ruled that “the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright”295 (emphasis added). This notion appears to amount in essence to the one of specific subject matter: the essential function and the specific subject matter of copyright are both linked to the rights vested in copyright owners that allow them to receive income from commercial exploitation. Furthermore, just like the restrictions to the free movement of goods, the grounds for restricting the free movement of services (including national copyright laws) also have to be subject to the principle of proportionality. In order to be a valid justification for restricting the free movement of services, the national legislative measures must thus be necessary and appropriate to achieve their intended aims, and not go beyond what is needed to do so.296

3.4.3. PRINCIPLE OF EXHAUSTION OF RIGHTS

The principle of exhaustion of rights was formulated by the CJEU to counteract the possibility that the distribution right gave the right holder to partition the market.297 If applied without limitations, the distribution right would give the right holder the ability to practice different prices in different Member States and to subsequently prevent parallel imports between them, which would be at odds with the establishment of an internal market.

In the field of copyright and neighbouring rights, the CJEU dealt with this problem for the first time in the Deutsche Grammophon v. Metro case. It ruled that a manufacturer of sound recordings could not make use of his distribution right to prohibit the sale in one Member State of products placed on the market by him or with his consent in another Member State.298 In other words, in the Court’s view,

296 See inter alia case 205/84 – Commission v. Germany at 27; case C-76/90 – Säger at 15; joined cases C-369-376/96 – Arblade and Others at 35; Case C-515/08 – Santos Pallotta, at 54.
297 See Dreier 2007 at 196-199; Goldstein & Hugenholtz 2010 at 305; Stothers 2010 at 334-335.
where goods were marketed in one Member State by the right holder or with the right holder’s consent, a right related to copyright could not be relied upon to prevent the free movement of those goods in the European Union. Another example where the Court resorted to the principle of exhaustion is the decision in *Musik-Vertrieb v. Gema*, which concerned the distribution of records in the UK by a German company. Those records were being subsequently imported into Germany and GEMA, the German collecting society, sued the importers for the difference in royalty fees paid in the UK and in Germany. The Court deemed the distribution right to be exhausted and did not allow the plaintiff to recover the difference in royalties.

The CJEU has since then consistently restated the principle of EU exhaustion in the context of the free movement of goods. It has also further clarified the fundamental requirements for the principle to apply. In particular, the Court has distinguished between situations where copyright products are sold by the owner or with his consent and situations where those products are lawfully sold, not due to an act of consent, but because of differences in the scope of protection. The latter situation, according to the Court, does not exhaust the distribution right in so far as it is derived from differences in national copyright laws. Moreover, the Court has differentiated sale from other forms of commercial exploitation, namely rental. For purposes of the principle of exhaustion, the Court decided that the sale of a copyright product with the consent of the right holder did not have the effect of exhausting other forms of commercial exploitation such as rental. National laws that granted rental rights aimed at providing right holders with an additional source of revenue that reflected the number of occasions of actual rental and that allowed them to partake in the rental market. If that right were to be exhausted by sale, it “would be rendered worthless,” according to the Court. It is therefore an argument of securing revenue that underlies the reasoning of the CJEU.

Following that argument, the outcome of cases in relation to services such as public communications of the work was different. This was the question at stake in *Coditel I*. The facts of the case concerned a Belgian cable television company

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299 *Deutsche Grammophon v. Metro* at 12-13. See for further discussion on this case Röttinger 1993 at 74-78; Lucas & Lucas 2001 at 999-1000; Colombet 1997 at 369.

300 Joined cases 55-57/80 – *Musik-Vertrieb v. Gema*.

301 *Musik-Vertrieb v. GEMA* at 10, 15 and 27. See further Bumbak 1984 at 422 ff; Röttinger 1993 at 78-84; Loewenheim 1995 at 838-839; Lucas & Lucas 2001 at 999-1000.

302 See e.g. case 58/80 – *Dansk Supermarked v. Inerco* at 11-12; case 395/87 – *Tournier* at 11. See also Lucas & Lucas 2001 at 988 ff.

303 Case 341/87 – *EMI Electrola v. Patricia* at 10 (in relation to differences in the duration of protection).

304 *EMI Electrola v. Patricia* at 10-14.

305 Case 158/86 – *Warner* at 18-19.


308 Schricker 1989 at 469.

309 Case 62/79 - *Coditel I*. 

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that received the broadcast transmission of a film from Germany and retransmitted it to its clients in Belgium. The exclusive licensee sued. The matter was thus whether the ownership of copyright in a film could be used to prevent an unauthorised cable retransmission (in Belgium) of a broadcast which in turn had taken place with consent (in Germany). The Court established that, since public communications may be “infinitely repeated”, the problems that arise in that realm are different from the ones relating to works that are brought to the public in a material form (like books or records).\(^{310}\) In such cases, the copyright holder has a “legitimate interest” in calculating the due fees on the basis of the actual or probable number of performances. Hence, the right to require fees for every showing of a film – i.e., an exclusive right of the right holder – is, as mentioned in the previous section, part of the essential function of copyright.\(^{311}\) The Court seems therefore to draw a line between goods and services for the purposes of exhaustion of rights.\(^{312}\)

However, the distinction between goods and services for the purposes of assessing whether a right is exhausted can be called into question,\(^{313}\) especially in view of the CJEU decision in Usedsoft.\(^{314}\) There, responding to the Commission’s argument that the exhaustion of the distribution right does not apply to services, the Court said that “the objective of the principle of the exhaustion of the right of distribution of works protected by copyright is, in order to avoid partitioning of markets, to limit restrictions of the distribution of those works to what is necessary to safeguard the specific subject matter of the intellectual property concerned.”\(^{315}\)

In relation to the concept of “sale” as an act that triggers the application of the principle of exhaustion, the CJEU has established in UsedSoft that “sale” amounts to the transfer of the right of ownership over a copy of the work,\(^{316}\) which can be defined as the grant of a right to use a copy of the work, for an unlimited period of time, in return for payment of a fee.\(^{317}\) The existence of such transfer of ownership, according to the Court, transforms an act of communication to the public and making available (which would in principle be one not subject to exhaustion) into an act of distribution (which is).\(^{318}\)

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\(^{310}\) Coditel I at 12. See for further discussion on this case and its implications, Bumbak 1984 at 418 ff; Desurmont 1990 at 109-110; Loewenheim 1995 at 840; Batchelor & Jenkins 2012 at 160 ff.

\(^{311}\) Coditel I at 13-14.

\(^{312}\) Coditel I at 18 and Case 395/87 – Tournier at 12-13.

\(^{313}\) Clark 2013 at 460 ff; Dreier 2013 at 137-139.

\(^{314}\) Case C-128/11 – UsedSoft.

\(^{315}\) Case C-128/11 – UsedSoft at 62.

\(^{316}\) See case C-128/11 – UsedSoft at 47. The exhaustion rule dealt with in this case is the one codified by the Computer Programs Directive (2009) in its Article 4 paragraph 2, which reads: “The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.”

\(^{317}\) Ibid. at 49.

\(^{318}\) Ibid. at 52.
Yet, the discussion can also be directed at what shall be considered a service in the first place. In cases where there is a transfer of ownership, the relevant act will be qualified as a sale and not as a service. Furthermore, it flows from the case law analysed above that the CJEU links the exhaustion of rights, or lack thereof, to the specific subject matter or essential function of copyright. Certain acts of commercial exploitation, such as selling copies of a work, are part of the normal exploitation of copyright and of the specific subject matter of copyright, but controlling further acts of resale and demanding remuneration for it goes beyond the specific subject matter of copyright and the appropriate remuneration that the right holder is entitled to. The right is thus, in such cases, exhausted. The same does not happen, however, with regard to certain acts – such as rental or public performance – whose repetition is the basis of the appropriate remuneration payable to the right holder. In these cases, the right to require payment for each repetition, as underlined by the Court, is connected to the essential function or specific subject matter of the right. The right is therefore not exhausted.

Again, there seem to be proportionality considerations underlying the principle of exhaustion. With regard to the free movement of goods, the distribution right gives in because the right holder is free to choose the Member State where he first distributes the work, which he will do according to his best interests (e.g., level of remuneration in that country and sales channels). Consequently, the right holder can shape his distribution strategy to get the highest income possible, there being no reason to allow him to partition markets in order to increase his income. Put differently, his exclusive distribution right is already protected to some extent and should be limited to accommodate the principle of free movement of goods. By contrast, in the case of services, the principle of proportionality allows the right holder to receive income for every act of commercial exploitation, so that he receives an appropriate remuneration. Both premises are also aligned with copyright goals and rationales, which, as already mentioned in the previous

319 Recital 29 of the Information Society Directive seems to make the exhaustion of the right dependent on the qualification of a given act as a service by stating that “the question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the right holder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature(…)”

320 This can be inferred from Usedsoft at 63: “To limit the application, in circumstances such as those at issue in the main proceedings, of the principle of the exhaustion of the distribution right under Article 4(2) of Directive 2009/24 solely to copies of computer programs that are sold on a material medium would allow the copyright holder to control the resale of copies downloaded from the internet and to demand further remuneration on the occasion of each new sale, even though the first sale of the copy had already enabled the rightholder to obtain an appropriate remuneration. Such a restriction of the resale of copies of computer programs downloaded from the internet would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned(…).”

321 Musik-Vertrieb v. GEMA at 25. See also Dreier 2007 at 197-198.
sections, entail a protection of authors that must at the same time take account of other interests.

3.4.4. PRINCIPLE OF NON-DISCRIMINATION ON GROUNDS OF NATIONALITY

The principle of non-discrimination on grounds of nationality is expressly spelled out in the Treaties. Article 18 TFEU (previously Article 12 EC Treaty) reads: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.” According to the CJEU, non-discrimination entails placing on equal footing persons in a situation governed by EU law and nationals of the Member State concerned. Yet, it should be noted that Article 18 TFEU does not prohibit disparities in treatment derived from differences in national laws, as long as those laws treat in the same fashion foreigners and nationals of a given Member State.

The CJEU has however ruled that the general principle of non-discrimination of Article 18 TFEU should only be resorted to in situations where there is no other specific Treaty provision applicable prohibiting discrimination, which makes it a fall-back rule to be used only where others – such as the provisions on free movement of goods and services – cannot offer a particular solution.

The CJEU first applied the principle of non-discrimination to the field of copyright and neighbouring rights in the Phil Collins/EMI Electrola case. There, the Court declared copyright and related rights to be subject to the general principle of non-discrimination, “without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty” (corresponding respectively to Articles 34, 36, 56 and 62 TFEU). Consequently, it considered that the principle of non-discrimination “precludes a Member State from making the grant of an exclusive right subject to the requirement that the person concerned be a national of that State.” To the Court’s understanding, then, the application of the

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322 Case 186/87 – Cowan at 10 and case C-274/96 – Bickel and Franz at 14.
323 See Tridimas 2006 at 122 and case law cited therein. See also Timmermans 2008 at 162.
324 See, e.g., case C-411/98 – Ferlini at 39 and case C-379/92 – Peralta at 18. See also, specifically in the field of copyright, joined cases C-92-326/92 – Phil Collins/EMI Electrola at 17: “on the rare occasions where a specific provision of the Treaty does not apply, the general principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty [current Article 18 TFEU] must, in any event, do so.”
325 Article 36 TFEU, in the context of justifications for restricting the free movement of goods, states that “such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination (…)."
326 Gaster 1996 at 20-21; Timmermans 2008 at 158; Stothers 2010 at 329.
327 Joined cases C-92-326/92 – Phil Collins/EMI Electrola.
328 See joined cases C-92-326/92 – Phil Collins/EMI Electrola at 32.
principle of non-discrimination to copyright and related rights was not dependent upon the concrete proof of restrictions or hindrances to trade.

It should be noted, however, that the principle of non-discrimination is not absolute.329 “Objective circumstances” can justify derogating from it.330 An “objective circumstance” will be a measure that is independent of the nationality of the persons concerned and that is furthermore proportionate to the legitimate aim it pursues.331 The analysis of the objective circumstances vis-à-vis an alleged discrimination comprehends, therefore, a proportionality test,332 which will be for the Court to apply on a case-by-case basis.

In the field of copyright, the Court has never deemed a derogation from the principle of non-discrimination to be acceptable. On the contrary, it has ruled twice on the inadmissibility of such derogations. It held that exceptions to the principle of national treatment by way of material reciprocity as posited in the Berne Convention do not constitute an objective justification for discrimination, even though such rules do not use nationality, but country of origin, as a criterion.333

The first rule of material reciprocity to come under the CJEU’s scrutiny was Article 7 paragraph 8 of the Berne Convention, which by default establishes that the term of protection of foreign works is set at the limit of the country of origin of the work, regardless of whether the country where protection is sought has longer terms.334 The Ricordi case335 concerned provisions of the German Copyright Law that did not deviate from this default rule of the Berne Convention (and therefore Article 7 paragraph 8 of that Convention applied). While deciding that the provisions of the German law were in fact in violation of the principle of non-discrimination, the Court also stated that Article 7 paragraph 8 of the Berne Convention permitted German law to not discriminate between foreigners and nationals, since it was not a mandatory rule. In other words, German law could extend to foreigners the same term of protection as it granted its nationals. Thus, said provision could not justify the difference of treatment as regards the duration of protection.336

Later on, in Tod’s,337 the question submitted to the Court was related to an action for infringement of registered designs in shoes, where the defendant pled for the

330 See generally case 14/68 – Wilhelm at 13, case 1/78 – Kenny at 18 and case C-398/92 – Mund & Fester at 16-17. In the field of copyright, see case C-28/04 – Tod’s at 28.
331 See inter alia case C-274/96 – Bickel and Franz, at 26-27.
332 Timmermans 2008 at 160 ff.
333 See case 360/00 – Ricordi and case C-28/04 – Tod’s.
334 Article 7 paragraph 8 of the Berne Convention: “In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.”
335 Case C-360/00 – Ricordi.
336 Ricordi at 32-33.
337 Case C-28/04 – Tod’s.
inadmissibility of the claim under Article 2 paragraph 7 of the Berne Convention. Unlike Article 7 paragraph 8, this provision puts forth a mandatory rule of material reciprocity by establishing that works protected in the country of origin solely as designs and models are only entitled to that protection, and not copyright’s. 338 Here, the Court expressly recognized that there was a link between the country of origin of a work and the nationality of the author of that work. 339 That being the case, the question at issue was actually one of discrimination based on nationality. It was in this context that the CJEU ruled that the provision of the Berne Convention could not stand for an objective justification of the discriminatory measure, since it was settled case law of the CJEU that the implementation of obligations imposed on Member States by the Treaty (such as the principle of non-discrimination) could not be subject to reciprocity. 340 Consequently, that discrimination – based on the country of origin of the work – was prohibited under the general principle of prohibition of discrimination on grounds of nationality. 341

In short, and even though in theory the principle of non-discrimination can comprise derogations based on objective circumstances, in the field of copyright the CJEU has not yet considered a situation of discrimination to be acceptable – which in turn goes to show the centrality of the principle.

3.5. Conclusion

For the purposes of building a normative basis for further legislative action, the case law of the CJEU supplies ground principles that should be taken into account. At the outset, it is apparent that the principle of proportionality plays a central role in balancing rules of free movement of goods and services and exceptions thereto. Proportionality considerations are present in both the general case law of the Court and the decisions in copyright cases. This moreover seems also to be in tandem with copyright rationales and goals, which entail – to a lesser or greater extent, depending on the theory followed – regard for other (often competing) interests. 342

338 Article 2 paragraph 7 of the Berne Convention: “Subject to the provisions of article 7 (4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.” (emphasis added). See also Ricketson & Ginsburg 2006 at 319, 465-467 and 570-571.

339 Tod’s at 24-27.

340 Ibid. at 30-31,34.

341 Ibid. at 35.

342 See also Geiger 2010 at 539, pointing out that “even among the advocates of a natural law-based view of property, it was always considered as a right inherently restricted by public interests.”
It can be concluded from the CJEU case law that copyright requires the protection of certain moral and economic rights, and such protection constitutes its specific subject matter. Nevertheless, just like other property rights, copyright is not an absolute right. As a result, the use or commercial exploitation of copyright can be restricted with the objective of protecting other interests. Such restrictions, however, must be in accordance with the principle of proportionality and cannot put at risk the core substance of copyright – which means inter alia that restrictions to copyright cannot impair some level of protection of authors.

The CJEU has somehow indicated that one way to achieve a balance between the interests involved is to bear in mind the concept of “normal exploitation” of copyright, which will be one that guarantees an adequate income to the right holder, but that does not go beyond that threshold. The principle of exhaustion, formulated by the Court and later codified in several directives, does exactly that: it restricts the use of the right of distribution to the first transfer of ownership, thus working as a limit to the commercial exploitation of copyright that goes beyond that standard of “normal exploitation.” The principle of exhaustion thus stands on proportionality concerns as well.

It follows that the principle of proportionality, as part of the normative basis for legislative action, encompasses a balance between the different interests that are implied in copyright legislation. Namely, where a legislative measure is aimed at protecting the interests of copyright owners, it must be appropriate and necessary to achieve that goal, and must not go beyond what is needed to attain it, taking account of other interested parties.

Another element that is central to the interplay between EU principles and copyright is the principle of non-discrimination. In fact, the discrimination test seems to take precedence over the other solutions established by the CJEU. The existence or grant of copyright is governed by the Member States as long as such grant is not subject to the requirement that the person concerned be a national of that Member State. The specific subject matter of copyright, which comes under the definition of “industrial and commercial property” of Article 36 TFEU as a justification to restrict trade, can only be considered a valid justification if it does not constitute a “means of arbitrary discrimination”, according to that provision. This is not to say that any conclusions should be drawn regarding the division of competences between the EU and the Member States, and the respective scopes of their legislative powers. As pointed out in section 3.3., neither of the provisions concerned has the effect of attributing legislative competence. However, the observations outlined above serve to show that, from a normative point of view, the principle of non-discrimination also occupies a central part in the scheme of the Treaties, and that fact should consequently be reflected on the harmonization of national laws.

343 See joined cases C-92-326/92 – Phil Collins/EMI Electrola at 32.
4. Minding the normative gap: the EU Treaties

4.1. Introduction

The creation of a normative basis for the purposes of establishing benchmarks of legislative activity relies on two sources: the case law of the CJEU and the norms of the Treaties. The present chapter analyses the latter.

Primary law is the highest source of law and must therefore be a tool to establish benchmarks of legislative activity. The Treaties are the central piece of EU primary law - they amount to a constitutional charter and consequently bind the EU legislator.344 Thus, following an argument of hierarchy of sources, the provisions embodied in the Treaties should be used to infuse normative content into the functional competence of Article 114 TFEU.

However, the Treaties have changed since their first version was adopted, with the creation of the European Economic Community, in 1957. The establishment of a European Community started off with a clear focus on economic integration, but over the years the European Community slowly included other non-economic features. The last Treaty amendment was carried out by the Treaty of Lisbon, which was adopted in 2009. It replaced the European Community by the European Union, which now stands on both the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

The Treaties are therefore not a static source of law. Taking them into account as an element of normative inspiration implies thus, first and foremost, having that evolution as a background where pertinent. The building of the Union is a dynamic process, and consequently so is the legal framework that the Treaties provide. Still, for the purposes of building a normative basis, only the current version of the Treaties will be used. Benchmarks of legislative activity, which are a tool to provide Article 114 TFEU with normative content, should reflect the current EU legal landscape in order to get copyright legislation aligned with present lawmakers guidelines.

Section 4.2. explains the specific methodology employed to select the norms of the Treaties that are relevant to the normative basis for copyright lawmaking. These

344 See chapter 1 at 21.
are of two types: norms that contain the objectives of the EU and norms that establish certain principles that support the competence system. Section 4.3. provides a short historical background of the evolution of the EU, highlighting the main changes in the norms of the Treaties that will be analysed in the subsequent sections. Section 4.4. expounds on the provisions that set forth the objectives of the EU. The selected objectives are examined in the following subsections: the establishment of an internal market (4.4.1.); the promotion of the EU’s values (4.4.2.); and the respect for cultural diversity (4.4.3.). Section 4.5. analyses the principles that underlie the competence system, allowing it to function more efficiently. They consist of the principle of conferral (4.5.1.); the principle of subsidiarity (4.5.2.); and the principle of proportionality (4.5.3.).

4.2. Specific methodology

The selection of provisions from the Treaties that are able to contribute to the establishment of a normative basis for copyright lawmaking was done according to a relevance criterion. The content analysis techniques were not used, since the selection of data here does not rely on the identification of patterns or repetition. Instead, such selection and respective justification is based on legal theories. The principle of constitutional legality, under which secondary law (directives) must conform to primary law, implies that copyright directives ought to conform to the totality of the Treaties’ norms in their current version.345

The first step is the identification of categories of norms that are relevant for competence issues. I selected two categories: the provisions dealing with the objectives of the EU and the ones laying down certain principles that operationalize the competence of the Union. As regards the objectives of the EU, Article 5 paragraph 2 TEU states that the Union can only act within its powers and to achieve the objectives set in the Treaties.346 The objectives thus provide the raison d’être of EU competences. Member States grant competences or powers to the Union to enable it to pursue certain objectives, since these are what justified the creation of the Union in the first place.347 The objectives of the EU are therefore a component

345 Von Bogdandy & Bast 2002 at 229-230. See also Article 7 TFEU: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.” [emphasis added]

346 See also Article 13 paragraph 2 TFEU: “Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.”; and Article 7 TFEU in the previous footnote.

of its competence and have a legitimization function to the extent that they can often serve as an interpretative tool of competence norms.  

The principles, on the other hand, are guidelines that allow the competence system to work. They mostly serve to operationalize the competence of the EU and consequently support the application of benchmarks for legislative activity. The use of the benchmarks in legislative activity should thus be seen against the background of principles that govern the competence of the EU.

The second step is to choose, within each of the categories, the objectives and principles that can be of use for the purposes of establishing benchmarks for copyright lawmaking. In what concerns objectives, I chose the ones that either touch upon copyright goals and rationales or the regulation of copyright aspects at the EU level. Hence, the selected objectives consist of: (1) the establishment of an internal market (because that has also been the main justification to harmonize national copyright laws); (2) the promotion of certain values of the EU, namely the respect for fundamental rights (because copyright relates to the field of fundamental rights) and the rule of law (which is linked to the principle of constitutional legality, one of the main arguments underlying the benchmarking exercise); and (3) the respect for cultural diversity (because the field of copyright is connected to the cultural realm). A more detailed explanation of the relevance of these objectives to copyright lawmaking is provided in each of the respective subsections.

Regarding the principles, I assessed the relevant ones based on Article 5 paragraph 1 TEU, which establishes clearly the principles that are important for competence matters. That provision reads: “The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.” The selected principles are thus the principles of conferral, subsidiarity and proportionality.

4.3. Historical background

The EU has undergone a substantial evolution since the “European Economic Community” was first established, in 1957. The overview of the EU’s evolution provided below will focus on two main developments, deemed relevant for the analysis of the sections to follow. The first one is the shift from an entity with a pure economic focus towards one that encompasses several different elements (such as social or human rights), which reveals that the general vision behind the European project has changed over time. The second significant development is the growing tendency towards more integration. Both developments can be seen throughout the various Treaty amendments, where several norms were changed, abandoned or added.

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348 Dougan 2008 at 653; see also Azoulai 2007 at 71-73, stating that the objectives of the Union have an interpretation function of EU law.
The Treaty of Rome, signed in 1957, clarified in its Article 1 that the Member States established among themselves a “European Economic Community”, whose goals were, among others, to promote throughout the Community “a harmonious development of economic activities” and “closer relations between the States.” The Community could make use of several tools to achieve its goals, one of them being the approximation of national laws necessary to the proper functioning of the common market. This could be carried out by directive, following a unanimous decision of the Council.

The Single European Act (SEA), signed in 1986, revised for the first time the Treaty of Rome. It stated clearly that the European Communities had as an objective “making concrete progress towards European unity” (Article 1, emphasis added). This provision shows an evolution from closeness to unity, and presumably an intention to have a higher degree of integration. Moreover, the SEA first prescribed as a goal of the EC the establishment of an internal market over a period expiring on 31 December 1992. The same provision clarified that the internal market encompassed the free movement of goods, persons, services and capital.

The removal of obstacles to the free movement of goods, services, persons and capital, described as a tool to achieve a certain level of economic integration in the Treaty of Rome, corresponds now to the goal of having an internal market in the SEA. To accomplish the ambitious deadline that was set, the SEA brought another innovation: the possibility of adopting harmonization measures by a qualified majority in the Council. The fact that the first directive in the field of copyright – the Computer Programs Directive – was adopted in 1991, in the reign of the SEA, highlights the relevance of this change, which made it easier for EU legislation to be passed.

Yet, the majority rule caused Member States to lose veto power, which meant that they could now be under the obligation to implement directives they had voted against in the Council. This fact gives more relevance to the problem of functional competences. By nature, this type of competence grants more leeway to the EU legislator in terms of the contents of a harmonizing measure. Under the unanimity rule, this was a lesser problem, since any Member State could bar legislation it did not consider adequate. The majority rule, however, opened the possibility of normatively misguided legislation being approved, even if a number of Member States disagreed with it.

Following the SEA, the EEC Treaty mentioned in addition the determination to “work together to promote democracy on the basis of fundamental rights”, recognized namely in the constitutions and laws of the Member States and in the Convention for the Protection of Human Rights and Fundamental Freedoms (also

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349 See Article 3 (h) of the Treaty of Rome, or European Economic Community Treaty (EEC Treaty).
350 Article 100 of the EEC Treaty.
351 See Article 8a of the EEC Treaty, as amended by the SEA.
352 See Article 100a of the EEC Treaty, as amended by the SEA.
known as the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter “ECHR”). Notably, the constitutions and laws of the Member States and the ECHR had been previously identified by the CJEU as sources of fundamental rights, and the Court had also held that fundamental rights were general principles of Community law. Still, their mention in the Treaty marks their first official reference in primary legislation and it is further evidence of an intention to move towards a Community not exclusively based on economic concerns.

With the Treaty of Maastricht, signed in 1992, the European Economic Community was converted into the European Community, which reinforced the idea that the Community was going beyond the economic sphere. This vision of Europe also stemmed from the preamble of the Treaty, where it was stated that economic integration was to be accompanied by a parallel progress in other fields. Accordingly, the first objective of the Union was now “to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without frontiers.” The internal market is not listed as one of the objectives of the EU, but it is referred to in the EC Treaty, where it is defined as one of the activities of the European Community.

The Treaty of Maastricht also formally established the European Union, which was composed of three pillars: the European Communities (i.e., the European Community, the European Coal and Steel Community and Euratom), the Common Foreign and Security Policy, and Police and Judicial Cooperation in Criminal Matters. The term “European Union” had been used informally before the Maastricht Treaty, usually in association with ideas of deeper integration. That being the case, it could be argued that the establishment of the EU went one step further in the direction of more integration. This argument is backed up by Article A of the Treaty of Maastricht, which stated that this Treaty marked “a new stage in the process of creating an ever closer union among the peoples of Europe.” It has also been pointed out, however, that the traits of this new EU revealed a lesser level of integration, as the second and third pillars relied on inter-state cooperation rather than on supranationalism (i.e., on policy and decision-making at the EU level).

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354 Internationale Handelsgesellschaft and Nold, id. See in addition, more recently, case C-112/00 – Schmidberger, at 71, where the CJEU confirmed previous decisions by stating that “fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.”
355 See Articles A and G(A)(1) of the Treaty on European Union (TEU), as signed in Maastricht.
356 See Article B of the TEU, first indent, as signed in Maastricht.
357 See Article 3 (c) of the EC Treaty, as signed in Maastricht.
359 De Witte 2009 at 13. Craig 2010, at 334, points out that the choice for inter-state cooperation meant that “Member States preferred the «default position» of intergovernmentalism, thereby retaining
With regard to fundamental rights, Article F paragraph 2 of the Treaty of Maastricht stated that: “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Fundamental rights, thus, went from a reference in the preamble of the Treaty in the SEA version to a positive obligation of the EU.

The Treaty of Maastricht also brought about new areas of Community competence. Examples include culture, consumer protection and competitiveness of EU industries.\(^360\) Even though some of these new powers were “weak” competences, in the sense that the Community could not harmonize Member States’ laws,\(^361\) they still allowed the Community to intervene to a certain extent in new policy areas. This of course does not mean that before Maastricht the Community was not touching upon such areas – internal market measures, for example, often had some impact in areas not covered by Community competence.\(^362\) Nevertheless, much like the first insertion of fundamental rights in the Treaty, the establishment of competence in new areas, some of them of a non-economic character, is sign of a Community expanding beyond the boundaries of economic integration. In particular, it has been pointed out that the insertion of an article on culture in the Treaties suggests that some impact of culture on market provisions was formally envisaged.\(^363\)

Another Maastricht innovation was the principle of subsidiarity, which was mentioned expressly in the new Article 3b of the EC Treaty. This was once again a matter of recognition of the principle, rather than an ex novo creation – subsidiarity was part of the EC’s agenda before that date and had already been referred to as far back as 1975, where the Commission stated in a report that the EC would only have competence to act when Member States could not do so efficiently.\(^364\) Article 3b also laid down the roots for the principles of conferral and proportionality, although it did not name them as such.\(^365\)

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360 Articles 128, 129a and 130 of the EC Treaty respectively, as signed in Maastricht.

361 See, e.g., Article 128 paragraph 5, corresponding roughly to current Article 167 paragraph 5 TFEU, expressly excluding Community power to harmonize national laws for the achievement of cultural objectives.

362 See Shore 2001 at 109-110, noting that in relation to culture the EU “was effectively operating a de facto cultural policy long before Maastricht gave it the legal right to do so”, by, e.g., invoking economic arguments to achieve cultural objectives. Drawing similar conclusions with regard to consumer policy, see Weatherill 2011 at 844-845.

363 Cunningham 2001 at 160.


365 Article 3b of the EC Treaty, as signed in Maastricht: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed
Finally, a significant Maastricht novelty was the new Article F paragraph 1 of the Treaty on European Union, which mandated the Union to “respect the national identities of the Member States.” The intention to strike a balance between the EU’s powers and Member States’ sovereignty, symbolically represented in this provision, might indicate that the expansion of EU’s competences was a controversial matter. But it also shows that Member States’ were keen to preserve their identities and traditions.

The Treaty of Amsterdam, signed in 1997, provided the EU with certain founding principles, namely the rule of law and respect for human rights and fundamental freedoms. This paved the way to their future recognition as “values”. The consecration of these soon-to-be “values” as founding principles of the EU represents yet a further expansion of the non-economic dimension of the Union, within which fundamental rights were becoming more prominent. On the other hand, the Treaty of Amsterdam barely changed the objectives of the EU, which hints that the modifications operated at this stage were mostly conceptual, as they mainly concerned the foundations of the Union.

In addition, the Amsterdam reform elaborates on the principles of subsidiarity and proportionality in a separate Protocol, which defined conditions and guidelines for the application of those principles. The development of criteria that clarified how the principles ought to work in practice shows an intention to better regulate the activity of the Community’s institutions, namely at the legislative level.

The EU’s integration path until this moment seemed to point to a common will of having a deeper level of integration in a number of areas, with all the implications it entails (e.g., a stronger unity between Member States in those areas). For that reason, in 2004, representatives of the governments of the then 25 Member States decided to take a further step in the integration process, by adopting the “Treaty establishing a Constitution for Europe” (TECE). The contents of this new Treaty were drawn up by a Convention that had the participation of the Commission and of the heads of states, but also of representatives of national and European parliaments.

The TECE bore several differences in relation to the precedent Treaties. It adopted European symbols, such as an anthem and a flag; it established the Union’s values (part of which corresponded to the previous “principles”); and it modified again the Union’s objectives, among which was the establishment of an internal market with free and undistorted competition.

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366 See Article 6 paragraph 1 of the TEU, as amended by the Treaty of Amsterdam: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

367 See Article I-3 paragraph 2 of the TECE.
However, the TECE was rejected by referenda in France and in the Netherlands. Supposedly, it was not the EU project as a whole that was given a red flag: Dutch and French voters could have voted “yes” if they had had better information about the Constitution (for example, its exact content and its costs and benefits), if the economic and social situation had been better and/or if the Government in power were more popular, as showed by a survey requested by the Commission after the referenda. Nevertheless, the referenda were one of the occasions where citizens had a direct saying in the integration process, and when given a chance to speak the citizens of these countries said “no” to a constitutionalized Europe. The results show discontentment with the EU in general and probably with the scope of its powers in particular, although the refusal to have a European Constitution should not affect the constitutional character of the Treaties, which was established early on by the CJEU.

After the failure of the TECE, the Treaty of Lisbon was drafted and adopted, in 2007. There are not many differences between the TECE and the Treaty of Lisbon: the substantive reforms conceived by the TECE remain in force. However, there are some important traits of the TECE that were abandoned, apart from the obvious constitutional symbols (flag, anthem and so on). The TECE referred to the intention of forging a “common destiny”, where the countries would “transcend their former divisions.” This seems to stand for a certain objective of commonality largely absent from the Treaty of Lisbon. In the preamble of the Treaty of Lisbon, less bold expressions such as “to deepen solidarity between peoples”, “single institutional framework” or “convergence of economies” are used. The Treaty of Lisbon also merged the European Union and the European Community into one single entity – the European Union.

In what concerns specifically the objectives of the EU, there are not many differences between the TECE and the Treaty of Lisbon either. In the latter, the goal of having an internal market is more evident in paragraph 3 of Article 3 TEU and the reference to free and undistorted competition disappeared, although Protocol No. 27 to the Treaties on the internal market and competition asserts that the notion of internal market “includes a system ensuring that competition is not distorted.” The other objectives of the EU are also posited in Article 3 TEU and include the promotion of EU’s values and the respect for the cultural diversity of the Member States. Moreover, other new, non-economic objectives were added, which again stands for an intention to integrate further non-economic elements in the EU project. An example of these new objectives is the concept of “social market
economy”, mentioned in Article 3 paragraph 3 TEU. This notion is supposed to combine freedom in the market with social balance, hinting that the social and market dimensions are not incompatible with one another.\textsuperscript{374}

The Charter of Fundamental Rights of the European Union (hereinafter, “Charter”) acquires a binding nature with the Lisbon reform and, although not being part of the Treaties themselves, has the same legal value as they do.\textsuperscript{375} As a result, the primary law of the EU now comprises a catalogue of specific fundamental rights.

The Treaty of Lisbon also introduced the collaboration of national parliaments in the assessment of the compliance of legislation with the principle of subsidiarity, which might have the effect of increasing the legitimacy of EU legislation vis-à-vis the Member States.\textsuperscript{376}

The evolution of the EU in the manner described above also provides some indication regarding the building of a normative basis for benchmarks of legislative activity. The move towards increased integration strengthens the case for harmonization, while the addition of non-economic elements to the Treaties makes an argument for the normative basis in copyright lawmaking to have both economic and non-economic components.

4.4. Objectives of the EU

This section analyses the objectives of the EU that are relevant for purposes of building a normative basis for copyright lawmaking: the establishment of an internal market (4.4.1.); the promotion of certain EU’s values (4.4.2.), notably the respect for fundamental rights (A.) and the rule of law (B.); and the respect for cultural diversity (4.4.3.).

4.4.1. ESTABLISHMENT OF AN INTERNAL MARKET

The objective of having an internal market is today set out in Article 3 paragraph 3 TEU, although, as explained in section 4.3. above, it can be traced back to the Union’s origins. Article 114 TFEU, which has been used as the main legal basis to harmonize copyright laws, reflects this objective by basing the EU’s legislative competence on the establishment and functioning of the internal market. Since national copyright laws can constitute barriers to cross-border trade in goods and

\textsuperscript{374} Rich 2006 at 536. See also Szyszczak 2009, noting that “the European Social Model that is emerging from the Treaty of Lisbon 2007 is a mix of competition, free market and solidarity based principles.”

\textsuperscript{375} Article 6 paragraph 1 TEU.

\textsuperscript{376} Timmermans 2008 at 44.
services, the establishment of an internal market as an objective of the EU must be considered in the creation of a normative basis for copyright lawmaking.

The Treaties provide a definition of the concept of internal market in Article 26 paragraph 2 TFEU. There, it is stated that: “the internal market shall comprise 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.” This means that the free movement of goods and services across the borders of EU Member States – including copyright goods and services – is one of the objectives of the EU. The definition encompasses a cross-border element that also reflects on Article 114 TFEU as a means to achieve the objective of having an internal market: legislation based on Article 114 TFEU must address one of the freedoms. Article 114 TFEU and the underlying EU objective of establishing an internal market do not concern pure internal situations.377

Another means to achieve the objective of having an internal market is through negative integration. Since the notion of internal market encompasses the four freedoms, it can be argued that the case law of the CJEU on the free movement of goods and services (Articles 34 and 56 TFEU), and permissible exceptions thereof (Articles 36, 51 and 52 TFEU), can contribute to a clarification of the concept of internal market. The question here is whether to accept that the case law of the CJEU on the free movement of goods and services can shape the concept of internal market as an objective of the EU and as a legal basis for harmonizing measures. In other words: is the notion of “internal market” a unitary one, which is used throughout the Treaties? Is the judicial definition of free movement of goods and services transposable to the notion of internal market as an objective of the EU and from there to a threshold of legislative harmonization? These questions are not settled in EU law circles: the CJEU has not clarified what the relation is between Articles 34 and 56, on the one hand, and Article 114, on the other. But it has been argued that a strict correspondence between those provisions is not desirable and can inclusively call into question the validity of some existing harmonizing measures.378

Nevertheless, it is submitted, the interpretation of the scope of the free movement of goods and services by the CJEU can, if not be transposed to a definition of internal market, at least provide some guidance regarding how that concept should be construed. For purposes of legal certainty and coherence, the Treaties should be taken as a whole, and their provisions made compatible with one another to the extent possible. This argument is also in line with the principle of

377 Crosby 1991 at 458. Along the same lines, the CJEU has also ruled that using Article 114 TFEU has a legal basis to legislate presupposes that the establishment and functioning of the internal market is a genuine goal, which will be the case where the EU legislation is designed to prevent obstacles to free movement that exist or are likely to occur – see case C-376/98 – Tobacco Advertising I at 84 and case C-380/03 – Tobacco Advertising II at 41. See also chapter 1, section 1.1.3.
378 See Weatherill 2010 at 439-440 and von Bogdandy & Bast 2002 at 244-245.
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constitutional legality, which requires that secondary legislation conforms to the totality of the ‘Treaties’ norms.

As results from the previous chapter, national measures “capable of hindering, directly or indirectly, actually or potentially, intra-community trade” amount to restrictions to cross-border trade in goods and are consequently forbidden. Much in the same vein, national measures that are liable to prevent or hinder trade in services are also forbidden. Such situations are therefore at odds with the objective of establishing an internal market. However, as was also explained in chapter 3, some trade-restrictive measures are admissible if they are necessary to fulfil certain mandatory requirements (relating, for example, to matters of consumer protection or national cultural policy), or if they concern, inter alia, the subject matter of copyright and related rights.

This interplay between prohibitions to trade and exceptions thereof yields a balance between the different policies of the EU, including between the economic and non-economic ones, which should be taken into account in the establishment of an internal market as an objective of the EU. The need to integrate economic and non-economic aspects of cross-border movement is furthermore supported by the fact that seemingly, in the CJEU’s opinion, the free movement of goods (and by the same token of services) applies even where no commercial transaction is involved. As a result, it is difficult to argue that non-economic movements of goods (and services) fall outside of the Treaties.

But, perhaps more importantly, the integration of non-economic aspects and the balance between the different policies come to show that the internal market objective has been revamped. It is now the goal of a European Union that goes beyond the economic sphere and it is thus not of a purely economic nature. This view is supported by the so-called “integration principle,” which mandates that certain integration clauses in the Treaties must be taken into account in the framework of other policies (chiefly, internal market policies). There are three main integration clauses in the Treaties: culture (Article 167 paragraph 4 TFEU), consumer protection (Articles 12 and 169 paragraph 2 (a) TFEU) and

379 See case 34/79 – Henn & Darby and, at length, Jarvis 2010 at 30-31.
380 Jarvis 2010 id.
381 Rosas & Armati 2010 at 179; de Vries 2006 at 13 ff; Jarvis 2010 id.
382 De Vries 2006 at 18 ff.
383 Article 167 paragraph 4 TFEU: “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”
384 Article 12 TFEU: “Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.”
385 Article 169 paragraph 2 TFEU: “The Union shall contribute to the attainment of the objectives referred to in paragraph 1 [promotion of the interests of consumers and ensuring a high level of consumer protection] through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;”
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Integration clauses are thus specific provisions in the Treaties that require the EU institutions to integrate particular horizontal policy interests in their actions under other policies. As a consequence, the objective of achieving an internal market should be taken together with these other policy interests (without however that leading to a harmonization of these policy fields - for example, in the case of culture, according to Article 167 paragraph 5 TFEU, the EU cannot harmonize the laws of the Member States). Seemingly, the Commission has subscribed to this view too: it has proposed that the internal market objective be embedded in a more "impact-driven" approach, under which the internal market policy assumes a proactive role in relation to other policies of the Union.

Finally, it should be noted that the internal market notion set out in Article 3 TFEU includes a system ensuring that competition is not distorted, as clarified by Protocol No. 27 to the Treaties, on internal market and competition. In any case, for the purpose of using the legislative competence of Article 114 TFEU, which is based on the “establishment and functioning of the internal market”, the CJEU had already ruled that the provision could be relied upon to prevent distortions to competition resulting from differences in national laws. However, the goal of

386 Article 173 paragraph 3 TFEU: “The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties.” Paragraph 1 reads: “The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union’s industry exist. For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:
— speeding up the adjustment of industry to structural changes,
— encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings,
— encouraging an environment favourable to cooperation between undertakings,
— fostering better exploitation of the industrial potential of policies of innovation, research and technological development.”

387 Article 167 paragraph 5 TFEU: “In order to contribute to the achievement of the objectives referred to in this Article: — the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States (…)” See also case C-376/98 - Tobacco Advertising I at 78-79, where the Court stated that the competence to harmonize national laws with the aim of achieving an internal market cannot be used to circumvent a prohibition of harmonization laid down expressly in another article of the Treaty, although it also admitted that certain harmonizing measures may have an impact on areas reserved to the Member States.


389 See, e.g., case 229/83 – Leclerc, at 9: “Articles 2 and 3 of the [EC] Treaty set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted.” With a similar statement, see also case C-202/88 – France v. Commission, at 41, which
having a system of undistorted competition as part of the internal market objective should be interpreted in the context of Article 3 paragraph 3 TEU, which, after setting the internal market objective, states that “the sustainable development of Europe” shall be based, inter alia, on a “highly competitive social market economy.” This again calls for a balance between principles of market freedom and non-economic considerations.

4.4.2. PROMOTION OF THE EU’S VALUES

The values of the EU are relevant to build a normative basis for copyright lawmaking for two reasons. First, they are common to Member States and at the same time they are the foundations of the Union, which turns them into an essential element for the exercise of public powers. Second, in the current version of the Treaties, the promotion of EU’s values is one of its objectives. Hence, while it is true that “values” have mostly a political dimension, the fact that their promotion constitutes one of the EU’s objectives gives them a normative depth.

Article 2 TEU enumerates the values on which the Union is founded – “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.” These values provide a context for the achievement of objectives via legislative activity, since they are a founding element of the Union and a common heritage of the European peoples. The values of the EU are inspired in “the cultural, religious and humanist inheritance of Europe” and from that inheritance “the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law” were developed.

There are two values of the EU whose promotion is of relevance to copyright: the respect for human or fundamental rights (A.) and the rule of law (B.).

390 Pilette & Poncins 2007 at 302 ff. The CJEU confirmed that the values of the EU are “the very foundations of the Community legal order” - see joined cases C-402-415/05 – Kadi, paragraph 304.
391 See Article 3 paragraph 1 TEU: “The Union's aim is to promote peace, its values and the well-being of its peoples.”
392 The second part of Article 2 TEU (“these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”) refers to political guidelines. These guidelines may serve to interpret the values contained in the first part of the provision, but they are not values in themselves – see Burgorgue-Larsen 2007 at 57 ff.
393 See Pilette & Poncins 2007, at 302.
394 See TEU, preamble.
395 For the purposes of this research, the terms “fundamental rights” and “human rights” will be used interchangeably, even though Article 2 TEU refers only to the latter. This is because, although conceptually different, human rights are, generally speaking, also fundamental rights (see Palombella 2006 at 3). Moreover, the term “fundamental rights” has become more prominent, particularly since the integration of the Charter of Fundamental Rights in EU primary law – see Article 6 TEU.
A. THE RESPECT FOR FUNDAMENTAL RIGHTS

Fundamental rights are relevant to the field of copyright in two aspects: first, some fundamental rights norms touch upon copyright’s own rationales; second, copyright itself might be a tool to protect other fundamental rights.

As regards the first aspect, it should be noted that copyright as such, even today, barely appears in the realm of fundamental rights.396 However, at least from a natural rights’ perspective, copyright encompasses both property and personality interests.397 Given that, according to that view, copyright’s goals and rationales can be traced back to either property or personality rights, copyright takes on a fundamental rights’ dimension.

The right to property is protected in most national constitutions as a fundamental right;398 in Article 1 of Protocol No. 1 of the ECHR,399 and in Article 17 paragraph 1 of the Charter.400 The Charter furthermore states that “intellectual property shall be protected.”401 Most national constitutions also guarantee some personality rights akin to copyright, such as the right to freely develop one’s personality402 or the right to privacy.403 The right to privacy is guaranteed by the ECHR as well.404

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396 One of the few exceptions is Article 27 paragraph 2 of the Universal Declaration of Human Rights (“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”), although the provision doesn’t indicate that copyright is the appropriate tool to protect scientific, literary or artistic production. At the level of national constitutions, see Article 42(2) of the Portuguese Constitution, which defines the protection of copyright itself as a fundamental right, and Article 19(2) of the Swedish Constitution, stating that creators shall own the rights to their works. Moreover, the current Charter of Fundamental Rights of the European Union declares in its Article 17 paragraph 2 that “intellectual property shall be protected”, even though it does not single out copyright as a form of intellectual property.

397 See chapter 1 section 1.1.1.

398 Many constitutions across the EU contain clauses expressly recognizing or guaranteeing the right to property (see for example Article 14(1) of the German Constitution, Article 42 of the Italian Constitution or Section 33(1) of the Spanish Constitution), while others stress that limitations to property are exceptions, thus indirectly proclaiming the fundamental right to property as the rule (see Article 14 of the Dutch Constitution).

399 Article 1 of Protocol No. 1: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

400 Article 17 paragraph 1: “Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.”

401 Article 17 paragraph 2 of the Charter.

402 See Article 2(1) of the German Constitution as an example.

403 See, for instance, Article 10(1) of the Dutch Constitution or Article 18(1) of the Spanish Constitution.

404 See Article 8 ECHR.
Furthermore, limitations to copyright often have a fundamental rights justification, such as the right to freedom of expression.\footnote{Most constitutions consider freedom of expression as a fundamental right, and in addition some of them provide that freedom of the arts is a fundamental right too (see for example Article 5 of the German Constitution or Article 20(1)(a) of the Spanish Constitution). The ECHR has also a provision on the right to freedom of expression, which includes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” (Article 10(1) ECHR). In a similar fashion, Article 11 paragraph 1 of the Charter of Fundamental Rights reads: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”}

With respect to the second aspect, copyright can be a means to guarantee certain fundamental rights linked to the area of culture. Because it grants exclusive rights on creations, it provides an incentive to cultural production, which is in line with the utilitarian justification for copyright.\footnote{See for example Article 5(3) of the German Constitution and Article 33(1) of the Italian Constitution, on the freedom of the arts, or Article 9(1) of the Italian Constitution, prescribing the duty of the State to promote cultural development.} Therefore, it may be held that copyright fosters such fundamental rights like cultural development or freedom of the arts, which are part of many national constitutions too.\footnote{See case 11/70 – Internationale Handelsgesellschaft at 4. This is now confirmed by Article 6 paragraph 3 TEU, which reads: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”}

In short, copyright relates to, and fosters the protection of, fundamental rights that are recognized at a national and/or international level. The mention of the notion of fundamental rights in the Treaties marks their recognition also at a European level, which in turn provides a first rationale for infusing fundamental rights considerations in copyright lawmaking. In any case, the CJEU had early on established that the respect for fundamental rights was part of the general principles of law, and should therefore be ensured within the objectives of the EU.\footnote{See, e.g., case C-275/06 – Promusicae, at 61-68, where the Court advocated that a balance should be struck between the fundamental rights to property, to an effective legal remedy and to protection of personal data, using the principle of proportionality. See also case C-70/10 – Scarlet Extended at 44-53 and case C-360/10 – SABAM v. Netlog at 42-51 (both concerning the fundamental right to property, the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information).} In recent decisions in copyright cases, the CJEU has in addition included fundamental rights’ considerations.\footnote{Chapter 1, section 1.1.1.}

The promotion of EU’s values elevates the respect for human rights to the status of an objective to be achieved by the Union. But also, apart from being now one of the core values of the EU, human rights have gained extra momentum with the
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integration of the Charter in the primary law of the EU.\textsuperscript{410} Following the argument of hierarchy of sources, since fundamental rights are now part of primary law, they too are candidates to be part of a normative basis for copyright lawmaking. The Charter itself makes clear that fundamental rights must be respected by the EU institutions “in accordance with their respective powers,”\textsuperscript{411} which adds an extra justification for the EU legislator to instill elements from the fundamental rights’ framework in copyright legislation.

In that respect, it should also be noted that Article 51 paragraph 2 of the Charter states that it “does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.” This is confirmed by Article 6 paragraph 1 TEU, which reads: “the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.” The Charter therefore does not supersede the principle of conferral, according to which the EU can only act within the powers that were conferred upon it by the Treaties.\textsuperscript{412} The Charter cannot change the scheme of competences laid down by the Treaties and therefore its Article 17 paragraph 2 cannot be used as a justification to harmonize national laws independently of internal market considerations. But that does not prevent the use of the Charter, including Article 17 thereof, as an element for providing normative content to the functional competence of Article 114 TFEU.\textsuperscript{413}

A related question is how Article 17 paragraph 2 in particular can provide such normative content. The provision does not specify the type of protection that should be afforded to intellectual property. The wording of the provision seems to indicate that intellectual property is an end in itself, as there, the protection of intellectual property is not linked to any particular function (such as the reward for the author’s work or the benefit of society). This is in sharp contrast with paragraph 1 of the same provision, which provides limitations to the general right to property.\textsuperscript{414}

\textsuperscript{410} Article 6 paragraph 1 TEU: “The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

\textsuperscript{411} Article 51 paragraph 1 of the Charter: “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

\textsuperscript{412} Article 5 paragraph 2 TEU. On the principle of conferral, see 4.5.1. below.

\textsuperscript{413} Craig 2010, at 215, seems to endorse a similar position by holding that the Charter “would not necessarily preclude attaching human rights considerations based on the Charter to action founded on other competences.”

\textsuperscript{414} Article 17 paragraph 1 of the Charter: “Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.”
Therefore, doubts could be raised as to whether the provision could be used to justify an upward harmonization of national copyright laws.\footnote{Discussing this point, see Geiger 2009a at 114-117; Mylly 2005 at 206-207; Peukert 2011 at 68-69.}

There are several reasons why this should not be the case. First, in the realm of fundamental rights, it is necessary to respect the principle of indivisibility of those rights, according to which all fundamental rights are of equal ranking.\footnote{See in particular the Vienna Declaration and Programme of Action (1993), point 5: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”} This means that, at the outset, one fundamental right should not take precedence over another – e.g., in light of this principle, the right to property cannot outweigh other fundamental rights such as, for instance, freedom of expression or the right to pursue a trade or profession.

Second, and in connection therewith, the CJEU has stated that fundamental rights are not absolute; instead, they must be viewed in light of their social function and may be limited in the name of public interest,\footnote{See case 4/73 – Nold at 14 and case 44/79 – Hauer at 32.} provided that those restrictions “do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.”\footnote{See, inter alia, case C-280/93 – Germany v. Council at 78 and case law cited therein; case C-112/00 – Schmidberger at 80. However, case law has also shown that a right can be deprived of much of its economic significance without there being an encroachment upon its essence, particularly in relation to the right to property – see Tridimas 2006 at 317 ff. See also in particular case 59/83 – Biovilac, at 21-22, where the applicant argued that certain measures adopted by the Commission amounted to unlawful expropriation because they reduced the profitability of its business to such an extent that it endangered its existence. The Court disagreed, holding that the measures did not deprive the applicant of its property or of the freedom to use it and therefore did not encroach on the substance of those rights, particularly where the detrimental effect at stake was merely an indirect consequence of a policy with aims of general public interest.} Specifically in relation to the general right to property, the CJEU has underlined that a “fair balance” should be struck between the interests of the individual right owner and the “demands of public interest,” taking into account the principle of proportionality.\footnote{See joined cases C-402-415/05 – Kadi, at 360.} Moreover, in \textit{Metronome Musik}, a case concerning the rental right, the CJEU has likewise stressed that certain fundamental rights akin to copyright, such as the right to property and the right to pursue a trade or profession, must be viewed in relation to their social function.\footnote{Case C-200/96 – Metronome Musik at 21.} This is also in line with the goals and rationales of copyright, which, independently of the theory endorsed, entail consideration for the social function of copyright and account of other general interests.\footnote{See chapter 1 section 1.1.1. See also Geiger 2010 at 539.} The Court has also ruled specifically on Article 17 paragraph 2, observing that the right to
intellectual property is not absolute and must be seen against the protection of other fundamental rights. \footnote{See e.g. case C-70/10 – Scarlet Extended at 43-45. In an earlier decision, in case C-275/06 – Promusicae, at 61-68, the CJEU had already hinted that the right to property, including intellectual property, should be balanced with other fundamental rights “protected by the Community legal order.”}

Third, the preparatory documents of the Charter point to that direction as well, by stating that “the guarantees laid down in paragraph 1 [of Article 17] shall apply as appropriate to intellectual property.” \footnote{Note from the Praesidium on the Draft Charter of Fundamental Rights (2000) at 20.} The “guarantees” of Article 17 paragraph 1 relate to the conditions under which one may be deprived of the right to property: in the public interest; according to conditions provided for by law; and subject to payment of fair compensation. In other words, paragraph 1 of the provision prescribes a balance between the right to property and other interests that is applicable to paragraph 2 as well. \footnote{Geiger 2009a at 116; Griffiths & McDonagh 2013 at 80.}

Fourth, the different drafting of paragraphs 1 and 2 of Article 17 does not necessarily have to do with the specific character of intellectual property vis-à-vis “normal” property. That different drafting can be attributed to the distinction between rights and principles. The Charter diverges from other instruments that set forth “rights and freedoms”– such as the ECHR or the Universal Declaration of Human Rights (UDHR). It adds a third element: “principles.” The difference between rights and principles is that the former are subjective rights that can be directly invoked by individuals in Courts, while principles define a goal to be achieved by the legislature. \footnote{Piris 2010 at 153; Schütze 2012 at 425-426; de Vries 2012 at 21.} Principles are thus more general and have to be concretized by legislation. \footnote{Piris 2010 at 154; Schütze 2012 at 426.} However, the Charter does not indicate which provisions concern rights and which concern principles. The same article can even contain both. \footnote{Piris 2010 at 154.} Hence, it is the way in which the provisions are drafted that indicates whether they contain rights or principles – usually, rights have a subject (“Everyone has the right to…”), while principles do not (“The Union recognizes the right to…”). \footnote{Piris 2010 at 154.} That difference seems to show in Article 17: paragraph 1 lays down the right to property as “everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions (…)”; conversely, paragraph 2 merely puts forth a statement – “intellectual property shall be protected” – that resembles a principle with no specific subject.

Apart from explaining the different drafting of paragraph 1 and 2 of Article 17, this difference between the general right to property and the principle of intellectual property protection has implications to copyright lawmaking. Principles are by nature more abstract and can bear more limitations than subjective rights. This
seems to weaken, rather than strengthen, the case for an upwards harmonization of copyright in terms of a benchmarking exercise.

The interpretation of the Charter as explained above shows that the promotion of respect for fundamental rights as an objective of the EU contributes to a normative basis in copyright lawmaking in two ways. First, there needs to be a balance of the right to property and the protection of intellectual property with other fundamental rights. The latter include, for example, the freedom of expression and information (Article 11 of the Charter), the freedom of the arts and sciences (Article 13), the right to education (Article 14) or the protection of the consumer (Article 38). Reaching a balance between these conflicting fundamental rights is a task of the legislator."429 Second, apart from having a balance between the right to property and other individual rights, it is also necessary to reach such a balance between that right and the general public interest. Both balancing exercises yield a vision of copyright as a non-absolute right, which in turn befits copyright’s goals and their consideration for copyright’s social function. Importantly, the realization of such balancing exercises is made possible through the application of the principle of proportionality, which should be used as a tool to weigh the different interests at stake.

B. THE RULE OF LAW

Just as the respect for fundamental rights, the rule of law as a value of the EU acquired a new dimension with the promotion of EU’s values being now an objective of the Union. Nevertheless, in a decision of 1986 (Les Verts), the CJEU had already stressed that the EEC was a “Community based on the rule of law.”430 The reference to the rule of law in that case was made to justify that the Court could review the legality of measures adopted by EU institutions – therefore, in a context of justiciability rather than defining the rule of law as an overarching value or principle. Still, the Court underlined the need for the acts of the EU institutions to be in line with “the basic constitutional charter, the Treaty,”431 which already implied back then that the rule of law bore a constitutional compass. This in turn relates to the principle of constitutional legality, under which the EU institutions must act in accordance with the Treaties.

429 Geiger 2009b at 38.
430 See case 294/83 – Les Verts, paragraph 23: “(…) the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.”
431 Ibid.
To be sure, the precise meaning and scope of the rule of law are contested. 432 Formal or “thin” conceptions of the rule of law are usually opposed to substantive or “thick” ones. The former define the rule of law as the need to comply with procedural requirements – under this view, the rule of law is a yardstick to evaluate whether a given measure is in line with certain formal precepts. By contrast, “thick” conceptions construe the rule of law as a standard by which the contents of the measure shall abide, which means that, according to these theories, the rule of law evaluates the subject matter of legal measures.

It has been pointed out that, in the EU legal order, the rule of law is a “multifaceted principle”, thereby including both formal components – such as the principle of judicial review - and substantive components – such as the obligation of the EU to respect substantive elements like fundamental rights. 433 The CJEU seems to endorse this view by linking the rule of law to the need of the acts of EU institutions being in conformity with the Treaty. 434

The rule of law comes thus to emphasize that the EU legislative power must conform to the Treaties. One of the consequences of this obligation to act in accordance with the law is the imposition of legal limits on lawmaking power. 435 Because the EU is now bound by the objective of promoting a compliance with the rule of law, it must make sure that EU legislation is in accordance with the Treaties and the rules contained therein – be it with its norms on division of competences or with the provisions related to the respect for fundamental rights, for example. Seen from this perspective, the rule of law not only justifies but also mandates that normative content based on the Treaties be infused in EU secondary legislation.

4.4.3. RESPECT CULTURAL DIVERSITY

The objective of respecting cultural diversity is enshrined in the last indent of Article 3 paragraph 3 TEU, which reads: “[The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.” There is no “cultural competence” proper in the Treaties, in the sense that the EU does not have competence to harmonize national laws in the area of culture, according to Article 167 paragraph 5 TFEU. 436 The

432 See, for a thorough description of the different views, Craig 1997. See also Walker 2009 at 119; Tamanaha 2009 at 3; Beatty 2009 at 99 ff; Chesterman 2008 at 332 ff.
433 Pech 2010 at 369-371. Holding that in general and for the most part the substantive and formal conceptions of the rule of law are complementary, Waldron 2008 at 6-9.
434 "Les Verts" at 23.
436 Article 167 TFEU paragraph 5 TFEU: “In order to contribute to the achievement of the objectives referred to in this Article: — the European Parliament and the Council, acting in accordance with the
cultural objective of Article 3 paragraph 3 TEU is concretized via Article 167 paragraph 4 TFEU, which clarifies that the obligation to take cultural aspects into account refers in particular to the respect and promotion of cultural diversity.\[^{437}\] This provision is also called the cross-sectional or policy-linking clause, and it has been argued that it establishes some sort of implicit cultural powers.\[^{438}\] This indeed constitutes the main argument to use the objective of respect for cultural diversity as an element in building a normative basis for copyright lawmaking. Furthermore, this view is supported by Article 13 TFEU, which states that the Union shall respect “cultural traditions and regional heritage” when formulating and implementing, inter alia, its internal market policies.\[^{439}\] Abidance by Article 167 paragraph 4 TFEU thus means that copyright legislation has to be compatible with the EU’s cultural objectives \[^{440–441}\]— namely that of cultural diversity.\[^{441}\]

A related question is what should be understood by “cultural diversity.” The definitions of culture and cultural diversity are absent from the Treaties. The concept of “culture” is vague and can arguably encompass all areas of EU policy.\[^{442}\] Article 167 paragraph 2 TFEU gives some context to that concept by referring to such expressions as “the culture and history of the European peoples”, “cultural heritage”, or, more significantly, “artistic and literary creation.” Taking in particular the “artistic and literary creation” as a reference, the notion of “culture” seems to come down to a variety of cultural expressions embedded in cultural services and goods. However, it is also a tenable theory that cultural expressions are often intertwined with regulatory aspects and become recognisable only through the latter,\[^{443}\] especially in fields that are strongly connected to cultural matters, as is the case with copyright law. For example, as mentioned in chapter 1, the differences

\[^{437}\] Article 167 paragraph 4 TFEU: “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”

\[^{438}\] Psychogiopoulou 2008 at 26.

\[^{439}\] Article 13 TFEU: “In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”


\[^{441}\] Psychogiopoulou 2008 at 57.

\[^{442}\] Shore 2001 at 114, referring to the Commission’s First Report on the Consideration of Cultural Aspects in the European Community Action (1996), where it is stated that “the entire European structure, the Treaties themselves and all the texts they have generated may be regarded as cultural expressions and works.”

\[^{443}\] Pykkönen 2012 at 545, 559. See also Gordon 2010 at 106, noting that differing national legal systems are one of the elements that have “some (often concealed) bearing” on the debate regarding the definition of culture.
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between the two main systems of copyright – the droit d’auteur system and the copyright system – also reflect differences in the cultures of the representative countries.444 This could support an understanding of culture that includes not only cultural expressions in the sense indicated above, but also the legal aspects of national systems.

Likewise, the definition of “cultural diversity” is far from clear. If “culture” is a rather obscure term, the concept of “diversity” can be open to different interpretations as well. It can be argued that Article 167 paragraph 1 TFEU implies that at least one dimension of cultural diversity is linked to Member States sovereignty, since it refers expressly to the cultures of the Member States. Respect for cultural diversity would, from this perspective, amount to respecting the national cultures of the Member States. Another argument to support this view is that the objective of respecting cultural diversity most probably derives from the previous Article 6 paragraph 3 of the EC Treaty, which stated that “[T]he Union shall respect the national identities of its Member States.” The respect for cultural diversity could thus be interpreted as including the protection of national regional cultural diversity.445

It can be pointed out that this view of cultural diversity seems to contradict harmonization aims. But Article 167 paragraph 1 TFEU accepts such contradiction by mandating the EU to respect the national and regional cultural diversity of the Member States, while at the same time “bringing the common cultural heritage to the fore.”446 It is of course not self-evident how it is possible to conciliate cultural diversity with a promotion of common heritage.447 It is also unclear how aims of respecting cultural diversity can coexist with integration goals such as the establishment of an internal market. Still, in its Communication on a European Agenda for Culture in a Globalizing World (2007), the Commission suggests that a conciliation of diversity and commonality is possible by nurturing cultural diversity needs while promoting exchange between the different cultures and the access of citizens to cultural works.448 One of the ways that this can probably be achieved is through the promotion of the free movement of goods (which enhances the

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444 Chapter 1 section 1.1.2.
445 De Vries 2006 at 23.
446 Article 167 paragraph 1 TFEU: “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.”
447 As noted also by Shore 2001 at 114.
448 See Communication at 8: “In order to simultaneously bring our common heritage to the fore and recognise the contribution of all cultures present in our societies, cultural diversity needs to be nurtured in a context of openness and exchanges between different cultures. As we live in increasingly multicultural societies, we need therefore to promote intercultural dialogue and intercultural competences. These are also essential in the context of a global economy with regard to enhancing the employability, adaptability and mobility of artists and workers in the cultural sector as well as the mobility of works of art. As citizens are among the main beneficiaries of developing cultural diversity, we need to facilitate their access to culture and cultural works.”
availability of foreign goods), or through a strict abidance by the principle of non-discrimination, which in itself presupposes the acceptance of diversity.449

Another interpretation of the term “cultural diversity” is given by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), to which the EU is a party. The Convention states in its Article 4 paragraph 1: “cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.”[emphasis added] This definition implies that cultural diversity relates to authors (“artistic creation”), industry (“distribution”) and users (“enjoyment”) alike. In this context, the respect for cultural diversity seems to entail the consideration of all these three actors.

It is therefore defensible that the respect for cultural diversity concerns two separate dimensions. First, this objective of the EU refers to the relation between the Union and its Member States, mandating the former to take national cultures into account, namely in the framework of its harmonization program. Second, the respect for cultural diversity can also be taken to the level of the concerned stakeholders, in which case it requires a fair balance of their interests in EU legislation.

4.5. Principles underlying the competence system

This section examines the principles that underlie the competence system, which operationalize the powers granted to the EU: the principle of conferral (4.5.1.); the principle of subsidiarity (4.5.2.); and the principle of proportionality (4.5.3.).

4.5.1. CONFERRAL

According to the current version of Article 5 paragraph 2 TEU, the principle of conferral implies that the Union is bound by its objectives and by the powers bestowed upon it by the Treaties.450 This means that the Union does not have sovereignty or lawmaking competence per se, as its powers have been endowed to it by the Member States.451 It also means that the EU only has legitimacy to act in order to achieve one of its objectives.

450 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.”
Under the principle of conferral, the Union must indicate the legal basis upon which it is acting, since its competence in a particular area should derive from specific Treaty provisions. If there is the indication of a legal basis for an act, there is a guarantee that in principle the EU is not overstretcing its competence. Likewise, as the EU can only act to attain the objectives set in the Treaties, the EU legislator should also indicate which concrete objective it intends to achieve with a given measure.

Since this research is aimed at infusing normative content into the main competence norm used in the field of copyright – Article 114 TFEU –, the principle of conferral is instrumental to trigger the application of that provision in the first place. The EU should thus be deemed competent to harmonize national copyright laws only where differences between those laws hinder the internal market. Because copyright is absent from the Treaties, the principle of conferral requires the EU legislator to explain how harmonizing national copyright laws, or specific aspects thereof, addresses internal market aims.

It should be recalled that, for a legislative measure to be validly based on Article 114 TFEU, it must have as a genuine goal the establishment or functioning of the internal market, which will be the case where obstacles to free movement exist or are likely to occur, and the measure in question is designed to prevent them. According to the CJEU, future obstacles might arise if Member States have taken, or are about to take, divergent measures establishing different levels of protection that hinder cross-border trade. This “likelihood” is rather hard to define and consequently very difficult to police, but following the Court’s reasoning such will be the case where the potential ability of future obstacles to hinder trade is documented in an impact assessment following a public consultation. Moreover, even in cases where Member States have, or are about to have, divergent laws, the requirement that the internal market be a genuine goal entails a causal relation between the divergent national laws and the hindrance to cross-border trade, since a mere finding of disparities is not enough to justify recourse to Article 114 TFEU. As a result, it must be actually and objectively apparent from the measure that its aim is indeed the establishment or functioning of the internal market.

452 Weatherill 1995 at 49 ff. See also case C-325/91 – France v. Commission at 26 and case C-370/07 – Commission v. Council at 46.
454 Tobacco Advertising I at 84-86; case C-377/98 – Netherlands v. Parliament and Council at 15; joined cases C-154-155/04 – Alliance for National Health at 29; Case C-217/04 – United Kingdom v. Parliament and Council at 60-62; Case C-301/06 – Data Retention at 64. See also Slot 2002 at 9 and Weatherill 2010 at 434.
455 See case C-380/03 - Tobacco Advertising II at 41; joined cases C-154-155/04 – Alliance for Natural Health at 29 and 32.
456 Weatherill 2010 at 434.
457 See case C-58/08 – Vodafone at 45.
458 See Tobacco Advertising I at 84 and joined cases 154-155/04 – Alliance for Natural Health at 28.
threshold established for harmonization under Article 114 is thus a genuine link between the aim and content of the measure, on the one hand, and the establishment of an internal market, on the other.

It is also important to note that, according to the CJEU, obstacles to cross-border trade are not the only factors that might impede the building of an internal market. National laws that cause distortions of competition also fall under Article 114 TFEU. In order to come under Article 114 TFEU, the distortion of competition must be “appreciable,” as opposed to remote and indirect. There is no objective criteria to assess how much distortion is appreciable, but the CJEU considered, for example, that differences of costs in production, operation or wholesale provision of cross-border services may give rise to appreciable distortions of competition.

However, since copyright touches upon fields other than trade and competition – notably, culture – it could also be argued that harmonizing copyright laws might entail more than one power of the EU. If so, the EU legislator could in theory base copyright legislation in other provisions of the Treaty, together with Article 114 TFEU. Such overlap of legal bases could render part of the benchmarking exercise dispensable, if the legal bases combined had the effect of providing normative guidance to copyright legislation.

That does not seem to be the case, though. In Opinion 2/2000, the CJEU clarified that a single basis is preferable to multiple ones – should there be two or more legal bases, that fact must be justified (namely, the different objectives must be equally important and they must be inseparably linked). In all other situations, the CJEU has solved the problem of potential multiple legal bases by resorting to the “centre of gravity” theory, which requires searching for the legal basis that has a more predominant role. The choice of a correct legal basis must be made in accordance to objective factors that are amenable to judicial review, which include, in particular, the aim and content of the measure. Therefore, to find out which legal basis has a predominant role, one should look into the content and objectives of the

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460 See case C-300/89 – Titanium Dioxide at 15 and 23; Tobacco Advertising I at 95 and 106; case C-301/06 – Data Retention at 63. See also Weatherill 2010 at 433 ff.

461 Tobacco Advertising I at 106 and 109.

462 Tobacco Advertising I at 109.

463 Data Retention at 36 and 68.

464 Vodafone at 47.


466 See Opinion 2/2000 at 23.

467 See inter alia case C-42/97 - Parliament v. Council, at 39 and 40 and case C-491/01 – British American Tobacco at 94.

legal act in question. Usually, the aim or objective of a measure is found in its preamble, while the content can be drawn from its substantive provisions.\textsuperscript{469}

It follows that, most probably, the harmonization of national copyright laws will continue to have as its main legal basis Article 114 TFEU, not least because the possibility to harmonize national laws with cultural aims is expressly outlawed by Article 167 paragraph 5 TFEU. As a consequence, the aspects of national copyright laws to be harmonized must constitute barriers to cross border trade and the harmonizing measure must have as its aim the establishment or functioning of the internal market, in the terms explained above. The lack of normative content derived from the functional character of Article 114 TFEU is therefore not addressed by an accumulation of legal bases permitted by the principle of conferral. Still, abidance by the principle of conferral ensures that Article 114 TFEU is the appropriate legal basis to harmonize copyright laws, which constitutes the necessary starting point to the supply of normative content to EU copyright legislation.

It is also noteworthy that the competence to harmonize national laws for the establishment or functioning of the internal market is a shared competence between the EU and its Member States, according to Article 4 paragraph 2 (a) TFEU. This has been clarified by the Treaty of Lisbon, whose Article 2 TFEU defines for the first time the meaning of exclusive, shared and supporting competences of the Union. That meaning is further explained by Protocol No. 25 to the Treaties on the exercise of shared competence and by Declaration 18 in relation to the delimitation of competences, annexed to the Treaties. From these provisions combined it is possible to outline the role of the EU, on the one hand, and of the Member States, on the other, regarding the three types of competences. In the areas where the Union has exclusive competence, only the Union is afforded legislative power.\textsuperscript{470} In the areas where that competence is shared, both the EU and the Member States may act, even though the exercise of competence by the EU pre-empts that of the Member States.\textsuperscript{471} Protocol No 25 to the Treaties on the exercise of shared competence further states that the scope of such exercise only covers the elements governed by the specific act in question and not the whole area to which that act relates.\textsuperscript{472}

\textsuperscript{469} St Clair Bradley 2011 at 91-92.

\textsuperscript{470} Article 2 paragraph 1 TFEU: “When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”

\textsuperscript{471} Article 2 paragraph 2 TFEU: “When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.” In similar terms, see Declaration 18 attached to the Treaties in relation to the delimitation of competences.

\textsuperscript{472} Protocol No. 25 to the Treaties, sole Article: “With reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a
Finally, in the areas where the EU has supporting competences, only actions to support, coordinate or supplement the actions of the Member States are possible. The Union can still adopt legislative acts – it just cannot supersede Member States’ competence, nor can it harmonise their laws.\footnote{Article 2 paragraph 5 TFEU: “In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States’ laws or regulations.”}

This classification is especially relevant because the qualification of a competence as shared – as is the case with the internal market - activates the application of the principle of subsidiarity. As will be seen in more detail in the next section, this principle requires that, in order to have legitimacy to act, the EU is in a better position than its Member States to achieve the objectives of a proposed action. For that purpose, the EU must demonstrate the benefits of a given measure, which in turn might have a positive effect on the quality of legislation, while at the same time ensuring that Member States’ regulatory space is respected.

\subsection*{4.5.2. SUBSIDIARITY}

Paragraph 3 of current Article 5 TEU clarifies the scope of the principle of subsidiarity – in areas which do not fall under its exclusive competence, the EU shall only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can be better achieved at the EU level.\footnote{Article 5 paragraph 3 TEU: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.”} Thus, should the Union have competence to harmonize copyright according to the principle of conferral – notably, because elements of different national copyright laws are an obstacle to the internal market -, the principle of subsidiarity further requires the Union to demonstrate that the internal market objective is better achieved at the EU level as compared to that of Member States’.

According to Article 5 paragraph 3 TEU, the principle of subsidiarity entails two cumulative conditions: (1) the objectives of the proposed action cannot be sufficiently achieved by Member States\footnote{The “sufficient attainment test”, see Horspool & Humphreys 2006, at 100-101.} and (2) they can be better achieved by the EU. There must thus be an efficiency gain to the EU’s intervention, but that certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.”
gain must also be above a certain minimum level – this qualification of the gain is apparent from the expression “cannot be sufficiently achieved”. In other words, it is not enough that there are some benefits to EU action; the benefits must also clearly outweigh the ones of Member States’ action.

This requires the EU to justify the need for harmonization measures, which can be an advantage in terms of rationalization of legislative intervention. It can of course be argued that the requirement to explain the benefits of legislative intervention is quite subjective and therefore largely dependent on discretionary powers. On the other hand, however, subsidiarity should require the Union to carry out impact studies and broad consultations. This provides the EU legislator with preliminary evidence of efficiency gains connected to its actions in terms of the building of an internal market. The data provided by such studies can be an important guidance for the EU legislator regarding the contents of the specific measure, and can even give a more precise account of the cultural diversity that the EU is obliged to respect. Moreover, the obligation to demonstrate the advantages of EU legislation and the rationalization of legislative intervention derived therefrom helps to clarify the competence divide between the EU and its Member States. Thus, not only does it contribute to the legitimization of EU legislation, but it also facilitates the respect for Member States’ regulatory power.

The Treaty of Lisbon tried to decrease the discretionary powers of the EU in the framework of subsidiarity by allowing national parliaments to perform ex ante checks. This early-warning system is set out in Protocol No.2 to the Treaties on the application of the principles of subsidiarity and proportionality. The system consists of two procedures: under the “yellow card” procedure, national parliaments may issue reasoned opinions whereby they contest the compliance of a European legislative draft with the principle of subsidiarity, which may, if a certain threshold of votes allocated to national parliaments is met, oblige the institution concerned to review the act and to justify its final decision. The Protocol also has an “orange card” procedure, under which a majority of the votes allocated to national parliaments may cause a legislative proposal to be rejected, if 55% of the members of the Council or a majority vote in the European Parliament find that the proposal does not comply with the principle of subsidiarity.

476 Barber 2005 at 311-312.
477 Ibid.
478 Article 2 of Protocol No. 2 to the Treaties on the application of the principles of subsidiarity and proportionality.
479 There is also an ex post supervision, to be performed by the CJEU (Article 8 of the Protocol). However, that procedure is hardly innovative, as it should take place under the general rule of Article 263 TFEU, concerning the review of legality of legislative acts. In that sense it is a legal, rather than political, mechanism of control.
480 See Articles 6 and 7 paragraph 2 of Protocol No. 2.
481 See Article 7 paragraph 3 of Protocol No. 2.
4. MINDING THE NORMATIVE GAP: THE EU TREATIES

The efficiency of this participation of national parliaments, and the impact it may have on decreasing the EU’s discretionary assessment of subsidiarity, will probably depend on the willingness of national parliaments to deal efficiently with these issues – for example, one foreseeable problem might be the difficulty in performing an assessment of the principle of subsidiarity separately from an evaluation of the content of legislative proposals. Nevertheless, it should be kept in mind that this subsidiarity check has a strong political focus. That fact alone might cause the EU to carefully rationalize its legislative acts. The “yellow card” procedure, in particular, by obliging the EU to review its legislative proposals, might be an important tool to increase the quality of legislation (for example, by leading the EU to formulate alternative solutions to better meet the aim of establishing an internal market).

4.5.3. PROPORTIONALITY

Unlike the principle of subsidiarity, the principle of proportionality, posited in current Article 5 paragraph 4 TEU, shall also apply where the EU has exclusive competence. Since this principle is to be applied whenever the EU is competent to act – either because it has exclusive competence or because it was deemed competent after consideration of the principle of subsidiarity –, it has been pointed out that it complements subsidiarity by taking it one step further, as it provides a criterion to measure the intensity of actions taken by the Union.

The principle of proportionality requires the evaluation of three factors: the suitability of the measure for the attainment of the objective; the necessity of the measure; and the proportionality of it vis-à-vis the restrictions that might be thereby involved, or proportionality stricto sensu. A measure will be deemed suitable if there is a causal relationship between it and the objective pursued, that is, if it is appropriate to achieve that objective. This amounts to a “negative test”, in the sense that the suitability step should mainly serve to cut out unsuitable means to achieve the legislative goal. The necessity test will on the other hand presuppose the use of the least restrictive alternative (considering that both measures are equally effective). As to proportionality stricto sensu, it will generally require a balancing of interests that takes into account their respective nature – i.e., this last step entails

482 See Craig 2010 at 47-48 and Louis 2008 at 442 ff.
483 Michel 2007 at 910.
484 Article 5 paragraph 4 TEU: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.(…)’’
485 Emiliou 1996 at 140.
486 See inter alia case C-331/88 – Fedesa at 13 and case C-210/00 – Käserei Champignon Hofmeister at 59-67. For a detailed explanation of the factors, see Groussot 2006 at 146-152; Jans 2000 at 240 ff and references therein; Tridimas 2006 at 139 ff.
487 Alexy 2010 at 398.
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an assessment of whether the burden imposed on other interests is excessive in relation to the aim of the legislative measure.488

It should be pointed out, however, that this principle is applicable not only in the realm of EU’s legislative action, but that it also serves to evaluate (and challenge) national measures when they concern EU law.489 The principle of proportionality can therefore be used to evaluate both EU measures and national measures. Throughout its case law, the CJEU does not apply the three-pronged test consistently and, especially in cases involving challenges to EU measures, it often uses a two-step test comprised of the first two elements (suitability and necessity).490 This difference in the evaluation of the principle of proportionality might be explained by the fact that the Court is not willing to review the policy choices of the EU legislator, in as much as that would not respect the separation of powers between the judiciary and the legislature.491

However, for the purposes of applying the principle when drafting copyright legislation, going through the three-step test described above can indeed be a better solution. The field of copyright is characterized by a constant tension between the interests of authors/performers, users, creative industries and intermediaries. Moreover, since the competence used to harmonize copyright laws is a shared one, a balance must also be struck between EU competence and Member States sovereignty. The use of the third step of the proportionality test, which is directed specifically at weighing different interests against one another, is therefore advisable when it comes to harmonizing national copyright laws.

If a proportionality test is employed when drafting harmonizing measures in the field of copyright, the EU legislator should first evaluate the adequateness of the legislation harmonizing copyright in relation to the objectives it wishes to attain.

Secondly, the EU legislator must ponder other options that are equally effective and less restrictive. This necessity test, it is submitted, should consider both the procedural and the substantive aspects of a measure when evaluating its level of restrictiveness. The procedural aspect concerns the division of competences between the EU and the Member States. The legislator should thus examine the extent to which a given measure encroaches upon Member States’ sovereignty. An example of a procedurally less restrictive measure is the mechanism of mutual recognition, by way of which Member States mutually recognize each other’s rules as being valid. This allows for an acknowledgement of national diversity and of the different interests involved.492 The substantive aspects, on the other hand, relate to the different interests involved in the EU measure itself – e.g., right holders and users of copyrighted works. An example of a substantively less restrictive measure

488 See Jans 2000 at 240 ff; Groussot 2006 at 146 ff; de Búrca 1993 at 113 ff; Craig & de Búrca 2003 at 372.
489 Craig & de Búrca 2003 at 372.
490 Groussot 2006 at 152-153 and case law cited therein; Craig 2012 at 590-604.
491 Groussot 2006 at 156 ff.
492 Héritier 2007 at 801.
is the introduction of a remuneration right granted to authors, instead of an exclusive right.

The last step of the proportionality test consists of balancing the different interests at stake. For example, the EU legislator should weigh the protectionism of a legislative measure against the restrictions that it might entail for the interests of other stakeholders (namely, users). This might be done in a myriad of ways. E.g., the EU legislator might counterbalance the effects of rules protecting right holders’ interests by introducing other rules that protect the interests of users, which can be done by creating a well-devised system of exceptions or limitations to the exclusive rights.

4.6. Conclusion

Some conclusions may be drawn from the analysis of the norms and principles of the Treaties as seen against the historical development of the EU. In particular, the relevant framework where the competences of the EU operate today is the result of an evolution of its values and objectives, on the one hand, and of certain principles, on the other hand.

The evolution of the EU from a pure economic entity to one that encompasses both economic and non-economic elements ought to be mirrored on the normative basis for copyright lawmaking. Namely, the objectives of establishing an internal market, promoting the respect for human rights and respecting the cultural diversity of Member States, which stand in equal footing in the scheme of the Treaties, should also be weighed in equally to the extent possible. In other words, since the EU goes now beyond the economic dimension, the normative content of Article 114 TFEU should also be devised in an integrated fashion, reflecting a balance between economic and non-economic components. This is also derived from the current conception of the internal market as an objective that must be integrated with other EU policies.

Specifically, benchmarks of legislative activity ought to take into account a fair balance between the different, often opposing, fundamental rights that can be involved in copyright legislation. Furthermore, the benchmarking exercise should be carried out bearing in mind that the position of the interests protected by copyright legislation must be considered vis-à-vis the general public interest.

Another element to be factored into the benchmarking exercise is the goal of respecting cultural diversity in its two dimensions: the regard for Member States cultures, both in the sense of cultural expressions and legal cultures; and the inclusion of the interests of different actors (namely, creators, industries and users) in copyright legislation.

The selection of these elements to be part of a normative basis from which benchmarks of legislative activity are derived runs parallel to the employment of certain principles that underlie the competence system. These principles mainly
provide some guidelines for the use of the EU’s competence, but also for the establishment and application of benchmarks of legislative activity. Among the analysed principles, the principle of proportionality plays a pivotal role. The elements described above encompass a balance between the different interests and/or rights involved, which can be achieved through the application of the principle of proportionality. This principle should serve as a backdrop for the design of benchmarks for copyright lawmaking, but also as a compass of balance between the benchmarks thus created. In other words, the principle of proportionality should be used not only for the establishment of benchmarks, but also in the application of said benchmarks to the drafting of copyright legislation.

Taking one step back from the building of a normative basis for copyright lawmaking, it should also be recalled that the observations above are valid considering that the competence norm in question – Article 114 TFEU – is an appropriate legal basis to begin with, following the principle of conferral and the case law of the CJEU with regard to the scope of Article 114 TFEU. Moreover, since the competence in question is shared with the Member States, a subsidiarity assessment should also be performed before the legitimacy of action by the EU is ensured.
5. Bridging the normative gap: proposed benchmarks for copyright lawmaking

5.1. Introduction

The directives in the field of copyright have so far been largely based on internal market needs, following the competence norm of Article 114 TFEU (ex Article 95 EC Treaty).\(^493\) There is no reason to believe that this will change - even the new Article 118 TFEU, allowing for the creation of a unitary copyright title, grants the EU competence to do so “in the context of the establishment and functioning of the internal market.” At the EU level, then, the establishment and functioning of the internal market will likely still be the main goal underlying legislative intervention in the field of copyright.

As explained throughout this book, the problem with the internal market competence is its thin normative value. Chapter 2 has demonstrated the extent of this problem by showing the panoply of goals – some not internal-market related at all - that Article 114 TFEU enabled the legislature to pursue. Infusing normative content into this type of functional competence should generate legislative measures that are at the same time closer to the rationales of the regulated subject and more aligned with the spirit of EU integration.

This chapter defines what that substantive content ought to be and what it means for the field of copyright. The definition of the adequate normative content is made taking into account the findings from chapters 3 and 4 together. The case law of the CJEU and the norms of the Treaties form therefore a normative basis for copyright lawmaking. The benchmarks are derived from such normative basis and represent a yardstick that should be met by the EU legislator.

\(^{493}\) See current Article 114 paragraph 1 TFEU, formerly Article 95 paragraph 1 EC Treaty: “Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”
Section 5.2. describes the specific methodology followed to establish benchmarks for copyright lawmaking, while the subsequent sections elaborate on each of those benchmarks: the harmonization of national laws (5.3.), the respect for national cultures and traditions (5.4.); the protection of creators (5.5.); the protection of end users (5.6.); and the promotion of competitiveness of EU industries (5.7.).

5.2. Specific methodology

The benchmarks of legislative activity are established following a content analysis technique. In the case of this chapter, the data analysed are the findings of chapters 3 and 4, which form a normative basis comprised of primary law and the case law of the CJEU.

In chapter 3, I drew conclusions from the case law of the CJEU that concerned the clash between national copyright laws and the norms of the Treaties, and how the principle of proportionality plays a key role in that regard. Namely, it results from the CJEU rulings that, while copyright requires in particular the protection of the moral and economic rights of creators, other interests have to be considered as well. Moreover, chapter 3 demonstrated that the principle of non-discrimination is also central to the conciliation of copyright with EU principles, with the consequence that copyright legislation must abide by it.

In chapter 4, I picked out specific provisions of the Treaties that contain features linked to competence matters: the objectives of the EU and the principles that underlie the competence system. I concluded inter alia that the objectives of establishing an internal market, promoting the respect for fundamental rights and respecting cultural diversity, each already presupposing a balance of interests and/or rights, should also be reflected equally in copyright legislation to the extent possible. This is again done by resorting to the principle of proportionality, which should be used both to design benchmarks of legislative activity and to achieve a balance between them.

The abovementioned aspects of chapters 3 and 4 are those chapters’ main components, which should therefore be part of a suggested normative basis. Such components are summarized in the following table (in the order that they were mentioned in the conclusions of chapters 3 and 4):

<table>
<thead>
<tr>
<th>NORMATIVE BASIS</th>
<th>CHAPTER 3</th>
<th>CHAPTER 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principle of proportionality</td>
<td>Establishment of internal market</td>
<td></td>
</tr>
<tr>
<td>Protection of moral and economic rights of creators</td>
<td>Respect for fundamental rights</td>
<td></td>
</tr>
<tr>
<td>Consideration of other interests</td>
<td>Respect for cultural diversity</td>
<td></td>
</tr>
<tr>
<td>Non-discrimination</td>
<td>Principle of proportionality</td>
<td></td>
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</tbody>
</table>

*Table 5.1.*
After enumerating the main components from the conclusions of chapters 3 and 4, the next step is the creation of clusters from such components, as a way to systematize the information. In other words, I aggregated the components that are similar or interrelated under one common concept. The aim of this methodological step is to funnel interconnected elements into a common cluster or concept, in order to avoid repetition when creating the benchmarks. I grouped the totality of components from Table 5.1. above and then divided them into the following clusters:

<table>
<thead>
<tr>
<th>NORMATIVE BASIS</th>
<th>CLUSTERS</th>
<th>COMPONENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1: Balance of private interests</td>
<td>Principle of proportionality</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Protection of moral and economic rights of creators</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Consideration of other interests</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Respect for fundamental rights</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Respect for cultural diversity</td>
</tr>
<tr>
<td></td>
<td>2: Constitutional balance</td>
<td>Establishment of internal market</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Respect for cultural diversity</td>
</tr>
<tr>
<td></td>
<td>3: Non-discrimination</td>
<td>Non-discrimination</td>
</tr>
</tbody>
</table>

I named cluster 1 “balance of private interests” because all the components of this group relate to some or all the different stakeholders in copyright (i.e., creators, industries and users). All the components grouped in cluster 1 stand either for a particular interest (e.g., the protection of moral and economic rights of creators), or for a balance between different interests (such as, for instance, the respect for cultural diversity in its dimension of inclusion of the interests of different actors). Cluster 2 refers to the constitutional balance between the EU and its Member States, where the former aims at establishing an internal market, while the latter want to preserve their cultural identity and national traditions. Cluster 3 is self-standing and refers to the principle of non-discrimination.

From these clusters, it is possible to conceptualize data and inductively create categories that reflect these notions. In fact, the three clusters summarize all of the findings of chapters 3 and 4, which constitute the normative basis for copyright lawmakering; however, the clusters in itself cannot serve as benchmarks of legislative activity due to their abstract nature. The next step is therefore to extract the final benchmarks from the three clusters explained above.

Clusters 1 and 2, on the balance of private interests and constitutional balance respectively, aggregate the majority of components and can be translated into individual benchmarks, each embodying one particular interest to be balanced. To represent an adequate balance of interests, then, the interests of creators, industry and users, on the one hand, and of Member States and the EU, on the other, should be converted into separate benchmarks, as illustrated in the figure below:
In other words, the benchmarks for copyright lawmaking should somehow reflect the position and the interests of: the EU; the Member States; the creators; the users; and the industry. The next question is how those interests ought to be framed in the benchmarking exercise. This is done by combining the three clusters and the elements comprised therein.

The benchmark concerning the EU is framed as “harmonization of national laws.” This conceptualization flows from clusters 2 and 3. In what concerns non-discrimination (cluster 3), chapter 3 explained that it amounts to the equal treatment of foreigners and nationals. A way to achieve that equal treatment and to prevent discrimination might be through the harmonization of national laws, which is in turn also linked to an element of cluster 2 (establishment of an internal market). By creating a level playing field, harmonization prevents discrimination. In that sense, the prohibition of discrimination is a fundamental component of the free movement of goods and services,\textsuperscript{494} and consequently of the internal market and of harmonization based thereon.

The benchmark relating to the Member States is concretized as “respect for national cultures and traditions,” and also derives from clusters 2 and 3. The application of the principle of non-discrimination (cluster 3) outside of a harmonized framework requires the acceptance of diversity.\textsuperscript{495} I therefore considered this view of the principle of non-discrimination to be connected to the benchmark relating to Member States and their diversity. The definition of this benchmark finds additional support in the element of cluster 2 regarding the respect for cultural diversity, in its dimension concerning Member States’ cultures.

\textsuperscript{494} See Tridimas 2006 at 60.
\textsuperscript{495} See von Bogdandy 2008, at 248 ff.
The creators’ benchmark is conceptualized as “protection of creators” and it is extracted directly from one of the components of cluster 1 – the protection of moral and economic rights of creators.

The following benchmark, concerning users, is based on cluster 1 (balance of private interests), since users represent one of the interests at stake in copyright law. The framing of this benchmark, however, derives from one of the elements of cluster 2 – the establishment of an internal market. As explained in chapter 4, the notion of internal market entails integration of other policies of the EU, namely consumer protection (Articles 12 and 169 paragraph 2 (a) TFEU). I used that integrated notion of internal market, and the intuitive link between the concepts of end user and consumer, to conceptualize the users benchmark as “protection of end users.”

The same reasoning was used to conceptualize the industry benchmark. While the benchmark is based on cluster 1, as it represents one of the interests in the framework of copyright, I defined its particular contours by resorting to cluster 2 and to the integrated notion of internal market: first, the definition of internal market includes a system ensuring that competition is not distorted; second, one of the policies that should be integrated within the framework of internal market policies is the competitiveness of Union’s industry (Article 173 paragraph 3 TFEU). As a result, I conceptualized the industry benchmark as “promotion of competitiveness of EU industries.”

The further definition and rationalization of each individual benchmark is carried out in detail in each section, corresponding to the individual benchmarks, and backed up where relevant by other norms of the Treaties.

5.3. Harmonization of national laws

The harmonization of national laws as a benchmark finds its basis in the internal market as a policy goal of the EU. The internal market has been one of the most pursued policy goals in the field of copyright, and the main legal basis used by the EU legislator when harmonizing national copyright laws (see current Article 114 TFEU, former Article 95 EC Treaty). Article 26 paragraph 2 TFEU defines the internal market as comprising “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.”

When harmonizing national copyright laws with a basis in Article 114 TFEU, there is however a further requirement to be met: the legislative measure must actually harmonize national laws, or at least contribute to the implementation of other harmonizing measures. Article 114 paragraph 1 makes clear that the

496 See inter alia van Eechoud et al. 2009 at 13. See also case C-217/04 – United Kingdom v. Parliament and Council at 44.
making of an internal market implies the approximation of national laws. The approximation or harmonization of national laws, then, ought to be a mandatory benchmark, and the first one to be considered since it stems from the main competence norm itself.

The harmonization of national laws as a benchmark is moreover supported by the principle of non-discrimination. As a result, the benchmark of harmonization of national laws is also in accordance with the general prohibition of discrimination on grounds of nationality enshrined in Article 18 TFEU. It is true that harmonization is directed at preventing disparities between national laws, which are conceptually different from discrimination – while the latter concerns the unequal treatment of persons by one same law, the former derive from divergences between different laws. Still, discriminatory situations can be addressed by and/or justify the enactment of harmonizing measures, to the extent that the prohibition of discrimination is an element of the free movement of goods and services. An example of this premise can be seen in Phil Collins/EMI Electrola, which concerned the different conditions of protection of performers afforded by German Law, depending on whether the performer was a German national or a foreigner. Such discrimination on grounds of nationality – deemed inadmissible by the Court – was only possible in the absence of a harmonizing measure levelling the protection of performers across the EU. The connection between non-discrimination and the absence of obstacles to cross-border trade has also been expressly highlighted by the CJEU, which stated that the prohibition of quantitative restrictions on imports and all measures having equivalent effect, enshrined now in Article 34 TFEU, reflects the obligation to comply with the principle of non-discrimination.

Moreover, harmonization increases legal certainty, which is itself a general principle of EU law binding the legislature. The principle of legal certainty requires that “rules must enable those concerned to know precisely the extent of the obligations which they impose on them.” The knowledge of the law by those concerned – who, in the field of copyright, consist of industry, individual creators and users alike – can arguably be better furthered by a harmonized legal framework than by a fragmented ensemble of several national laws. The connection of harmonization to legal certainty was underlined by the EU legislator also in relation to copyright: in the Information Society Directive, it is stated that “a harmonized

497 Article 18 TFEU: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.”

498 Timmermans 2008 at 162.

499 See Tridimas 2006 at 60.

500 See case C-110/05 – Commission v. Italy at 34 and case C-108/09 – Ker-Optika at 48.


502 As put by the CJEU in case C-209/96 – UK v. Commission, at 35.
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legal framework on copyright and related rights, through increased legal certainty (...) will foster substantial investment in creativity and innovation (...)\textsuperscript{503}

A different question is what the harmonization of national laws as a benchmark entails. This benchmark involves, at the outset, an assessment of whether harmonization is needed in the first place. This particular element of the benchmark is connected to the principle of conferral, establishing that the EU is bound by the powers granted to it, which in this case are concretized in Article 114 TFEU as a legal basis for action.\textsuperscript{504}

There are several ways of determining whether there is a need for harmonization, the most important of which – an actual divergence of national laws – was elaborated upon by the CJEU. The Court has ruled that, for purposes of harmonization with internal market goals, it must be actually and objectively apparent from the measure that its aim is indeed an improvement of the internal market.\textsuperscript{505} The harmonization of national laws must thus be linked to the building of an internal market, it cannot be a mere “incidental effect” of EU’s action.\textsuperscript{506} This will be the case where the measure is aimed at removing obstacles to trade. However, as explained in chapter 4, it is not necessary for the obstacles to trade to be already in place. The CJEU opened the door to an \textit{ex ante} harmonization by stating that Article 114 TFEU can still be used to prevent future obstacles from arising, provided that they are likely to occur and the measure in question is designed to prevent them.\textsuperscript{507} According to the Court, future obstacles might arise if Member States have taken, or are about to take, divergent measures establishing different levels of protection that hinder cross-border trade.\textsuperscript{508} In other words, the Court has established that the likelihood of future obstacles is translated into relevant national measures being emergent.

The lower threshold of this benchmark is not therefore the existence of a majority of divergent national copyright laws that hinder cross-border trade. Preventive harmonization is allowed, to a certain extent. In order for this benchmark to be met, it is only necessary that such a scenario is imminent. For instance, one of the ways to conclude that preventive harmonization is permitted is if the future disparities capable of hindering cross-border trade are documented in

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\textsuperscript{503} Recital 4 of the Information Society Directive.
\textsuperscript{504} See in more detail chapter 4, section 4.5.1.
\textsuperscript{505} See joined cases C-465/00, C-138 and 139/01 – Österreichischer Rundfunk at 41; case C-380/03 – Tobacco Advertising II at 80; case C-217/04 – United Kingdom v. Parliament at 42.
\textsuperscript{507} Tobacco Advertising I at 86; case C-377/98 – Netherlands v. Parliament and Council at 15; joined cases C-154 and C-155/04 – Alliance for National Health at 29; Case C-217/04 – United Kingdom v. Parliament and Council at 60-62; Case C-301/06 – Data Retention at 64. See also Slot 2002 at 9 and Weatherill 2010 at 434.
\textsuperscript{508} See case C-380/03 - Tobacco Advertising II at 41; joined cases 154-155/04 – Alliance for Natural Health at 29-32.
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an impact assessment following a public consultation. Clearly, impact assessments are not substitutes for political decision-making. Yet, they are a tool to assess the existence and scope of the problem, on the one hand, and to discuss the available policy options, on the other, thereby supporting harmonization claims. Another possibility, not explored by the Court, is to consider that the “likelihood” might imply that the national legislative procedure must already be in motion – for example, because concrete legislative proposals have been presented. In both circumstances, a case could be made for the need to harmonize national laws, and consequently this benchmark would be fulfilled.

The need for harmonization will be clear where differences between national laws are in breach of Article 34 TFEU but are allowed to stand by virtue of Article 36 TFEU. These are the cases where the CJEU finds that national legislation constitutes an obstacle to cross-border trade (thus prohibited by Article 34 TFEU), but then holds that such legislation is admissible because it concerns an exception to the prohibition of obstacles to the free movement of goods under Article 36 TFEU. In these situations, the divergences between national laws are also well documented (by way of a court decision). As a result of this type of rulings, obstacles to trade are legitimately allowed to remain in place, thus sending a strong signal to the EU legislator that some harmonization measures are needed. An early example of this is the Commission Communication concerning the consequences of the judgement given by the Court of Justice on February 20, 1979 in Case 120/78 (Cassis de Dijon), from 3 October 1980. There, the Commission expressed the need to “tackle a whole body of commercial rules” of the Member States. It specified that harmonization should especially take place in situations where national law, still being an obstacle to trade, had been found admissible by the Court.

A second element of this benchmark concerns an assessment of whether the provisions of the directive at stake can actually achieve de facto harmonization. If the harmonization measure does not target existing national laws and/or if divergences arising from different national laws are not addressed, the directive will not be considered as approximating those laws. This will be the case, for example, where new rights, which did not previously exist at the national level, are

509 See case C-58/08 – Vodafone at 45. See also chapter 4 at 97 and Craig 2012 at 389.
510 Craig 2012 id.
511 Article 34 TFEU: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”
512 Article 36 TFEU: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”
513 See Communication at 2-3.
514 This is also referred to in the White Paper on Completing the Internal Market, at 66.
introduced.\textsuperscript{515} This type of situation adds an extra regulatory layer to the national systems, but it does not in itself harmonize existing laws. Where the supposedly harmonizing measure does not replace or modify national laws (or their effects), one cannot really talk about harmonization.\textsuperscript{516} In these circumstances, the measure should not be based on article 114 TFEU. Alternative legal bases may be Article 352 TFEU\textsuperscript{517} or Article 118 TFEU,\textsuperscript{518} if conditions therein are met.

The introduction of new rights is different from enhancing existing protection, which is generally made by harmonizing existing laws at the highest threshold available. Such an upwards harmonization is made to avoid transitional measures that would delay the harmonizing effect, should the national laws be harmonized by lower denominators.\textsuperscript{519} Transitional measures in those cases are directed at guaranteeing that existing rights remain unaffected even after the entry into force of a legislative measure establishing lower thresholds, which is necessary because of the need to have due regard for established rights and legitimate expectations as corollaries of the principle of legal certainty.\textsuperscript{520} Upwards harmonization implies that national measures are already in place; it just picks as a standard the more protectionist rules among the ones that are available.

It should also be noted that harmonization does not necessarily amount to homogenization. One of the facets of harmonization in the EU context is getting rid of national disparities to the extent that they hinder cross border trade in goods or services. Still, this does not always result in the total elimination of differences between the national laws of the Member States, particularly where directives give a large margin of discretion to Member States for the implementation stage.\textsuperscript{521} It is important to recall that there are several possible meanings of “harmonization”, and

\textsuperscript{515} See case C-436/03 – Parliament v. Council at 44-46. The case concerned a Regulation that introduced a new form of cooperative society (in addition to the national forms). The Court considered that the measure was correctly based on Article 308 EC Treaty (current Article 352 TFEU), and that Article 95 EC Treaty (current Article 114 TFEU) could not constitute an appropriate legal basis. The reasoning might thus be applied, mutatis mutandis, to the introduction of new rights.

\textsuperscript{516} Lohse 2011 at 295 ff.

\textsuperscript{517} Article 352 TFEU paragraph 1 TFEU: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.”

\textsuperscript{518} Article 118 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.(…)”

\textsuperscript{519} Bradshaw 1995 at 172; von Lewinski 1992 at 787-788.

\textsuperscript{520} On the respect for acquired or established rights and legitimate expectations as aspects of the principle of legal certainty, see Groussot 2006 at 194-212 and case law cited therein.

\textsuperscript{521} Lohse 2011 id.; van Eechoud et al. 2009 at 299-300.
legal scholarship is not unanimous regarding its legal definition. One possible
classification is to oppose consequential harmonization – which defines
harmonization as the outcome of a process, independently of what that process is –
to procedural harmonization – which defines harmonization as the process itself.
Consequential harmonization is therefore more concerned with the harmonizing
effect, while procedural harmonization focuses on methodological matters. The
concept of harmonization endorsed in the context of this benchmark refers to the
former rather than to the latter. It relates to a harmonizing effect, rather than a
formal streamlining or literal uniformization of national laws. The difference is that
the harmonizing effect can be achieved through the use of different mechanisms
and does not per se require a formal uniformization. This notion of harmonization
includes thus the adoption of a common framework, or the implementation of a
common concept, that can counteract the effects of existing divergent laws.

In that regard, several mechanisms can be of aid to harmonization actions. It is
the case, for instance, of the principle of mutual recognition, which can be used in
the context of harmonization measures (e.g., through the setting of a mutually
recognized rule), in relation to subjects where political consensus is hard to
achieve – for example, where sensitive aspects of national cultures are at stake.
The principle implies that national laws/rules/standards remain the same, but
Member States are obliged to recognize each other’s standards as valid. Mutual
recognition therefore presupposes acceptance of diversity without jeopardizing the
harmonizing effect. Granted, the principle started to be used in the context of
negative integration (it was first enunciated by the CJEU in the Cassis de Dijon
judgement) and plays a central role there. In that sense, because it is used more in
the context of negative integration, mutual recognition can be seen as an alternative
to harmonization, especially since it has proved of great help in realizing the single
market where there is no consensus in harmonization.

522 See, for an overview of the different theories and meanings of harmonization, Boodman 1991;
Andenas et al. 2011; Lohse 2011.
523 Andenas et al. 2011 at 579-587.
524 On the advantages of using mutual recognition, or similar mechanisms, in the context of
harmonization, see Pelkmans 2007 at 702-703 and de Witte et al. 2008 at 319-320. See also
Armstrong 2002 at 253-256, discussing the advantages and drawbacks of such use of mutual
recognition.
525 See Commission Communication on mutual recognition in the context of the follow-up to the Action
with the Single Market philosophy according to which the rules of the Member State of origin
normally prevail. The application of this principle is also consonant with the idea of a dynamic
approach to the application of subsidiarity; by avoiding the systematic creation of detailed rules at
Community level, mutual recognition ensures greater observance of local, regional and national
traditions and makes it possible to maintain the diversity of products and services which come onto
the markets. It is thus a pragmatic and powerful tool for economic integration.”
526 Young 2005 at 103.
527 Schmidt 2007 at 667-671.
However, there is nothing that prevents mutual recognition from being used in the context of a harmonizing measure, especially in relation to sensitive issues. In addition, resorting to mutual recognition in the context of harmonization addresses one of the main criticisms made to this mechanism, which is the risk that it promotes a “race to the bottom” of regulatory standards. The “race to the bottom” implies that the laxer national rules serve as a standard for the other national legislators, thus resulting in a weakening of the protection level throughout the EU. The risk of a “race to the bottom” is mitigated where isolated rules of mutual recognition are combined with harmonizing norms. If there is a harmonized legislative background, it is unlikely that mutual recognition will lead to a race to bottom, as national rules will be in any case harmonized at the EU level. Moreover, it has been noted that in practice instances of a “race to the bottom” are rare. In the field of copyright, an example of a mutually recognized rule is Article 4 of the Orphan Works Directive, mandating Member States to recognize the orphan works status of a work or phonogram if such status has been established in any other Member State.

The harmonizing effect of a particular directive or of the norms contained therein can be assessed in a myriad of ways, which will depend, inter alia, on the subject-matter to be harmonized and on the type of political compromise reached. For example, if a norm aims at harmonizing an aspect of national copyright laws where the different laws do not differ much from one another, or where there is a strong political consensus, it is foreseeable that its harmonizing effect will be strong. Nevertheless, a couple of indicators seem to be able to provide a fairly accurate assessment of the harmonizing effect independently of other factors. It is the case of the technique of harmonization, which determines the leeway that Member States have to deviate from the harmonizing norm. There are several types of harmonization techniques, and their classification is not unanimous. For the purposes of this research, a classification was chosen that opposes total harmonization, on the one side, to partial harmonization, on the other side. This suggested classification further breaks down partial harmonization into minimum, optional or alternative harmonization.

Total or complete harmonization defines precisely certain conditions or standards, leaving no room whatsoever for national policy choices. Partial harmonization allows national legislations some regulatory space, although the type

528 Analysing the true risks of a “race to the bottom” resulting from mutual recognition, see inter alia Bernard 2002 at 108-110 and Kerber & van den Bergh 2012 at 134 ff.
529 Majone 1994 at 83; Horng 1999 at 138; Bernard 2002 id.
530 Schmidt 2007 at 677.
531 Article 4 of the Orphan Works Directive: “A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States.”
532 See on this subject, e.g., Slot 1996 at 382 ff; Kurcz 2001 at 295 ff; de Vries 2006 at 253 ff; Steiner et al. 2006 at 324 ff; Weatherill 2010 at 467 ff.
of regulatory space permitted differs according to the specific technique of partial harmonization. Minimum harmonization sets only minimum requirements or standards, but Member States are entitled to establish more stringent ones. Optional harmonization, as the name indicates, establishes non-mandatory norms, which the Member States are free to adopt or not. Alternative harmonization sets an objective to be attained, but leaves the choice of means to attain it to Member States.

There is no rule in the Treaties expressly prescribing the desired technique or level of harmonization, and the CJEU has already made it clear that the legislator enjoys a margin of discretion in that regard. It is therefore up to the EU legislator to decide whether a certain policy area or part of it should be subject to minimum, optional, alternative or total harmonization. The main limit to this discretionary power seems to be the principle of proportionality, since the legislative measure must be suitable and necessary to achieve its objective.

The harmonization technique used contributes to the definition of the harmonizing effect of the legislative measure – the more room Member States have, the most likely the harmonizing effect will be lower. Conversely, a measure prescribing total or quasi-total harmonization does not leave Member States with many choices at the implementation phase, which means that its harmonizing effect will probably be high.

The technique employed is not always apparent from the legislative measure, and the elbow room left to Member States is not necessarily spelled out. To complicate matters further, it is possible for the EU legislator to use more than one harmonization technique in the same legislative measure. A directive can therefore have total harmonization provisions mixed with optional, minimum, or alternative ones. Hence, the degree of harmonization of a legislative measure – and the assessment of the harmonization technique used - will depend on its context, nature, purpose, and content.

Another way to evaluate the harmonizing effect of a directive is through an analysis of the wording of the rules contained in a legislative measure. A broad or abstract wording, albeit more flexible, might not lead to an effective harmonization of national laws, since Member States might interpret it in different ways. In contrast, a more precise or concrete wording will not leave much room for interpretation.

Finally, this benchmark also has to take into account another feature of the EU legislator’s discretionary power, concerning the concrete instrument or strategy chosen to harmonize. The discretionary power of the EU in the context of harmonization encompasses some leeway regarding "the method of approximation

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533 See, e.g., case 63/89 – Les Assurances du Crédit, at 11.
534 Arena 2011 at 537-538.
535 As suggested by the CJEU in case C-324/99 – DaimlerChrysler at 42: “It therefore follows from the context in which the Regulation was adopted, from its nature, from the aims which it pursues and from its content, that it regulates in a harmonised manner, at Community level, the question of shipments of waste in order to ensure the protection of the environment.”
most appropriate.”536 The EU legislator is thus relatively free to decide which type
of instrument is more appropriate to a given situation, as not only directives but
recommendations and non-binding guidelines can be used to approximate national
laws.537 The nature of the instrument, however, can also have an impact on the
harmonizing effect of its content, as non-binding measures will most likely yield a
lower harmonizing effect.538

5.4. Respect for national cultures and traditions

The respect for national cultures and traditions as a benchmark is at the outset
derived from the respect for cultural diversity as one of the objectives of the EU. As
mentioned in chapter 4, one of the aspects of this objective is the relationship of the
EU with the Member States, which obliges it to take national cultures into account
in the context of harmonization.539

Yet, there are also other rationales that support the adoption of this benchmark.
In the framework of the prohibition of restrictions to trade (Article 34 TFEU) and
exceptions thereof (Article 36 TFEU), culture per se is not mentioned as a
permissible exception to the principle of free movement of goods. However, the
Court has stated throughout its case law that legislative measures that restrict trade
are not contrary to the Treaty if they are necessary to meet certain “mandatory
requirements.”540 In particular, the CJEU has confirmed that cultural goals are
“mandatory requirements”, the compliance with which can justify national
restrictions to the free movement of goods and services. Importantly, the first
decision on this was delivered in 1985, in Cinéthèque,541 before any specific
provision on culture was introduced in the Treaties. The CJEU therefore already
attached some weight to national cultural policies, allowing them, under certain
circumstances, to have a negative impact on the internal market. The Court’s ruling
seems thus to be in line with the view that national cultures should be accounted for
in internal market-based legislation.

536 See Tobacco Advertising II at 42; case 66/04 – Smoke Flavourings at 45; case C-217/04 – United
Kingdom v. Parliament and Council at 43; case C-58/08 – Vodafone at 35.
537 Lohse 2011, at 293.
538 See, in the field of copyright, the example of the Commission Recommendation on Cross-border
Management of Copyright and Related Rights for Online Music (2005). In its Monitoring Report of
the Recommendation (2008), at 8, the Commission states that “the Recommendation seems to have
produced an impact on the licensing marketplace and is endorsed by a number of collective rights
managers, music publishers and users.” However, doubts have been raised as to whether all Member
States will voluntarily adapt the guidelines set in the Recommendation in order to achieve a
minimum level of harmonization – see Guibault & van Gompel 2010 at 155-165.
539 See chapter 4, section 4.4.3.
540 See, e.g., case 120/78 – Cassis de Dijon.
541 See joined cases 60-61/84 – Cinéthèque, at 23.
This argument is further reinforced by the so-called “cultural clause” of the Treaties (Article 167 TFEU). Despite the fact that the EU has no competence to take harmonization measures in the area of culture, it must, according to Article 167 paragraph 4 TFEU, take cultural aspects into consideration when acting under other provisions of the Treaty. This provision has been in force since the Treaty of Maastricht (1992), which marks the formal integration of culture in the Treaties. However, as previously noted, cultural developments were taking place before – apart from CJEU decisions that concerned cultural matters, other EU institutions were already adopting acts and developing actions that touched upon the field of culture, which can stand for an intention to combine culture with other policies since a very early stage of EU development.

Article 167 paragraph 4 TFEU adds that the obligation to take cultural aspects into account refers especially to the respect and promotion of cultural diversity. This provision concretizes the cultural diversity objective of the EU, and shows that cultural diversity can indeed form the basis for injection of normative content in other provisions of the Treaties. Probably based on this “cultural clause”, several documents from the different EU institutions also refer to the need to take into account “respect for the different cultures of European peoples.”

It should moreover be emphasized that the obligation to “take cultural aspects into account” is not a mere policy statement. Nor is it only an authorization to take culture into consideration. This expression is also used in the context of other policy areas where the EU has legal obligations, such as consumer protection. The provision contains therefore an effective obligation, imposed upon the EU, to take cultural aspects into account, as stressed by the Commission itself in its First Report on the Consideration of Cultural Aspects in European Community Action and by the European Parliament on its Resolution concerning such Report.

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542 Article 167 paragraph 4 TFEU: “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”

543 See chapter 1 at 17-20 and chapter 4 at 79.

544 See chapter 4, section 4.4.3.


546 Also sharing this view, Kitz 2004 at 406 ff.

547 See Articles 12 and 169 TFEU. See also Kitz 2004, id.

548 First Report on the Consideration of Cultural Aspects in European Community Action (1996) at 2: “(…) this provision gives expression to the European Community’s obligation to consider the cultural objective in all aspects of its activity.”

549 Resolution on the First Report of the Commission on the Consideration of Cultural Aspects in the European Community Action (1997) at 2: “(…) the taking into account of cultural aspects will in future be a requirement imposed on the European Community and that compliance with this requirement involves the establishment of a clause whereby all Community acts and actions which may have a cultural impact must be compatible with cultural objectives.”
The respect for national cultures and traditions as a benchmark is also in line with the principles of subsidiarity and proportionality. Both of these principles call for a consideration of national cultures and traditions to the extent possible. Subsidiarity limits EU action to areas where it can be more efficient, as compared to action by Member States. Hence, it presupposes that, when legislating in the field of copyright, the EU legislator should consider carefully the particular aspects of copyright that should be harmonized – namely, the ones that relate to national cultures. Proportionality entails an assessment of the suitability and necessity of a legislative measure. The suitability and necessity test is aligned with cultural concerns – respecting national cultures and traditions can carry an obligation to evaluate an harmonizing measure regarding its impact on national culture.

Paradoxically, the respect for national cultures and traditions finds its roots in the principle of non-discrimination as well. While it is true, as argued above, that harmonization prevents discrimination, the respect for other (foreign) cultures has strong ties with the principle of non-discrimination, in so far as the latter amounts to an obligation to afford foreigners equal treatment to Member State nationals.

Lastly, the Charter of Fundamental Rights also serves as a rationale to consider the respect for national cultures and traditions as a benchmark. The preamble of the Charter reads: “The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.” This wording is similar to that of Article 167 TFEU and reinforces the idea of commitment of the EU to respect national cultures and traditions. Article 22 of the Charter further adds that “the Union shall respect cultural, religious and linguistic diversity.” Since, according to Article 6 paragraph 1 TEU, the Charter is now part of EU primary law, the constitutional dimension of the obligation to respect cultural diversity is thereby also strengthened.

It is apparent from the arguments presented above that the respect for national cultures and traditions should be part of a list of benchmarks for legislative activity. A different issue, however, is what exactly is comprised in the concept of “national cultures and traditions.” For the purposes of this research, national cultures and traditions encompass both culture in the traditional sense of “cultural expression” but also national legal cultures and traditions. Legal traditions reflect in a way the different visions of culture of the different Member States. These two aspects are often intertwined, namely in the field of copyright lawmaking, which touches upon cultural matters. An example of how the two are inextricably linked has already been provided in chapters 1 and 4: the differences between the copyright and droit d’auteur systems are strongly connected to chief cultural differences as well.

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550 See Article 4 paragraph 3 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005): “Cultural expressions are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.”

551 See chapter 1 at 10 and chapter 4 at 94-95.

552 See also Von Lewinski 2008 at 34, 63.
Another example concerns the national exceptions to the exclusive rights of copyright holders, which are often based on national cultures or traditions in the “cultural” sense, while the way in which they are regulated can also be revealing about the legal culture or tradition of each particular country.

Specifically in the field of copyright, respect for the national cultures and traditions of the Member States should thus amount to taking into account those cultures and traditions in the context of harmonization measures. One way to achieve this is to accommodate national legal and cultural oddities, namely by way of recognition of certain exceptions linked to cultural or legal idiosyncrasies. An additional form of complying with this benchmark is by catering for both copyright and droit d’auteur traditions in the EU’s harmonization process.

The respect for national cultures and traditions can at first sight seem at odds with the benchmark of harmonization of national laws, in the same way that the EU objective of having an internal market appears to be in contradiction with the objective of respecting cultural diversity. In some aspects, the respect for national cultures and traditions can be the exact opposite of the benchmark of harmonization of national laws. This is especially true if one focuses on the technique of harmonization used. Techniques of partial harmonization, such as optional or minimum harmonization, give Member States some leeway to accommodate their national specificities and will in principle score high in this benchmark, while ranking low in the benchmark of harmonization.

However, it is submitted that it is possible to reconcile both benchmarks, as is the case in relation to the corresponding EU objectives, an approach that is hinted by one of the main, long-standing slogans of the EU, “united in diversity.” For example, it was suggested in chapter 4 that one way to reconcile the two objectives was to promote the free movement of goods, in so far as that would increase the availability of foreign goods. Also in chapter 4, it was pointed out that the Commission proposed a conciliation of both objectives by promoting cultural dissemination and exchange, while accommodating cultural diversity needs. In that sense, the respect for national cultures and traditions can be seen as an aspect of European integration, in as much as it places side by side cultural and legal differences, making them interdependent in the harmonization process. The interdependence of the various national cultures thus understood should then be taken as a preservation of Member States’ cultural or legal specificities.

553 See chapter 4 at 95-96.
554 Ibid.
555 See also Psychogiopoulou 2008 at 51.
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5.5. Protection of creators

The protection of creators as a benchmark finds its rationale, together with the protection of other interests, in the need to cater for a balance of interests in copyright law. The protection of creators is justified, first, by way of the Charter of Fundamental Rights. Apart from certain rights and freedoms akin to creative activity in general, such as the freedom of the arts and sciences (Article 13), the Charter has a specific provision on intellectual property, Article 17 paragraph 2, which states that “intellectual property shall be protected.” As argued in chapter 4, this provision contains a principle, rather than a right. This means, inter alia, that it has an abstract nature, thus having to be concretized by specific legislation. However, in the *Luksan* case, the CJEU has made a clear link between Article 17 paragraph 2 and the protection of the author of a copyright work (in that case, the principal director of a cinematographic work). The Court reasoned that the principal director of a cinematographic work was, as an author, entitled to exploitation rights to that work. Because the national law at stake did not allocate such exploitation rights to the principal director, the Court considered that it was in breach of Article 17 paragraph 2 of the Charter. The Court therefore linked authorship of a work to the ownership of exploitation rights as protected by the fundamental right to property. The connection made by the Court between the individual author and the fundamental principle of intellectual property protection seems thus to endorse Article 17 as a justification for protecting creators.

It can also be argued that the protection of creators is a way to foster artistic and literary creation and the dissemination of culture, goals that are specifically mentioned in Article 167 paragraph 2 TFEU. This is linked to the incentive rationale that underlies utilitarian justifications of copyright: granting certain rights to creators – the original source of cultural goods - can provide them with incentives to produce more goods.

In addition, the protection of creators can also find a basis in the provisions of the Treaties dealing with the facilitation of the taking-up and pursuit of activities of self-employed persons, in the context of the right of establishment (Article 53 paragraph 1 TFEU, ex Article 47 paragraph 2 EC Treaty) and the freedom to

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556 Case C-277/10 – *Luksan.*
557 *Luksan* at 44-53.
558 *Luksan* at 68-70.
559 Barazza 2012 at 395.
560 See chapter 1, section 1.1.1.
561 Article 53 paragraph 1 TFEU: “In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.”
provide services (Article 62 TFEU, ex Article 55 EC Treaty). According to the CJEU, a self-employed person is defined as someone who pursues an economic activity outside a relationship of subordination. This definition is somewhat close to the concept of individual creators, such as authors or artists, who are often self-employed persons.

Another reason for choosing the protection of creators as a benchmark relates to the concept of “specific subject matter” developed by the CJEU, and what it encompasses. In *Phil Collins/EMI Electrola*, the Court established that the specific subject matter of copyright and related rights is “to ensure the protection of the moral and economic rights of their holders.” It is true that the Court refers to “holders” rather than individual creators, which is a broader term that can include creative industries, for example. It is also true that the Court never expressly spelled out that copyright holders as such ought to be protected – the Court’s arguments are developed in the context of the application of the rules of the Treaty to copyright and related rights. However, it is still possible to extract from the Court’s reasoning what the core of copyright consists, or should consist, of. The fact that moral and economic rights are grouped together hints that it is really the creator, as the original copyright holder, who is mostly at stake here. This is confirmed in the same paragraph of the decision by the Court: “The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work (…).”[emphasis added]. The goal of protecting authors and their interests in their works is thus at the core of the notion of “specific subject matter.”

Moreover, the General Court also put the emphasis of copyright on the individual creator by stating that the “essential function” of copyright is to “protect
the moral rights in the work and ensure a reward for creative effort. This definition presupposes the existence of a natural person and clearly reports back to the concept of original creator.

The points made by both the CJEU and the General Court are connected to a related question, which is the definition of the concept of “creator”. The term is employed here to refer to natural persons, i.e., authors and performers. Legal persons (e.g., creative industries) do not therefore fall under this category. This was also the definition used in chapter 2 when analysing the goals of legislative activity, but there are added reasons why the protection of creators as a benchmark ought to be restricted to individuals only.

To begin with, the interests of the individual creators and industry are not always coincidental. The former seek to widely distribute their works, receive credit and financial reward for it, and engage creatively with other works (through, e.g., adaptation or sampling); conversely, the latter want to extract maximum returns from their investments. Placing both individual creators and industry under the same benchmark would therefore blend their interests, while in many cases they are not the same (and are even sometimes opposite).

The European Parliament has recognized the importance of the social and economic role of both authors and performers, stressing that the future cultural heritage and the quality of society depend on their work. More importantly, the Parliament has clearly linked the protection of creators as individuals to harmonization actions. In a Resolution dated from 1983, the Parliament has stated that provisions on the approximation of laws (such as current Article 114 TFEU) “must be used for the benefit of cultural assets, authors’ and performers’ rights, workers in the cultural sector and all taxation on cultural activities.” In that regard, the Parliament called on the Commission to propose directives aimed at increasing social security protection for people working in the cultural sector and to “[adjust] legislation on authors’ and performers’ rights to developments in the reproduction and transmission of sound, vision and written word.”

Consequently, for purposes of this benchmark, creators should be equated with the natural persons who participate in the creative outcome. This will, at the outset, include individual authors in the concept of “creators.” But, as noted above, the concept also includes performers. There are several justifications for performers to be included under the umbrella term of “creators” together with authors. It is true

566 Case T-76/89 – ITP at 56.
567 Kretschmer & Kawohl 2004 at 42-43.
568 Resolution of the European Parliament on the situation and role of artists in the European Union (1999), point 1. See also, along similar lines, Resolution of the European Parliament on Community policy in the field of culture (1994), point 19.
569 Resolution of the European Parliament on stronger Community action in the cultural sector (1983), Recital C.
that for the most part the concept of “creator” is linked to authors and copyright, not to performers and related rights. Copyright and related rights have different subject matter and underlying rationales. This leads to considerable differences in their legal treatment – for example, the outcome of the performer’s work (the interpretation) does not have to be creative or original to be protected by related rights.

However, there are points of convergence that justify the joint treatment of authors and performers. As mentioned in chapter 1, the rationales underlying performers’ protection are arguably closer to the ones used to justify the protection of authors than to the justifications for the protection of other related rights’ owners. Namely, there are natural justice arguments to both of them, as performers put an artistic effort into their performances that should be protected. More importantly, from the point of view of EU law, it makes sense for performers and authors to come under the same category. The notion of “self-employed persons”, which lies at the core of a main justification for protecting creators, is equally applicable to both authors and performers. In addition, the concept of “specific subject matter” of copyright and related rights, as developed by the CJEU, groups authors with performers.

In relation to the contents of this benchmark, they amount firstly to the protection of the economic and moral interests of the individual creators, as hinted by both the CJEU and the General Court. The protection of creators thus devised is achieved by affording them recognition and a financial reward – for example, through the grant of exclusive or remuneration rights to creators. Secondly, it is also in the creators’ interest to be able to engage creatively with other works (through adaptation, sampling, etc). This second element of the benchmark builds on the premise that creators are frequently users of existing works as well. The possibility of using protected works for purposes of further creation is also a way to foster the freedom of expression of (future) creators, a right that is protected, inter alia, by Article 11 of the Charter of Fundamental Rights.

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571 See chapter 1, section 1.1.1.
572 See, for an extensive analysis of this matter, van Eechoud et al. 2009, 185ff.
573 Ibid.
574 See Phil Collins/EMI Electrola at 20.
575 See ITP at 56.
577 As also acknowledged by the Commission in the Green Paper on Copyright in the Knowledge Economy (2008) at 19, and recalled in some submissions to that Green Paper – see, e.g., the submission of European Documentary Filmmakers (2008) at 1, where they state: “Creative people are often using precisely the same techniques and distribution outlets, whether they are amateurs, artists or documentary filmmakers. Drawing a distinction between user-generated content and content created within defined creative communities is not a helpful policy approach.”
578 See also Guibault 2002 at 28, stating that “the recognition and exercise of exclusive rights on works impose a burden on freedom of expression of those who wish to use copyrighted material to convey their own message (...).”
Measures that make the creative process less burdensome for creators are therefore also a way of protecting them. As a result, another element in the protection of creators as a benchmark should be the facilitation of further creative uses, which can be achieved through provisions that favour future creators or future acts of creation.

5.6. Protection of end users

The autonomy of the protection of end users as a benchmark and its justification rely heavily on the qualification of end users as consumers of copyright goods, as consumer protection has been a concern of both the CJEU and the Treaties. Consumer protection has also been a focal point of EU policies, figuring high in the EU policy agenda. It is thus necessary, first, to see in detail if end users of copyright goods can come under the definition of “consumers” for that purpose.

In the so-called “consumer acquis” there is no unanimous definition of the notion of consumer. But a majority of directives in the area of consumer law frames the consumer as a natural person who is acting for purposes that are outside his trade, business or profession. Moreover, the actions that qualify a natural person as a consumer usually involve some sort of transaction or contract, like for example a purchase. This definition corresponds to the wording found in Article 15 paragraph 1 of the Brussels I Regulation (2001) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is also in line with Article 5 paragraph 1 of the Rome I Convention on the law applicable to contractual obligations.

Cultural goods and services are in principle meant to be used or consumed by users. End users are at least part of the addressees of these goods and services. To the extent that end users are natural persons who consume copyright goods and services for non-commercial purposes, they can thus be seen as consumers.

On the other hand, coining end users as “consumers” is prone to some criticism. Two main points are in order here. First, nowadays the end user can accumulate both the functions of creator/producer and passive consumer, making the term

579 See, inter alia, Helberger & Guibault 2013 at 37-38; Smits 2010 at 6-7; Schovsbo 2008 at 394.
580 Ebers 2008 at 713 ff. See, as an example, Article 2 paragraph 1 of the Consumer Rights Directive (2011): “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.”
581 Ebers 2008, id.
582 Article 15 of the Brussels I Regulation: “In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section (…) .”
583 Article 5 paragraph 1 of the Rome I Convention: “This Article applies to a contract the object of which is the supply of goods or services to a person (the consumer) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.”
“user” much broader than that of “consumer.” Second, it is implied in the definition of consumer that there should be some kind of contract involved, while copyright law does not always presuppose the existence of a contract. Certain uses are accepted by copyright law without the need for a contract – for example, further distribution of the work deriving from the principle of exhaustion of the distribution right.

The difficulty in drawing a parallel between consumers and users, or between consumer law and copyright law, is connected to the different objectives, rationales and concepts used in these two areas, which come down to one basic premise: consumer law puts the consumer at its centre, while copyright law focuses on the author. Nevertheless, even though the concepts of “end user” and “consumer” are not interchangeable, it is apparent that there is some overlap between them, especially if, for the purposes of this benchmark, one defines “end user” as an individual who is the passive recipient of copyright goods and services (i.e., one that does not use protected works for purposes of further creation). In so far as end users are consumers, then, the inclusion of the protection of end users as a benchmark of legislative activity ought to be partially justified by resorting to consumer protection imperatives.

Principles of consumer protection can be found throughout the Treaties. Article 12 TFEU reads: “Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.” This is confirmed by Article 169 paragraph 2 (a) TFEU, which mandates the EU to ensure a high level of consumer protection when adopting harmonizing measures under Article 114 TFEU. More than proclaiming principles of consumer protection, however, these two provisions constitute integration clauses (just as, e.g. the ones relating to culture - Article 167 paragraph 4 TFEU - and competitiveness of the Union’s industry - Article 173 paragraph 3 TFEU). As integration clauses, these articles require the EU to embody consumer protection standards in their harmonizing legislation. They therefore stand for a recognition of the need of having consumer protection considerations giving normative content to other norms of the Treaties, as a way to shape EU’s policies.

Moreover, Article 114 TFEU paragraph 3 mandates the Commission to “take as a base a high level of protection” in its proposals concerning consumer protection. The obligation of setting consumer protection at a high level in EU legislation is thus part of the mandate of the legislator to build an internal market. As a consequence, this benchmark is also derived from, and abides by, the principle of conferral.

The Charter of Fundamental Rights gives further constitutional depth to consumer protection, by stating that the “Union policies shall ensure a high level of

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584 Benkler 2000 at 1 ff; Loos et al. 2011 at 17-19.
585 See, on the different objectives and concepts of copyright and consumer law, Helberger and Guibault 2013 at 45 ff.
consumer protection.”

This comes as a confirmation that consumer protection has to be taken as an element of other EU policies such as the building of an internal market.

But the preoccupation with consumer interests is not new to the European framework. Powers to act in the field of consumer protection only expressly came with the Maastricht Treaty (1992). However, the Treaty of Rome (1957) already contained five explicit references to consumers, and it can be argued that substantive provisions of the Treaties (such as those relating to free movement) were indirectly aimed at improving consumers’ welfare.

In addition, the principle of consumer protection was formally approved by the Council in 1975. This was followed by another Council Resolution in 1981, on a second programme for consumer protection and information policy. The premises of this last resolution do not differ much from the one of 1975, but it serves to show the commitment to consumer protection. A third Resolution from the Council came out in 1986, regarding the future orientation of the policy of the Community for the protection and promotion of consumer interests, where consumer protection was conceived within the context of the internal market. Shortly before, the Commission itself, in a Communication to the Council, had stressed the need to take consumers interests into account when formulating and executing other Community policies – namely, by consulting consumer representatives on Community measures that significantly affected consumer interests.

The CJEU has also stated that consumer protection can justify restrictions to free movement. Similar to what happens in relation to culture, the Treaty does not list consumer protection as one of the admissible exceptions to the prohibition to restrict trade. The Court has however admitted that certain national measures could restrict trade, if they were necessary to meet certain “mandatory requirements.” In the first case where the Court dealt with this question – Cassis de Dijon –, some examples of “mandatory requirements” were listed, among which “the defence of the consumer.” The Court confirmed in subsequent cases that consumer protection is an imperative requirement in the framework of free movement.

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586 Article 38 of the Charter.
587 The provisions expressly tackling the interests of consumers were mainly set in the fields of common agricultural policy and competition law.
588 Weatherill 2005 at 2-4.
591 See Weatherill 2005, id.
593 Case 120/78 – Cassis de Dijon.
594 See Cassis de Dijon at 8.
595 See, e.g., case C-315/92 – Clinique at 15.
explained in relation to culture as a mandatory requirement, the recognition of consumer protection as an element that can restrict trade shows that the CJEU considered that it is a significant feature in the context of free movement, and it should thus be factored as such also in the drafting of internal-market based legislation.

It flows from the arguments above that consumer protection is a legitimate goal within the context of the internal market and that it must provide internal market regulation with normative content. However, the protection of end users as a benchmark also finds its rationale in the protection of other fundamental rights, namely privacy-related rights - such as the right to protection of personal data - , the freedom of expression and information or the right to education.596 For example, the private copy exception has a fundamental rights justification mainly in the right to privacy,597 but also in the freedom of expression and information.598

The CJEU has, for its part, acknowledged the position of the end user of copyright goods and services as well. Although in the past the user was largely absent from copyright cases before the CJEU, the Court has started to take into account his interests in more recent decisions, namely vis-à-vis the interests of content providers.599 The protection of end users was thus also pursued by the CJEU in the specific realm of copyright. The Court focused in particular on the right to protection of personal data and on the freedom to receive or impart information,600 both being part of the Charter of Fundamental Rights (Articles 8 and 11 of the Charter respectively).

The protection of the end user as a benchmark in copyright lawmaking should consequently be seen against the rationales of consumer protection and protection of fundamental rights. Both can be fostered by granting end users access to cultural goods and services in a way that ensures that their rights are respected (namely, their fundamental right to privacy). As a result, this benchmark is composed of a single element, which is the grant of such access.

This begs the question of how that access can be guaranteed. For example, in order to enhance or guarantee access to cultural goods, it could be argued, in light of the utilitarian justification of copyright,601 that conferring either exclusive or remuneration rights to content creators will generate a large number of cultural goods on the market – which in turn is in the users/consumers’ best interest. The same could also be said of granting rights to content industries, as an incentive for them to disseminate cultural goods.

596 See generally Guibault 2002 at 28 ff; Geiger 2004 at 278-279.
597 Hugenholtz 1996 at 94; Bygrave & Koelman 2000, at 97 ff; Sentfleben 2004 at 23.
599 See, e.g., case C-70/10 – Scarlet Extended, and case C-360/10 – SABAM v. Netlog.
600 See case C-70/10 – Scarlet Extended at 50, and case C-360/10 – SABAM v. Netlog at 48-51.
601 Chapter 1, section 1.1.1.
However, it can also be reasoned that a high number of cultural goods on the market does not necessarily mean that end users have access to such goods. For instance, exclusive rights can effectively exclude users from the enjoyment of copyright goods, and remuneration rights force users to pay for the consumption of cultural goods. Following this argument, neither of these rights could stand for a guarantee of access to cultural goods. They can nonetheless be a starting point for having such access, to be complemented by more specific forms of guaranteeing it – e.g., by exempting certain uses from the sphere of exclusivity.\textsuperscript{602} Conceiving exceptions that enable end users to access copyright goods and services can thus be a way to comply with this benchmark, provided that such exceptions take into account their rights (namely, their right to privacy or to protection of personal data).

5.7. Promotion of competitiveness of EU industries

Apart from the need to balance the interests of different stakeholders, the benchmark of promoting the competitiveness of EU industries finds its main rationale in Article 173 paragraph 1 TFEU. This provision expressly states that “the Union and the Member States shall ensure that the conditions for the competitiveness of the Union’s industry exist.” It goes on to clarify that action should be aimed, inter alia, at encouraging an environment favourable to initiative and to the development of firms throughout the EU, and at fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

The same Article, in its paragraph 3, reinforces the argument that the competitiveness of EU industries should provide Article 114 TFEU with normative content: it establishes that “the Union shall contribute to the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties.” Article 173 paragraph 3 is thus an integration clause as well. In other words, when harmonizing national copyright laws based on Article 114 TFEU, the EU legislator should aim at contributing to the competitiveness of EU industries – namely, its creative and intermediary industries.

The provision is however silent regarding the instruments to be used in order to achieve competitiveness. It does not define what competitiveness itself is, either. It has been argued that the reasoning behind Article 173 endorses the so-called passive industrial policy, which entails the correction of market failures, the removal of distortions to competition and the general provision of a stable economic environment.\textsuperscript{603} In addition, it has also been pointed out that the

\textsuperscript{602} See Psychogiopoulou 2008 at 199-200.
\textsuperscript{603} Nicolaides 1993 at 4; Buiges & Sapir 1993 at 21-22. Contra, arguing for a broader EU industrial policy that also includes more active policies, Sauter 1997 at 66 ff.
5. BRIDGING THE NORMATIVE GAP: PROPOSED BENCHMARKS FOR COPYRIGHT LAWMAKING

Instruments to achieve competitiveness are to be found in other provisions of the Treaties as well — namely, in Article 114 TFEU.

The history of Article 173 TFEU seems to support both views. This article was inserted in the EC Treaty for the first time by way of the Treaty of Maastricht. It was, to a large extent, inspired by the Commission Communication on industrial policy in an open and competitive environment (1990), which set forth guidelines for a Community approach.

The Communication explains that the main responsibility for industrial competitiveness “must lie with firms themselves, but they should be able to expect from public authorities clear and predictable conditions for their activities.” This is closely connected to Article 114 TFEU and to the benchmark of harmonization of national laws, as a harmonized legal framework increases legal certainty. Harmonization of national laws is therefore a precondition for competitiveness.

Likewise, the promotion of competitiveness also concerns questions of competition policy. This is made clear by Article 173 itself, whose paragraph 3 mandates that the aim of competitiveness “shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition (…)”. And in fact, if the promotion of competitiveness is connected to harmonization, then consideration of competition matters has to be factored in: the internal market notion, which inter alia serves as a legal basis for harmonization, includes a system ensuring that competition is not distorted, as clarified by Protocol No 27 to the Treaties and by the case law of the CJEU. This view finds additional support in the Charter of Fundamental Rights. The Note from the Praesidium on the Charter of Fundamental Rights (2000) clarifies that Article 16 of the Charter, on the freedom to conduct a business, is based on CJEU case law that recognized freedom to exercise an economic or commercial activity and freedom of contract, as well as on provisions of the EC Treaty that recognize free competition. As a result, matters of industrial policy – namely, promoting the competitiveness of EU industries – have to be combined and may not be at odds with a system of undistorted competition.

In that regard, it should be recalled that the system of undistorted competition is to be construed in the context of Article 3 paragraph 3 TEU, which sets the objectives of the EU, referring therein to the need to have a “highly competitive social market economy.” This calls for an incorporation of social concerns in competition policies, which might back up the promotion of competition in the market, while taking into account the interests of society at large — e.g., the

604 Darmer 2000 at 22.
605 Buiges & Sapir 1993 at 24.
606 See Communication at 1.
607 See chapter 4 at 81.
608 See Note from the Praesidium on the Charter of Fundamental Rights (2000), Article 16, and case law cited therein.
609 See chapter 4 at 81-82.
Commission Communication on industrial policy in an open and competitive environment (1990) also establishes that the maintenance of a favourable business environment "does not mean that legitimate policy interests, such as those in the social, environmental and consumer protection areas must be sacrificed to the interests of industry. Their impact on industry must however be considered so that a reasonable and balanced approach can be adopted."\(^ {610}\) This view has been confirmed by a subsequent Commission Communication, where it held that the main role of industrial policy is to provide conditions for enterprise development and innovation, with the goal of making the EU attractive for both investment and job creation\(^ {611}\) - thus making the economic and social spheres compatible.

The stance presented above should translate into a moderate protection of industry, in the sense that such protection, while being directed at competitiveness, should also be embedded with competition concerns.\(^ {612}\) At a theoretical level, these objectives might seem contradictory, in that fostering competitiveness is usually linked to interventionist measures that favour individual companies or sectors (namely, by granting them exclusive rights). Fostering competition, by contrast, implies securing an equal playing field, which runs counter to privileging specific market actors.\(^ {613}\)

In practice, however, these objectives can be reconciled. For instance, the moderate protection of industry can amount to granting certain rights to industries so as to help them thrive, while at the same time ensuring some degree of competition between them. In short, incentives to production combined with abidance by competition policies should be able to foster competitiveness within the context of this benchmark.\(^ {614}\)

One of the ways to achieve a compromise between competitiveness and competition seems to be to limit the rights granted to industry, so as to accommodate the interests of competitors. This can be done, for example, by devising competition-related exceptions, that is, exceptions to the exclusive rights that favour competitors.

Another way of accommodating the interests of competitors is through the granting of limited rights such as short-term neighbouring rights, much like what happens in the field of industrial property.\(^ {615}\) Certain industrial property rights, like

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\(^{610}\) See Commission Communication on industrial policy in an open and competitive environment (1990) at 6.

\(^{611}\) See Commission Communication on implementing the Community Lisbon Programme (2005), at 3.

\(^{612}\) See Barents & Slot 2008 at 1255-1258, highlighting this compromise character of Article 173 TFEU (ex 157 EC Treaty). Along similar lines, see Sauter 1997 at 93-97.

\(^{613}\) Sauter 1997 at 96-97; Darmer 2000 at 20.

\(^{614}\) Smit et al. 2012, at 173-7, while not referring to the bestowing of rights or incentives to production per se, hold that “the main conditions necessary for the Community’s competitiveness can be identified as research and development, the proper functioning of the internal market, which promotes industrial cooperation, and the strengthening of competition.”

\(^{615}\) Significantly, many industry-related rights in the field of copyright are closer to industrial property than to copyright – see van Eechoud et al. 2009 at 186-190.
5. Bridging the Normative Gap: Proposed Benchmarks for Copyright Lawmaking

Patents or designs, have a limited duration, after which the exclusive rights granted expire. Presumably, the monopoly granted by such rights lasts long enough for the right owner to recoup his investment, and after that recoupment the invention or design falls into the public domain for the benefit of society at large— including, primarily, the right owner’s competitors, who can then freely produce the formerly protected invention or design.

Finally, this benchmark should also take into account the interests of different industry sectors. Because the promotion of competitiveness entails fostering an environment favourable to the development of firms, care should be taken to assure that one industry sector does not choke others. As a result, the grant of rights to creative industries should not jeopardize the activity of intermediary industries, in the sense that a balance between these different interests should be achieved in the context of copyright legislation.

5.8. Conclusion

Using the three clusters described in the methodology as a source, this chapter has established five benchmarks that should be met by the EU legislator when harmonizing national copyright laws. Each benchmark furthermore comprises one or more elements that concretize their substance, as summarized in the table below:

It is apparent that some benchmarks point in opposite directions, and probably where some are met others will barely be fulfilled – e.g., a harmonizing measure that sets a high level of protection for creators will score high in the benchmark of protecting creators, but might score low in the protection of end users if their access to works is not ensured. Likewise, a legislative measure that ranks high in harmonizing national laws might score low in the respect for national cultures and traditions if the latter are not taken into account when designing the measure.

Because primary law – namely, the Treaties and the Charter of Fundamental Rights – is a central element in the creation of benchmarks, the representation of different interests therein reflects on the final benchmark design as well. Both primary law and the case law of the CJEU seem to work out the conflict between interests by resorting to some sort of balancing exercise between them. So, for instance, the Charter states that limitations to the rights and freedoms it recognizes are possible in certain circumstances – namely, where there is the need to protect the rights and freedoms of others - so long as they respect the essence the rights and freedoms being limited.\(^{617}\) Similarly, the Treaties contain several norms aimed at

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617 See Article 52 paragraph 1 of the Charter: “Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are
balancing different interests. For example, while Article 34 TFEU prohibits quantitative restrictions on imports between Member States and all measures having equivalent effect, Article 36 exempts certain cases of restrictions that are based on particular grounds. Moreover, the CJEU has repeatedly stated in copyright cases that copyright protection is not absolute and that it has to be balanced with competing interests.618

The key is then for copyright legislation to achieve a balance between the different benchmarks as well, which might entail meeting all of them to a certain extent, rather than few of them to a large extent. Admittedly, achieving such balance is not an easy task, and will always come down to a compromise between the different benchmarks, just as a compromise between the different interests is advocated in the sources from which the concrete benchmarks are derived.

618 See e.g. Promusicae at 61-68, and joined cases C-403-429/08 – Premier League at 108.
6. Field-testing the normative bridge: the EU copyright acquis

6.1. Introduction

The previous chapter established benchmarks of legislative activity, which were derived from the case law of the CJEU and from EU primary law, taking into account the findings of chapters 3 and 4.

The present chapter tests the benchmarks against the current copyright acquis. The objective is not to perform an exhaustive analysis of the acquis through the application of the benchmarks; rather, this chapter aims at field-testing the benchmarks. It identifies examples in the acquis of how the benchmarks are or are not met by the EU legislator. Examining how the benchmarks can be materialized in practice allows for the collection of good and bad practices in copyright lawmaking. On the one hand, highlighting high performance points in the acquis allows the EU legislator to follow and expand upon such examples in the future. On the other hand, identifying regulatory flaws or low-performance points will too help to plan future legislative steps. The collection of both best and worst practices paves the way for the recommendations in chapter 7.

The next section (6.2.) will explain the methodology used to apply the benchmarks to the acquis. The following sections (6.3. to 6.7.) will proceed to analyse how the benchmarks are concretized in the acquis. The analysis will be done per benchmark. For that purpose, concrete examples from the current directives will be provided. Section 6.8. wraps up by, first, drawing some conclusions regarding the way in which each benchmark is expressed in the acquis; and finally by discussing the extent to which the benchmarks as a whole are reflected in said acquis.

6.2. Specific methodology

This section explains how the particular benchmarks will be tested in relation to the legislative acquis. I will use a content analysis technique based on deductive
reasoning. For that purpose, I will apply pre-established propositions (the benchmarks) to selected data (the directives).

Regarding the pre-established propositions, chapter 5 has described the benchmarks and what they entail. It can be seen from that analysis that each benchmark is comprised of one or more elements – for example, the benchmark of harmonization of national laws can be divided into two elements, the need for harmonization and the harmonization effect. To simplify the application of the benchmarks, the analysis will be done considering each element of each benchmark separately.

In what concerns the selected data, since this research is about lawmaking competences, only the legislative output (the directives) will be tested. The directives examined are the eight directives that have been enacted so far in the field of copyright.\textsuperscript{619} The analysis will occasionally refer to case law from the CJEU in relation to directives – e.g., as confirmation of gaps or deficiencies left by the legislator -, but the judicial output in itself will not be tested.

In order to test the benchmarks, I select empirical indicators of those benchmarks in the directives. The empirical indicators amount to certain features that appear throughout the \textit{acquis} and that can show whether a benchmark is met. In other words, indicators show how the benchmarks can be concretized in practice. I will use the indicators as examples of both good and bad practices in the \textit{acquis}. Pinpointing these examples of good and bad practices illustrates how the benchmarks can be applied to legislation, which in turn can serve as guidance for future copyright lawmaking. Some examples of indicators were already provided in the previous chapter. For instance, the harmonization technique is an indicator of the harmonizing effect of a norm – total harmonization equals a high harmonizing effect, while partial harmonization will normally stand for a low harmonizing effect.

Because there is a piecemeal approach to copyright harmonization, the selection of indicators is not straightforward or uniform. This means that some indicators are present in all directives, while others are only visible in a few. It is the case, for example, of the implementation of international treaties as an indicator for the need of harmonization. Not all directives are an offspring of international commitments; on the contrary, only one – the Information Society Directive – has international treaties (the WCT and the WPPT, i.e., the WIPO Treaties) as one of its main propellers. However, given the weight of the WIPO Treaties in justifying the need for the Information Society Directive, such an indicator could not be disregarded.

The following table summarizes the indicators that pertain to each element of each benchmark:

\textsuperscript{619} Directive 2004/48/EC, on the enforcement of intellectual property rights (“Enforcement Directive”) is not part of this data pool, as it covers other intellectual property rights as well.
6. FIELD-TESTING THE NORMATIVE BRIDGE: THE EU COPYRIGHT ACQUIS

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<thead>
<tr>
<th>BENCHMARK</th>
<th>ELEMENTS</th>
<th>INDICATORS</th>
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<tr>
<td>Harmonization of national laws</td>
<td>Need for harmonization</td>
<td>Divergent laws (actual or potential)</td>
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<td></td>
<td></td>
<td>Implementation of international treaties</td>
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<td></td>
<td>Harmonizing effect</td>
<td>Harmonization technique</td>
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<td></td>
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<td>Independence from non-harmonized terrain</td>
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<td>Derogation from harmonized rules</td>
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<td></td>
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<td>Wording</td>
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<tr>
<td>Respect for national cultures and traditions</td>
<td>Consideration of national cultures and traditions</td>
<td>Compromise between copyright and droit d'auteur systems</td>
</tr>
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<td></td>
<td></td>
<td>Accommodation of national legal and cultural specificities</td>
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<td>Protection of creators</td>
<td>Guarantee of income and recognition to creators</td>
<td>Grant of rights</td>
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<td></td>
<td></td>
<td>Strength of rights</td>
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<tr>
<td></td>
<td>Facilitation of further creative uses</td>
<td>Unencumbered use of existing works for creative purposes</td>
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<tr>
<td>Protection of end users</td>
<td>Access to cultural goods/services that takes into account the rights of end users</td>
<td>Establishment of exceptions to exclusive rights</td>
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<tr>
<td></td>
<td></td>
<td>Strength of exceptions</td>
</tr>
<tr>
<td>Promotion of competitiveness of EU industries</td>
<td>Moderate protection of industry</td>
<td>Grant of limited rights</td>
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<tr>
<td></td>
<td></td>
<td>Establishment of competition-related exceptions</td>
</tr>
</tbody>
</table>

| Table 6.1. |

The rationalization of each indicator will be done in the context of each benchmark.

6.3. Harmonization of national laws

The harmonization of national laws as a benchmark is connected to one of the main goals of legislative activity, which is the achievement of an internal market for copyright goods and services; using the legal basis related to the establishment and functioning of the internal market requires an actual harmonization of national laws (or at least a contribution to the implementation of other harmonizing measures). The benchmark is comprised of two elements: the need for harmonization (6.3.1.) and the harmonizing effect of directives (6.3.2.). The need for harmonization entails an assessment of whether there was a need to harmonize

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620 See chapter 2, section 2.3.1.
621 See chapter 5, section 5.3.
national laws in the first place, while the harmonization effect evaluates whether a legislative measure can in practice achieve harmonization of national laws.

6.3.1. THE NEED FOR HARMONIZATION

In general, the need for harmonization is fulfilled where different national laws are hindering the internal market, or where such laws are emergent. Both ex-post and preventive harmonization will therefore be expressions of this benchmark if obstacles to trade are in place or are likely to occur, provided that the legislative measure is designed to prevent them.622

As a result, the first indicator in the context of this benchmark is the de facto existence of divergent national laws, or the imminence of such laws, which hinder the internal market (A.). The need for harmonization is assessed by checking in practice whether national laws differ on the subject-matter of harmonization, and whether those differences have a negative impact on the internal market. This will be the case where a decision from the CJEU confirms that divergence. Moreover, the differences between national laws can also be evaluated by examining the individual national laws or by resorting to impact assessments where the divergence (and impact on the internal market) is documented. If there are no such laws in place, there might still be a need for harmonization where Member States have initiated national legislative procedures that will eventually generate divergent laws that can negatively impact the internal market.

The second indicator is the obligation to implement international treaties in the EU legal order (B.). In the field of copyright, apart from bilateral and regional agreements, there are two international treaties that the EU is party to, together with the Member States: the TRIPS Agreement and the WIPO Treaties (WCT and WPPT). As with any other party, the EU must make sure that its legal system complies with the substantive provisions of those treaties, in matters falling within its competence.623 Hence, the need to implement international treaties can act as a justification for legislative action.

It should be noted that this section is concerned with the need for harmonization alone, and not with the way in which the EU legislator addresses that need. Admittedly, however, if there is a need to harmonize a certain aspect of copyright law and the legislator goes beyond that particular need, the claim for harmonization loses strength. This is because in that case the real weight that harmonization goals have in the context of the legislative measure might not be readily apparent. Some

622 Tobacco Advertising I at 86; case C-377/98 – Netherlands v. Parliament and Council at 15; joined cases C-154-155/04 – Alliance for National Health at 29; Case C-217/04 – United Kingdom v. Parliament and Council at 60-62; Case C-301/06 – Data Retention at 64.

623 See Eeckhout 2004 at 276-278; Cremona 2011 at 232-244 and case law cited therein. See also Article 216 paragraph 2 TFEU (on international agreements): “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”
examples in the *acquis* illustrate this point. For instance, while it is true that the Information Society Directive was partly derived from the obligation to implement the WIPO Treaties, the Directive goes beyond their scope in several matters. But the substantive provisions of the Directive will instead be assessed vis-à-vis the other element of this benchmark (the harmonizing effect) and the other benchmarks as well. In that regard, the need for harmonization must then be analysed as separately as possible from the substantive provisions it generated.

Connected to this question is the choice of subjects to harmonize. As a matter of fact, some non-harmonized subjects are more pressing than others. The EU Commission tried to carry out a priority assessment, at least to a certain extent, in a couple of Green Papers. For example, the Green Paper on Copyright and the Challenge of Technology (1988), which preceded the first directive on copyright, expressly states that the matters dealt with therein “are not the only ones requiring attention at Community level, but constitute the issues considered most urgent.” In the Commission’s view, those urgent issues were piracy; home copying of sound and audio-visual material; distribution and rental rights for certain classes of works, in particular sound and video recordings; protection of computer programs and databases; and limitations on the protection available to Community right holders in non-member States.

This choice of urgent issues, however, is prone to some criticism. For instance, the inclusion of computer programs on the priority list and in particular its choice to kick off the EU’s harmonization program can be disputed. Despite the fact that slightly over than half of the Member States had national laws on the subject, that threshold might still be considered quite thin as compared to other aspects of national copyright laws. Namely, at the time of the Computer Programs Proposal (1989), already two decisions of the CJEU were out that demonstrated the need to harmonize other issues: cable retransmission and rental rights. Even if the

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624 An example is the protection of technological measures: the Directive prohibits preparatory acts of circumvention of technological measures, and it also extends the protection of technological measures and rights management information to the field of the sui generis right of the database maker. Neither of these cases was contemplated in the WIPO Treaties. Another case in point is the right of making available, which was granted to all four EU related right holders (i.e., performers, producers of phonograms, producers of films, broadcasters), while the WPPT only covered performers and producers of phonograms. For a thorough comparison of the WIPO Treaties with the Directive, see Dietz 1998. See also Cohen Jehoram 2001 at 539 ff.


627 Ibid.

628 At the time of the Computer Programs Proposal, only four of the then twelve Member States (France, Germany, Spain and the United Kingdom) expressly afforded protection to computer programs. However, three other countries (Denmark, Italy and the Netherlands) were considering draft laws on the subject, while yet in others court decisions and doctrinal opinions on the protection of computer programs under the available laws were likely to prompt national legislators to act. See Computer Programs Proposal, at 7. See also Czarnota & Hart 1991 at 103-118 for a detailed account of the position of each Member State at the time of the adoption of the Computer Programs Directive.

629 Case 62/79 – Coditel I, the judgement of which took place on 18 March 1980.
number of national laws on copyright protection for computer programs could support a claim for harmonization, the subject matter of the Computer Programs Directive is rather narrow, especially when compared to the rest of the non-harmonized European copyright landscape.

Nevertheless, the Commission, as the institution that is usually empowered to propose legislation, has a certain margin of discretion within that right of initiative – which includes deciding whether to propose legislation at all. Provided that the selection of subject-matter to be harmonized corresponds indeed to a need for harmonization (namely because the divergent national laws are hindering the internal market), there seems to be no room for challenging the decisions of the EU legislator regarding its choice for a subject over another. The need for harmonization must thus be assessed within the context of a particular directive, and not by way of comparison to the non-harmonized terrain.

A. DIVERGENT NATIONAL LAWS (ACTUAL OR POTENTIAL)

This indicator relates to the existence of divergent national laws that hinder the internal market, or the likelihood of such laws being enacted. At the outset, where a decision from the CJEU confirms said divergence, this benchmark will in principle be met. Three out of the eight directives can partly be justified in this fashion.

The first one is the Satellite and Cable Directive, which is an offspring of Coditel I. There, the CJEU sided with the right holder of copyright in a film and ruled that it was possible for the right owner to forbid an unauthorized cable retransmission in another Member State. The Court perceived the right of the right owner and his assignee to require fees for any showing of a film as part of the essential function of copyright in this type of work, with the consequence of the freedom to provide services (in this case, a cable retransmission) being restricted. The Satellite and Cable Directive addresses this specific question by regulating the exercise of cable retransmission rights (which might only be exercised through a collective society, in order to facilitate licensing).

630 Article 17 paragraph 2 TEU: “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.”
631 Lenaerts & Verhoeven 2002 at 69.
632 The Explanatory Memorandum to the Satellite and Cable Proposal states in paragraph 61: “[G]iven the disparities that exist it is conceivable that the Court of Justice could follow its findings in Coditel v Ciné Vog [case 62/79] and hold that there has not yet been established a single audiovisual area.” The creation of an EU audiovisual area is one of the aims of the Directive (see the Explanatory Memorandum, paragraphs 44 and 54).
633 Coditel I at 14.
634 See Article 9 of the Satellite and Cable Directive. See also Cohen Jehoram 2001 at 532-533 and Walter & von Lewinski 2010 at 399-400, 450-451.
The second is the Rental and Lending Rights Directive, which was partially based on *Warner*. In this case, the Court confirmed that a national copyright (in this particular context, Danish) could, in certain situations, restrict Community trade. The case concerned differences in the rental rights regime, with Denmark vesting right holders with rental rights, as opposed to the United Kingdom, where such rights did not exist. The Court considered that the Danish rental right, while being an obstacle to trade, was justified on the grounds of protection of intellectual property. As a result, the free movement of goods was impeded, as the right holder could prevent the unauthorized renting of his film in Denmark, even though the film had been legally sold in the United Kingdom. The Rental and Lending Rights Directive subsequently mandates Member States to provide for the right to prohibit or authorize the rental of copyright works and other subject matter.

Finally, the Term of Protection Directive was also a partial result of *EMI Electrola v. Patricia*, where the Court ruled that the differences between national laws prevented the distribution of imported Danish records (where they were already in the public domain) in Germany (where copyright subsisted). In the decision, the CJEU suggested that this outcome - which of course was not the most desired for purposes of establishing an internal market - was due to the “lack of harmonization or approximation of legislation”, which ascribed to Member States the determination of the conditions and rules of the protection of literary and artistic property. The case was taken up by the Commission as one of the justifications to act, as shown in the Explanatory Memorandum to the Term of Protection Proposal.

In these three cases, therefore, the need for harmonization is substantiated by the CJEU, as the Court could not remove the obstacles to trade, which were justified under Treaty rules. This signaled to the EU legislator that there was a need for legislative intervention and justified further legislative measures. However, the differences between national laws that justify legislative intervention can also be assessed by checking national laws in relation to the subject-matter of harmonization, or through impact assessments where that divergence is analysed. The imminence of divergent national laws, on the other hand, can be confirmed either through impact assessments as well, or in cases where Member States have national legislative procedures in motion from which those laws will derive.

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635 See Explanatory Memorandum to the Rental and Lending Rights Proposal at 26-27, where the Commission refers expressly to this case.
636 Article 1 paragraph 1 of the Rental and Lending Rights Directive.
637 *EMI Electrola v. Patricia* at 11.
638 See Explanatory Memorandum at 14-15, especially paragraph 28: “It is clear from this judgment that the differences between terms of protection in the Member States are such that the internal market in literary and artistic works and in cultural goods and services will not be brought about unless those terms are harmonized.(…)
639 See also Leistner 2009 at 847-848, Dreier 2013a at 294 and Cohen Jehoram 1994 at 822 ff, who states: “[T]hose three decisions of the ECJ were each the immediate cause for the EC executive to adopt three of the now existing four copyright directives”.

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It is not necessary for all Member States to have enacted national laws on a given subject; it is enough that part of them did, and that such part is relevant for internal market purposes. This criterion can be rather abstract – there is no guidance as to the necessary number of national laws that have to be in place in order to support a claim for harmonization. The *acquis* presents clear-cut examples of a need for harmonization based on the number of divergent national laws. It is the case, for instance, of the Resale Right Directive. At the time of the Proposal for the Resale Right Directive (1996), 11 out of the then 15 Member States already had a resale right.\(^{640}\) The regime varied as to the nature of the works covered by the resale right, the right holders and the transactions that triggered the obligation to pay the amount due, as well as in other details of payment.\(^{641}\)

Another example is the part of the Information Society Directive that deals with the exclusive rights of reproduction, communication to the public and distribution (Articles 2 to 4). There were some divergences in national laws with regard to these rights that could potentially hinder cross-border trade. All Member States had an exclusive reproduction right for all categories of right holders, but the scope of the right varied, namely in what concerned the precise acts covered by the right.\(^{642}\) The same goes for the right of communication to the public. Most significantly, there were differences regarding the question of whether it covered the right of making available.\(^{643}\) Regarding the distribution right, there were differences concerning its definition as an autonomous right\(^{644}\) and its exhaustion, with some Member States applying the principle of international exhaustion, while others provided for national exhaustion only.\(^{645}\) Furthermore, the exceptions to the exclusive rights also varied considerably throughout the Member States.\(^{646}\)

\(^{640}\) Explanatory Memorandum to the Resale Right Proposal, at 2.

\(^{641}\) Explanatory Memorandum to the Information Society Proposal, at 7-12. See also, for an overview of the different regimes, Katzenberger 1973 and Stokes 2002 at 154-155. Long before the Proposal for the Resale Right Directive, the European Commission had already pinned down its intention to harmonize the resale right. In its Communication on Action in the Cultural Sector (1977), harmonization of the resale right was deemed necessary to eliminate disparities between artists of the different Member States, and to put an end to distortions of competition deriving from the divergent national regimes – see Commission Communication on Action in the Cultural Sector (1977), at 14-16.

\(^{642}\) See Explanatory Memorandum to the Information Society Proposal at 12-13 and Follow-up to the Green Paper on Copyright and Related Rights in the Information Society at 9.


\(^{644}\) For instance, in France and Belgium the distribution right came under a destination right, while in the Netherlands, Ireland and the Nordic countries it was part of a sort of publication right/right of communication to the public. See Westkamp 2007 at 7-10 and Explanatory Memorandum to the Information Society Proposal at 21.

\(^{645}\) See Explanatory Memorandum to the Information Society Proposal at 21-22.

\(^{646}\) See Explanatory Memorandum to the Information Society Proposal at 12-22. See also Dusollier 2003 at 65-66, pointing out that, while there were some generally recognized exceptions (such as private copying, parody, quotation or the use of a work for scientific or teaching purposes), these were not all recognized in all countries. At the same time, specific Member States had exceptions for
Likewise, the section on lending in the Rental and Lending Rights Directive finds its justification on the differences between national laws regarding lending rights, as well as on the fact that “an overwhelming majority” of stakeholders argued in favour of harmonizing both rental and lending. The same holds true for the part of the Directive that harmonizes certain neighbouring rights, which is justified due to the differences in national laws, notably with respect to categories of right owners and specific rights granted.

There are however borderline cases in the acquis where the need for harmonization is not that apparent. Namely, the need for harmonization is less defensible with regard to the sui generis right created by the Database Directive. As its name indicates, the new right is one “of its own kind.” Prior to the Directive there were some types of intellectual property protection for non-original databases, namely in the Nordic countries, but the Directive does not purport to harmonize those. Although the Directive does harmonize copyright protection for databases, which was available in many Member States under the category of “collections” or “compilations”, when it comes to the sui generis right it cannot really be argued that national legislation was imminent. Neither was there any report or impact assessment documenting that future national legislation was on the way, nor were national legislative procedures in motion. The Explanatory Memorandum to the Database Proposal (1992) merely stated that “there is a risk that Member States may legislate expressly in widely differing ways,” failing to provide concrete evidence to support that statement. The new sui generis right does not harmonize national laws in the proper sense of the word. Instead, it introduces ex novo in the EU legal order a new kind of exclusive right. Therefore, with respect to the sui generis right, the need for harmonization is debatable.

The same can be said of Directive 2011/77/EU, amending the Term of Protection Directive (2006) (hereinafter, “Term of Protection Amending Directive (2011)”). This Directive operated an extension of the term of protection that is not justifiable from the perspective of a need for harmonization, since most of the matters it dealt with were particular situations (e.g. Germany exempted the communication of works during religious ceremonies and the Nordic countries had an exception for disabled persons).
it were already harmonized (exception made to the harmonization of the term of protection of co-written musical compositions with words, now enshrined in Article 1 paragraph 7 of the Directive). This was expressly noted by the Commission in its Staff Working Paper on the Review of the EC Legal Framework in the Field of Copyright and Related Rights (2004), where it is stated that “from the point of view of the Internal Market, the term of protection for phonogram producers does not cause particular concern since the term has been harmonised in the Community.”

Still, all the directives are, to a greater or lesser extent, rooted in the divergent laws of the Member States. At least part of the matters they harmonize are indeed non-harmonized terrain that can hinder the internal market – the Database Directive established the sui generis right, which might score lower in terms of need for harmonization, but it also harmonizes the copyright regime for databases, where national laws bore some differences. In a similar fashion, there was no harmonizing need for the term extension carried out by the Term of Protection Amending Directive (2011), but there was such need in relation to the term of protection of co-written musical composition with words, also harmonized by said Directive.

B. IMPLEMENTATION OF INTERNATIONAL TREATIES

In the field of copyright, there are two multilateral treaties so far that the EU is party to: the TRIPS Agreement and the WIPO Treaties (WCT and WPPT). As a party, the EU was under the obligation to implement these Treaties in matters falling within its competence.

When the TRIPS Agreement was signed, there were already four directives in force: the Computer Programs Directive, the Rental and Lending Rights Directive, the Satellite and Cable Directive and the Term of Protection Directive. These directives contained provisions that were already compliant with the TRIPS Agreement, such as the obligation to protect computer programs as literary works (Article 10 paragraph 1 TRIPS Agreement), or the establishment of rental rights at least in respect to computer programs and cinematographic works (Article 11 TRIPS Agreement). Therefore, in that sense, implementation of the Agreement was already partly taken care of. In any case, the EU institutions ought to apply and interpret the TRIPS Agreement in areas where the EU had exercised its competence by passing secondary legislation.

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654 The term of protection for co-written musical compositions with words had been one of the harmonization gaps of the initial Term of Protection Directive (1993): because this type of work was considered as a work of joint authorship in some Member States but not in others, the duration of its protection also differed throughout the EU – see Walter & von Lewinski 2010 at 638-639.


656 Moncayo von Hase 1998 at 114.

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The rest of the Directives – the Database Directive, the Information Society Directive, the Resale Right Directive and the Orphan Works Directive – were enacted after the TRIPS Agreement. While it cannot be argued that the subsequent directives were meant to implement the Agreement in the proper sense of the word, the Commission was wary of the need to be “consistent” with it where relevant.657

The argument goes differently in relation to the WIPO Treaties, however. Those Treaties were implemented via the Information Society Directive, which expressly had such implementation as one of its main justifications.658 Because the European Community also acceded to these Treaties, it needed to iron out the differences between the national laws of its Member States in a way that would ensure compliance with them.659

The EU is also party to a number of regional and bilateral agreements that contain intellectual property and/or copyright provisions. These however aimed mainly at exporting EU standards, as until now the counter-parties of such agreements usually had lower levels of intellectual property or copyright protection – for example, many bilateral agreements were concluded with prospective members of the European Community, and the intellectual property provisions included therein aimed at bringing future members on a par with EU protection standards.660 As a result, these agreements have not required the EU to change its internal legal framework for purposes of compliance.

6.3.2. THE HARMONIZING EFFECT OF DIRECTIVES

The second element to be examined in the context of this benchmark is the harmonizing effect of the directives. There are several ways to assess the harmonizing effect of norms. Here, four indicators in particular were chosen.

The first one is the harmonization technique used (A.). As explained in chapter 5, several mechanisms can be used to harmonize national laws. One refers to total harmonization and partial harmonization techniques. Total harmonization sets forth a single regime and does not give the Member States room for legislative choices.  

657 See, e.g., Explanatory Memorandum to the Database Proposal, paragraph 5.1.1.
658 See Recital 15 of the Directive. See also Desurmont 2001 at 5; Ficsor 2002 at 68; Lehman 2003 at 521-522; Walter & von Lewinski 2010 at 944-945.
659 This also holds true for practical reasons. At the Assembly of Contracting Parties, the Community could only exercise the right to vote of the Member States, since it didn’t have a separate vote of its own. Consequently, its vote was equal to the number of votes of its Member States and it would be precluded should any of them exercise its right to vote (see Article 15 paragraph 3(b) WCT/ Article 24 paragraph 3(b) WPPT). With a harmonized framework, internal disagreements were less likely to occur and the Community could more easily speak in one voice on behalf of the Member States.
660 See von Lewinski 2008 at 367-372, 589. A notable exception to this rule is the EU-South Korea Free Trade Agreement, which entered into force in July 2011 (requiring the parties to provide for criminal sanctions for piracy), but which has not yet found its expression in the EU acquis – see Nadde-Phlix 2012 at 957-958.
Therefore, total harmonization generally yields a high harmonizing effect. Conversely, partial harmonization leaves certain policy choices to Member States. The concrete policy choices depend on the type of partial harmonization: minimum harmonization allows Member States to adopt more stringent requirements than the one established at the EU level; optional harmonization lets Member States decide whether to adopt the EU rules or not; and alternative harmonization fixes a goal to be attained but leaves the choice of means to do so to the Member States. As a consequence, partial harmonization techniques may lead to different national regimes, and their harmonizing effect is lower. Another mechanism of harmonization is mutual recognition. This implies that the setting of a given standard by one Member State must be recognized by all Member States, thereby achieving the same status quo throughout the EU. Since the consequence of mutual recognition is having the same result in all EU Member States, this mechanism can achieve a high harmonizing effect.

The second indicator is the independence of harmonizing norms from non-harmonized terrain (B.). In order to reach a high harmonizing effect, a harmonizing norm should not be intertwined with, or dependent on, non-harmonized notions. The harmonizing effect is thus also related to whether a norm has underlying or intertwined notions that are not harmonized, as those can taint the final harmonizing result.

The third indicator is the derogation from harmonized rules (C.). This relates to cases where a directive itself has derogations to the harmonized rules it sets forth, thereby undermining their harmonizing effect.

The last indicator relates to the wording of specific provisions in directives (D.), which can also reveal the harmonizing effect of legislative measures. A broad or abstract wording has less of a harmonizing effect, as it gives more freedom to national legislators in the implementation stage and can therefore lead to different national results. For the purposes of this indicator, “wording” means not only the formulation or definition of concepts – for example, the definition of the scope of a right - but also the use of certain terms, that can be more or less clear in the European context. So, for instance, the use of key terms by the EU legislator should be accompanied by a definition of such terms, if they are new to the EU legal order and their meaning is not self-evident.

A. HARMONIZATION TECHNIQUE

Throughout the copyright acquis, the different harmonization techniques are used transversally, the result of which is that the same directive combines several of those techniques. In general, there is a tendency to use total harmonization in
relation to the definition of protected subject matter and economic rights, while other aspects are regulated using partial harmonization.\(^\text{661}\)

In relation to the subject matter, that tendency is visible in the definition of computer programs, databases, and original photographs as protected works. In these three cases, the Computer Programs Directive, Database Directive, and Term of Protection Directive, respectively, use the same condition for protection: the subject matter shall be protected if it is original in the sense that it is the author’s own intellectual creation, and no other criteria may be applied to determine its eligibility for protection.\(^\text{662}\)

It is noteworthy that the high harmonizing effect in this case is not only derived from the total harmonization technique, but also from the criterion used. The “author’s own intellectual creation” represents a compromise between the skill and labour required in copyright countries and the originality threshold of the droit d’auteur countries.\(^\text{663}\) The fact that it is middle ground between the two copyright traditions makes it easier to interpret as per reference to the (already known) standards of protection of said traditions. The high harmonizing effect of this criterion was further stretched by the CJEU, which mandated that it applied to other types of works.\(^\text{664}\)

This tendency to a total harmonization of subject matter can also be seen in other directives, namely in the Resale Right Directive, which defines, in its Article 2, the works to which the resale right shall apply;\(^\text{665}\) or in the Database Directive, in relation to the definition of the subject matter of the sui generis right.\(^\text{666}\)

\(^{661}\) See however Article 5 of the Term of Protection Directive (2006), using a partial harmonization technique in relation to protected subject matter. The provision gives Member States the possibility of protecting critical and scientific publications of works that have come into the public domain – admittedly, quite a confined area. Member States have the option of implementing this protection or not. If they do, the term is set at a maximum of 30 years.


\(^{663}\) See Report on the Implementation of the Computer Programs Directive (2000) at 6: “The program must be the “own intellectual creation of its author”. No other criteria are allowed. This uniform level has required 12 Member States to lower the threshold for granting protection and the remaining three to “lift the bar.”” See also Cohen Jehoram 1994 at 828-830; Handig 2009 at 671-672; Walter & von Lewinski 2010 at 587; van Eechoud 2012 at 61.

\(^{664}\) In case C-5/08 – Infopaq, the CJEU ruled that the reproduction right for authors in respect of their works as granted by the Information Society Directive applies only in relation to a subject matter that is original in the sense that it is the author’s own intellectual creation (at 37). This generalization of the standard of protection was confirmed later on, namely in case C-393/09 – BSA (at 45-46), in joined cases C-403-429/08 – Premier League (at 96-97 and 155) and in case C-406/10 – SAS (at 45 and 65). On the enlargement of the scope of the protection standard by the CJEU, see Derclaye 2010 at 248-249; Rosati 2011 at 748 ff; van Eechoud 2012 at 63 ff.

\(^{665}\) These are the “works of graphic or plastic art.” The Directive further provides a list of examples of this type of works and, following a Parliament’s amendment to the Commission’s original proposal, expressly excludes from its scope original manuscripts of writers and composers.

\(^{666}\) According to Article 7 paragraph 1 of the Database Directive, the subject matter of the sui generis right is “a database which shows that there has been qualitatively and/or quantitatively a substantial
With regard to the economic rights, the technique of total harmonization is also the most employed. For example, the exclusive rights of reproduction, distribution and communication to the public have been the object of total harmonization by several directives, in relation to different subject matter. Member States are obliged to implement these rights in their national legislations.

Moreover, the rights are defined in the various directives in a very broad manner. The acts that were carved out of the scope of these rights were carefully defined, not leaving much regulatory leeway to the Member States. It is the case, for instance, of the reproduction right, which usually encompasses any reproduction, temporary or permanent, in whole or in part, by any means or in any form. The Information Society Directive then exempted from the definition certain acts of temporary reproduction, which is the only mandatory exception to the exclusive rights of that Directive. Similarly, the right of distribution entails any form of distribution to the public, but the EU legislator has clarified that this right does not include resale where the first sale was carried out by the right holder or with its consent. Both cases are mandatory rules that define the scope of the exclusive rights and from which Member States are not allowed to deviate. The situation is less clear regarding the right of communication to the public - while Article 3 of the Information Society Directive speaks of “any communication to the public”, Recital 23 of the same Directive declares that this covers the communications to the public not present at the place where the communication originates, adding that the right “should not cover any other acts.” At the same time, however, the remuneration right for communication to the public granted by Article 8 paragraph 2 of the Rental and Lending Rights Directive covers any communication to the public, including the ones where the public is present at the place of the communication.

There are few exceptions to the total harmonization of rights. One is the right of broadcasting and communication to the public of Article 8 of the Rental and Lending Rights Directive, which is a measure of minimum harmonization: with respect to this neighbouring right, Member States can provide for more far-reaching protection. E.g., they can provide for an exclusive right instead of a remuneration investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.”

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667 For the right of reproduction, see e.g. Article 4 paragraph 1 (a) of the Computer Programs Directive (2009), Article 7 of the Rental and Lending Rights Directive (2006), Article 5 (a) of the Database Directive, Article 2 of the Information Society Directive. For the right of distribution see e.g. Article 4 paragraph 1 (c) of the Computer Programs Directive (2009), Article 9 of the Rental and Lending Rights Directive (2006), Article 5 (c) of the Database Directive, Article 4 of the Information Society Directive. For the right of communication to the public, see e.g. Article 2 of the Satellite and Cable Directive, Article 5 (d) of the Database Directive, Article 3 of the Information Society Directive.


670 Van Eechoud et al. 2009 at 82.

right as established in Article 8 paragraph 2, or they may extend the remuneration right to any kind of phonogram and not just commercial ones. 672 Another exception is the public lending right, in relation to which Member States have the option of either derogating from it or transforming it into a remuneration right (depending on whether the right holder is a related right owner or an author, respectively). 673

By contrast, the harmonization of other aspects of copyright is done through techniques of partial harmonization, which have a lower harmonizing effect. The exceptions to the exclusive rights are a case in point. Among those, the most obvious example is Article 5 paragraphs 2 to 4 of the Information Society Directive, which follow a strategy of optional harmonization. Article 5 paragraphs 2 and 3 together conjure up a list of 20 optional exceptions to the exclusive rights of reproduction and communication to the public (including the right of making available). Article 5 paragraph 4 allows Member States to provide for exceptions or limitations to the distribution right where they have already done so for the reproduction right.

The list of paragraphs 2 and 3 is quasi-exhaustive: adding or maintaining national exceptions that are not comprised therein is not allowed except if the use in question relates to “certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in [Article 5]”. 674

Nevertheless, since the list is optional, Member States may cherry-pick the exceptions to implement. This may lead (and has in fact led, to a certain extent) 675 to a non-harmonized range of exceptions throughout the EU. The missed goal of harmonization regarding the exceptions is so apparent that it caused a throng of commentators to note it and criticize it. 676 The harmonizing effect is further hampered by another measure of optional harmonization: Member States are allowed to provide for fair compensation also when applying other exceptions that do not mandatorily require it. 677

The same happens in the realm of the Database Directive, which performs an optional harmonization of exceptions to both copyright and the sui generis right (Article 6 paragraph 2 and Article 9, respectively). 678 The Directive makes only one

672 Walter & Lewinski 2010 at 310.
673 See Articles 1 and 6 of the Rental and Lending Rights Directive (2006).
674 Article 5 paragraph 3 (o).
677 Recital 36 of the Directive.
678 Also pointed out by Stamatoudi 1997 at 462-464 and 471.
exception mandatory to each of those rights,\textsuperscript{679} while the others are for the Member States to pick and choose at will. Although the list of optional exceptions is not very long (four for copyright and three for the sui generis right), Article 6 paragraph 2 (d) allows Member States to provide for “other exceptions to copyright which are traditionally authorized under national law.” This is a potential gate-opener for an undefined number of exceptions and therefore also scores low in terms of harmonizing effect.

Similarly, the Rental and Lending Rights Directive puts forth an optional list of limitations to the rights in Article 10. This list, albeit short (it comprises only four exceptions) may be enlarged by the Member States, which are given the option to extend their national exceptions to copyright to the related rights established by the Directive.\textsuperscript{680}

The trend to use partial harmonization techniques in the field of exceptions to the rights is not absolute, however. The Computer Programs Directive sets forth exceptions to the exclusive rights that are mandatory and from which the Member States may not deviate.\textsuperscript{681}

Nevertheless, it flows from the above that there is a divide between rights and exceptions: the majority of rights are harmonized through total harmonization, while most of the directives use partial harmonization techniques to harmonize the exceptions. This leads to a higher harmonization level of rights, while the shaping of exceptions is largely left to national legislators. As a result, the problem of balancing interests is shifted to the national level, and the outcome of such balance might result in a non-harmonized EU landscape.

In addition to the harmonization techniques just mentioned, it is also possible to use other type of mechanisms that are an aid to harmonization endeavours. It is the case of mutual recognition, which can facilitate cross-border trade while at the same time contributing to Member States reaching a compromise in the context of a harmonizing measure. There are a couple of examples in the acquis where mutual recognition is used. One is the mutual recognition of orphan work status, posited in Article 4 of the Orphan Works Directive, which mandates that a work or phonogram considered to be an orphan work in a Member State shall be considered an orphan work in all Member States. Another example is the Satellite and Cable Directive, providing for a country of origin rule, which is an application of the principle of mutual recognition.\textsuperscript{682} The Directive creates a broadcasting right (i.e., a right of communication to the public by satellite) that can only be exercised in the country where the programme-carrying signals are introduced into an uninterrupted

\begin{footnotesize}
\begin{itemize}
  \item[679] Both mandatory exceptions concern the “lawful user” of the database. Article 6 paragraph 1 deals with the mandatory exception to copyright relating to the normal use of the database; Article 8 paragraph 1 concerns the exception to the sui generis right for the lawful user of a database who extracts and/or re-utilizes insubstantial parts of the database.
  \item[681] Articles 5 and 6 of the Computer Programs Directive (2009).
  \item[682] Majone 2007 at 73-74; van den Gronden & de Waele 2010 at 401.
\end{itemize}
\end{footnotesize}
chain of communication leading to the satellite and down towards the earth (that is, the country of transmission /country of origin of the signal). 683

B. INDEPENDENCE FROM NON-HARMONIZED TERRAIN

The independence of a harmonizing rule from non-harmonized terrain is connected to the question of “layered” harmonization undertaken by the EU legislator. Because the harmonization of copyright has taken place in a piecemeal fashion, it can happen that some harmonizing rules are linked to non-harmonized concepts. This amounts to the permeability of the harmonizing rule vis-à-vis the non-harmonized aspects of copyright. In fact, even if the technique of harmonization used is total harmonization – thereby conferring in theory a high harmonizing effect to the norm -, the harmonizing effect is diminished if the norm is intertwined, or dependent on, other non-harmonized aspects of copyright.

It is the case, for example, of certain non-harmonized rules regarding authorship in the context of the Term of Protection Directive (such as the notions of author, collective works and works of joint authorship). The calculation of the term of protection in the case of works of joint authorship and collective works is dependent on the qualification of the work as such. 684 The problem is that there is no harmonized notion of either, and therefore this non-harmonized terrain impacts on a supposedly harmonized rule. 685

Article 6 of the Resale Directive exemplifies this matter as well: it lays down the persons entitled to receive royalties, i.e. the author and, after his death, those entitled under him/her. However, the beneficiaries after the author’s death might vary according to national laws, as shown by the Fundación Gala-Salvador Dalí case. 686 There was a discrepancy in national laws that underlied this case: while French law reserved the benefit of the resale right only to the artist’s heirs, the Spanish law contained no such restriction and considered testamentary legatees just as entitled. The CJEU ruled that Member States were free to determine the

683 Article 1 paragraph 2(a) and (b) and Article 2 of the Satellite and Cable Directive. Note however that cross-border trade is still halted in this case, due to market fragmentation techniques that continue to be used by right holders, such as territorial licensing – see Hugenholtz 2005 at 65 ff. and Report on the Satellite and Cable Directive (2002), paragraph 3.1.1.

684 The term of protection for works of joint authorship is calculated from the death of the last surviving author (Article 1 paragraph 2 of the Term of Protection Directive (2006)). By contrast, the term of protection for collective works follows the rule for anonymous or pseudonymous works of Article 1 paragraph 3, except if the natural persons who have created the work are identified as such in the versions of the work which are made available to the public (Article 1 paragraph 4).


686 Case C-518/08 – Fundación Gala-Salvador Dalí.
categories of persons who can benefit from the resale right after the author’s death. 687

A possible solution for this problem is the establishment of certain standards or reference points that are independent of the non-harmonized concepts. The _acquis_ also displays examples of this. So, for instance, Article 2 of the Term of Protection Directive (2006) states that the protection afforded to cinematographic or audiovisual works expires 70 years after the death of the last to survive out of a list of persons, regardless of whether national law considers them as authors or not. This sets a reference standard that works independently of issues of authorship and ownership, which are non-harmonized areas. The same is applicable to the new number 7 of Article 1 of that Directive, introduced by the Term of Protection Amending Directive (2011), which lays down a similar rule for musical compositions with words independently of the qualification of the persons as co-authors.

C. DEROGATION FROM HARMONIZED RULES

This indicator refers to derogations to the harmonizing rules contained in directives. The least problematic types of derogations are the provisions on the application in time of each directive, because they are by definition temporary. As clarified in the previous chapter, a way to side-step this is to harmonize national laws by the highest common denominator, so as to avoid transitional measures that delay the harmonizing effect.

Admittedly, this is not always straightforward. The Term of Protection Directive, for example, had a problem at the outset in this aspect: some Member States had deviations to their general rule that set longer terms of protection. 688 Instead of harmonizing at the absolute highest term – a daunting task that would require a search of potential works falling under the exception -, the Directive sets the threshold at the highest general rule, i.e., 70 years after the death of the author. However, transitional measures make sure that works that would qualify for longer terms of protection under the national regimes are still protected under such rules. Article 10 paragraph 1 of the Term Directive (2006), on the application in time, reads: “Where a term of protection which is longer than the corresponding term provided for by this Directive was already running in a Member State on 1 July 1995, this Directive shall not have the effect of shortening that term of protection in that Member State.” As a result, there is a delay of the harmonizing effect that corresponds to these longer national terms.

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687 Case 518/08 – Fundación Gala-Salvador Dalí, at 31-35.
688 See, e.g., the war-related term extensions in France, that added from 6 years and 152 days till 30 years to the original term of protection of a work (Articles L123-8 to L-123-10 of the French Intellectual Property Code).
Other types of derogations to harmonized rules, however, can lead to more permanent problems. The Rental and Lending Rights Directive, for example, allows Member States to derogate to the public lending right for the benefit of certain categories of establishments. According to the Report on the Public Lending Right in the EU (2002) this possibility is used widely, thus hampering the harmonization of the right. Another case is Article 1 paragraph 2 of the Resale Right Directive. This provision establishes the acts to which the right applies and it sets forth examples to clarify the definition of “art market professionals.” However, Article 1 paragraph 3 allows Member States to exempt acts of resale under certain circumstances (where the seller has acquired the work directly from the author less than three years before the resale and where the resale price does not exceed Euro 10,000).

D. WORDING

As explained in the beginning of this section, the notion of “wording” can refer to whether certain unclear concepts are defined at all in the directives, or to the way in which that definition is provided, where it does exist. In the case of the latter, this indicator opposes broad or abstract wording (corresponding to a low harmonizing effect) to a precise or concrete one (corresponding to a high harmonizing effect).

In relation to the first meaning – the definition of concepts – there are some points in the acquis where key concepts remain undefined. The use of the concept of “remuneration” and modalities thereof is an example: the Rental and Lending Rights Directive (2006) alone uses indistinctly the notions of “equitable remuneration” (Articles 5 and 8 paragraph 2), “remuneration” (Article 6) and “adequate remuneration” (Article 11 paragraph 3). No definition is provided for any of these terms, apart for some guidance regarding the notion of “equitable.” The CJEU came to clarify that “equitable” refers to the economic value of the use, but ruled that Member States can regulate the remuneration in detail, as long as they achieve a balance between the interests at stake and they do not contravene any EU law principle. As a result, the exact concept of “remuneration” (and its modalities) remains unharmonized. Similarly, the concept of “fair compensation”,
introduced for the first time in the EU legal order by the Information Society Directive, is a new and undefined notion.\(^{694}\)

Other examples include the notion of “lawful acquirer” of a computer program (Article 5 of the Computer Programs Directive (2009)), which is interpreted differently across the EU.\(^{695}\) Similar doubts extend to the concept of “lawful user” of the Database Directive (Articles 6, 8 and 9). In the context of the Information Society Directive, the same happens with the regulation of the protection of technological measures, which was a subject new to most national copyright laws – for instance, Article 6 paragraph 4 first indent establishes an obligation for Member States to take “appropriate measures” to ensure that right holders make available to beneficiaries of certain exceptions the means to benefit from those exceptions, if right holders have not taken “voluntary measures” to do so within a reasonable period of time.\(^{696}\) The Directive does not give any guidance as to what shall be considered an “appropriate measure”, and gives only one example of a “voluntary measure” (“agreements between right holders and other parties concerned”, according to Article 6 paragraph 4 first indent). As a consequence, Member States are free to decide on the appropriate measures to take, the nature of such measures (administrative, judicial, etc), their timing and also, in many cases, the concrete beneficiaries of those measures.\(^{697}\) Member States are also rather free to decide what type of “voluntary measures” taken by right holders preclude their obligation to intervene. The low harmonizing effect of these provisions is further confirmed by the sharp differences between national implementations of Article 6.\(^{698}\)
Leaving certain key concepts undefined becomes even more problematic if the subject matter in question is not familiar to national copyright laws. In fact, the use of established copyright paradigms – be it derived from international treaties, case law or even widely-accepted doctrines – contributes to a high harmonizing effect of provisions. Such use facilitates questions of interpretation and implementation, since in case of doubt it is possible to resort to the general principles of the international instrument or to generally known doctrines. Ultimately, this contributes to a more harmonized landscape. Especially in the case of non-typical works (such as computer programs), this technique is helpful if one considers that the option would be to come up with new definitions that, because they are unknown, could be interpreted differently at the implementation stage.

The Computer Programs Directive provides a couple of positive examples. First, it links the Directive to the Berne Convention, thereby providing for a common legal umbrella, as all the Member States are parties to the Convention - similarly to the WCT\(^{699}\) and to the TRIPS Agreement\(^{700}\), the Directive establishes that computer programs shall be protected as literary works within the meaning of the Berne Convention.\(^{701}\) The harmonizing effect of considering computer programs as literary works was described as “significant” by all the interested parties interviewed in the context of the Report on the Implementation of the Computer Programs Directive (2000).\(^{702}\)

Second, Article 1 paragraph 2 of the Computer Programs Directive (2009) expressly states that “ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected.” This refers back to the traditional idea/expression dichotomy in copyright, according to which only the expression of an idea can be protected by copyright, while the underlying idea itself cannot. Many have criticized the idea/expression test, one of the main comments being that the line between an idea and its expression is very difficult to draw in practice.\(^{703}\) However, just like referring to the Berne Convention simplifies matters of implementation and interpretation, the allusion to the idea/expression dichotomy provides for a previously known common ground, thereby avoiding the use of new terms and expressions that have no tradition in national legal systems.\(^{704}\) Moreover, the difficulty in ascertaining the precise boundaries of ideas and expressions is

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\(^{699}\) Article 4 WCT.  
\(^{700}\) Article 10 paragraph 1 TRIPS Agreement.  
\(^{701}\) See Article 1 paragraph 1 of the Computer Programs Directive (2009).  
\(^{703}\) See, inter alia, Lindey 1952 at 4; Karnell 1989 at 16-17; Lucas & Lucas 2001 at 63-64; Netanel 2008 at 66-62. Arguably, this critique applies even more accurately to computer programs, where idea and expression are often intertwined – see Pilarski 1987 at 339-346; Grosjeide 1994 at 219-220; Newman 1999 at 699-700; Tumbragel & Villiers 2004 at 35-36; Saw 2005 at 470.  
\(^{704}\) It should be noted that the idea/expression dichotomy has meantime been posited in both the WIPO Copyright Treaty (Article 2) and the TRIPS Agreement (Article 9 paragraph 2).
watered down by the so-called “merger doctrine”, under which the idea and its expression merge where there is essentially one way to express an idea, leaving the expression unprotected in those cases.\textsuperscript{705} While the merger doctrine originated in the United States, there is nothing that impedes its application also in the context of the Computer Programs Directive.\textsuperscript{706}

By contrast, the Database Directive shows how the use of undefined concepts can have a low harmonizing effect. The sui generis right is a new type of right in the EU legal order, and therefore there is no previous legal tradition that can serve as an interpretation standard. As a consequence, and even though the provisions relating to the sui generis right (Articles 7 to 11) are almost all measures of total harmonization,\textsuperscript{707} the distorting effects of using undefined terms in relation to that right are augmented. The low harmonizing effect of the sui generis regime is proven by the degree of divergence between national laws after implementation of the Directive, as documented in a study commissioned by the European Commission.\textsuperscript{708}

There are for instance two particular terms that have a potentially high disharmonizing effect: the “substantial part” of a database and the “substantial investment”, which qualify inter alia protectable databases and their term of protection.\textsuperscript{709} The CJEU had to step in to define these concepts,\textsuperscript{710} which also accounts for the unclear wording of the relevant provisions of the directive. The Court also had to intervene to clarify what the acts of “extraction” and “re-utilization” – the two exclusive rights of the database maker - encompassed.\textsuperscript{711} Another example is the notion of “completion” of a database, upon which the term of protection also depends.\textsuperscript{712} It is not clear what exactly is meant by date of completion, especially in the case of dynamic databases, which are constantly being updated.\textsuperscript{713}

In relation to the second meaning of “wording” – the type of language used in defining concepts - some examples in the acquis show that the use of broad wording has a low harmonizing effect. It has in particular been pointed out that the wording of Articles 2 to 4 of the Information Society Directive, which recognize the

\textsuperscript{705} See, on the merger doctrine, Samuels 1989 at 382-395; Jones 1990 at 575-580; Saw 2005 at 470.
\textsuperscript{706} Czarnota & Hart 1991 at 38. Although not expressly citing the merger doctrine, the CJEU has also resorted to it by stating that where the expression of certain components is dictated by their technical function “the different methods of implementing an idea are so limited that the idea and the expression become indissociable” – see case C-393/09 – BSA at 49. See also Gervais & Derclaye 2012 at 568.
\textsuperscript{707} Exception made to Article 9, regarding the exceptions to the sui generis right.
\textsuperscript{709} See Articles 7 and 10 of the Database Directive.
\textsuperscript{710} See e.g. case C-203/02 – BHB v. William Hill; case C-46/02 – Fixtures Marketing I, case C-338/02 – Fixtures Marketing II.
\textsuperscript{711} See e.g. case C-203/02 – BHB v. William Hill and case C-304/07 – Directmedia Publishing.
\textsuperscript{712} See Article 10.
\textsuperscript{713} Derclaye 2008 at 138; Stamatoudi 1997 at 473-474.
exclusive rights of reproduction, communication to the public and distribution, is very broad and abstract, tarnishing the harmonizing effect of those provisions. A proof of this is the amount of referrals to the CJEU that have at their core questions of interpretation of these Articles (or expressions comprised therein). E.g., the wording of Article 4, on the distribution right, does not make clear which types of acts are covered by the right other than sale. Namely, it does not clarify whether acts of distribution must necessarily entail transfer of ownership. Member States were thus free to interpret broadly the distribution right – they could either include in it the rental and lending rights, or narrow it down to cover only sale.

In addition, the broad wording of the three exclusive rights makes it harder to grasp their concrete boundaries, and to assess where one right ends and the other one begins. It is generally accepted that there can be an overlap of the right of reproduction with the right of communication to the public in relation to Internet-based exploitation, since an act of communication via Internet (like webcasting or podcasting) will require reproduction of the work or other subject matter. Moreover, the distinction between the right of making available and broadcasting is unclear. While the definition of broadcasting presupposes that the access to the work or other subject matter is carried out simultaneously with its transmission, some Internet services – such as the possibility of the user choosing from multiple broadcasting programs on the Internet - might blur that line.

The absence of clear boundaries between the exclusive rights has of course implications for their clearance and for avoiding double payment for the same act of exploitation. However, it can also encompass a disharmonizing effect: if the boundaries between the rights are not clear, national legislators and courts might qualify the same act of exploitation as falling under different categories of rights. A case in point is the distinction between the right of making available and possession.

716 See Westkamp 2007 at 8. It had to be the CJEU to resolve this issue (in case C-456/06 – Peek & Cloppenburg) by establishing that only acts of transfer of ownership are covered by the concept of distribution.

717 Van Eechoud et al. 2009 at 84-89. See also Westkamp 2004, at 1102.

broadcasting in the field of related rights, where the right holders do not have an exclusive right to authorize or prohibit broadcasting.\textsuperscript{719} In some cases, this will mean that the same act will be subject to authorization by the right holder in one country (because it comes under the right of making available of a related rights owner), while in another country the right holder is only entitled to remuneration, but not to authorize or prohibit the act (because it comes under the definition of broadcasting).

6.4. Respect for national cultures and traditions

The second benchmark is the respect for national cultures and traditions, which has a single element: the consideration of the cultures and traditions of the Member States. It presupposes the integration of cultural diversity in internal market legislation. “Cultural diversity” is used here in a broad sense that encompasses national and regional cultural expressions, on the one hand; and national legal traditions, on the other hand.

Chapter 2 has demonstrated that one of the goals of the EU legislator was the fostering of culture at the EU level, which was there understood in its narrow sense of cultural expressions. Variations of this goal could be spotted throughout the \textit{acquis}. Some of these variations included the protection of cultural diversity and the consideration of cultural aspects in harmonizing measures, which are in turn akin to part of the contents of the present benchmark.

It should be recalled that the EU gained cultural competences in 1992, with the Treaty of Maastricht, which could have meant that the EU harmonization of copyright would integrate cultural considerations from then on. However, not all the directives after Maastricht had the fostering of culture as a goal, which means that such goal is not linearly seen throughout the \textit{acquis}. In any case, the goal of fostering culture and its variations, being on the background of some of the directives, should be reflected in their substantive provisions, thereby providing some examples of how this benchmark can be met in copyright legislation.

Two indicators are used to test this benchmark vis-à-vis the \textit{acquis}. The first one is the compromise between the systems of copyright and \textit{droit d'auteur} (6.4.1.). Reaching a compromise between these two systems is a way to take into consideration national copyright regimes, which are roughly grouped into either the system of \textit{droit d’auteur} or the copyright system. The majority of Member States comes under the system of \textit{droit d’auteur}, but a few follow the copyright system (notably, the United Kingdom, Ireland, and Cyprus). Ideally, then, EU copyright legislation should take account of both systems, as they stand for each Member State’s legal tradition in copyright. Achieving a compromise between the systems

\textsuperscript{719} See also van Eechoud et al. 2009 at 90-91.
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of copyright and droit d’auteur is possible by formulating concepts or rules that comprise elements of both traditions, or that stand at middle ground between them.

The second indicator is the accommodation of national legal and cultural specificities (6.4.2.). Apart from being grouped into a particular system of copyright, each Member State has certain features inherent to its own traditions – either from a legal or from a cultural point of view. Taking these specificities into account to the extent possible reveals that national cultures and traditions have been considered. This can be done by omission – for example, leaving outside of the harmonization measure certain aspects that relate to national cultures and traditions –, or by positive action – for instance, integrating certain national oddities in EU copyright legislation.

6.4.1. COMPROMISE BETWEEN THE SYSTEMS OF COPYRIGHT AND DROIT D’AUTEUR

If the harmonization program in copyright must take account of both the systems of copyright and droit d’auteur, then harmonization measures should seek to reach a compromise between key features of both systems. However, it should be noted that the boundaries between the systems of copyright and droit d’auteur are not completely rigid. Copyright and droit d’auteur countries share many characteristics, such as the grant of a few basic exclusive rights to authors. Where harmonization measures cover such common characteristics, one cannot really talk about a “compromise” between copyright and droit d’auteur. It is the case, for instance, of the exclusive rights of reproduction, communication to the public and distribution granted by the Information Society Directive (Articles 2 to 4). As mentioned above, all Member States already had those rights (or some variation of them that in any event covered the basic forms of exploitation). The differences between national laws concerned the exact scope and boundaries of the rights, but those differences did not result from the divide between the systems of copyright and droit d’auteur. Hence, the harmonization of such common features is a neutral factor in the context of this benchmark.

Nevertheless, in the aspects where copyright and droit d’auteur differ, the acquis displays some examples that show that a compromise was achieved between them. A case in point is the condition for protection of computer programs, databases and original photographs that the subject matter be original in the sense that it is “the author’s own intellectual creation.” As seen in chapter 1, droit d’auteur systems originally required that the work reflected the author’s personality in order to qualify for copyright protection. This was a higher threshold than the one traditionally demanded in copyright systems, which valued the skill, labour and judgment invested in creating the work. The notion of originality as being the author’s own intellectual creation is a trade-off between the lower threshold of

720 Chapter 1, section 1.1.2.
copyright tradition countries and the higher threshold of *droit d’auteur* countries, 721 although recent case law from the CJEU suggests that this standard is closer to *droit d’auteur* than to copyright. 722

Another example is the establishment of the principal director of a cinematographic or audiovisual work as one of its authors, which is set forth by three directives (Article 2 paragraph 1 of the Term of Protection Directive (2006), Article 2 paragraph 2 of the Rental and Lending Rights Directive (2006), Article 1 paragraph 5 of the Satellite and Cable Directive). A number of Member States already considered the principal director as an author. But Member States closer to the copyright tradition vested initial ownership of rights in cinematographic works in the producer only. The EU rule bridges the gap between the two approaches by mandating that the director be one of the authors, while at the same time leaving it to Member States to choose other co-authors, according to their own traditions. In practice, the exploitation rights in this type of work are in any case transferred to the producer by operation of law or contractual arrangements, again according to each Member State’s own legal tradition, 723 although the CJEU has recently made clear that national laws have to allocate initial ownership of the exploitation rights at least to the principal director. 724

Finally, the Information Society Directive, by introducing the notion of “fair compensation,” reveals another compromise between the two systems. The term “fair compensation” was new to the European copyright acquis. It represents a midway between the countries that have the equitable remuneration realized through the levy system (a form of statutory remuneration rights existing mainly in countries with a *droit d’auteur* tradition) and countries that do not have such a system (mainly countries with a copyright tradition). 725 As a result, countries that have pre-existing remuneration schemes are allowed to maintain them, while countries without a levy tradition are able to adopt other forms of compensation. 726

721 See Davies 1995 at 985 ff; Synodinou 2012 at 97-98; Walter & von Lewinski 2010 at 94-97 (the latter however arguing that the Directive’s compromise “inclines to the British concept rather than to the Continental European approach”). See also the Report on the Implementation of the Computer Programs Directive (2000) at 6, where it is noted, in relation to the Computer Programs Directive, that the new threshold of protection has “required 12 Member States to lower the threshold for granting protection and the remaining three to «lift the bar»”.

722 See joined cases C-403-429/08 – Premier League at 97-98, where the Court refers to “creative freedom” as being implied in the requirement that the work be original in the sense of the author’s own intellectual creation. See also case C-5/08 – Infopaq at 45 and case C-393/09 – BSA at 50, both mentioning the requirement that the author “express[es] his creativity in an original manner and achieve[s] a result which is an intellectual creation” of that author.


724 See case C-277/10 – Luksan at 71-72.

725 Dreier & Hugenholtz 2006 at 373, Guibault 2010 at 58; Walter & Lewinski 2010 at 1028-1029.

726 Or even no compensation at all – because in certain de minimis cases no obligation for payment may arise (Recital 35 of the Information Society Directive), the payment of fair compensation will depend on how the national legislator frames the notion of minimal prejudice.
In contrast with these examples, the *acquis* also comprises cases where the balance between the two systems is more precarious. For instance, the fact that certain rights are deemed unwaivable – namely, the right to an equitable remuneration for the transferral or assignment of the rental right,\textsuperscript{727} or the resale right\textsuperscript{728} – shows a concession to a *droit d’auteur* tradition. Indeed, the unwaivability of rights stands for a protection of the author in contractual relationships that is more akin to a civil law or *droit d’auteur* tradition.\textsuperscript{729}

6.4.2. ACCOMMODATION OF NATIONAL LEGAL AND CULTURAL SPECIFICITIES

The accommodation of national legal and cultural specificities can be achieved by omission - namely, by not harmonizing certain aspects of copyright -, or by positive action – for instance, by integrating certain national specificities in copyright legislation.

The accommodation of national specificities can thus be accomplished by leaving it to Member States to regulate cultural matters that have a negligible impact on the internal market, which comes down to a careful consideration of the subject matter to harmonize. Moral rights provide a good example of this, as they are arguably a subject that touches closely upon Member States’ own traditions. Several directives explicitly clarify that moral rights are outside of their scope and that regulation of moral rights is at Member States’ discretion.\textsuperscript{730}

Another option is to generally pursue the harmonization of national laws in the most “culture-friendly” way, e.g., by safeguarding in copyright legislation certain features of national cultures. This can be done, for instance, by devising exceptions to the exclusive rights that are inspired in or taken from national cultures and traditions.

Three directives have devised a system of exceptions that allows Member States to reflect their national cultures and traditions when implementing exceptions. The Rental and Lending Rights Directive allows Member States to transpose their national exceptions to copyright to the field of related rights.\textsuperscript{731} The Database Directive gives Member States the option of providing for exceptions to copyright in databases that are traditionally authorized under their national laws.\textsuperscript{732}

\textsuperscript{727} Article 5 of the Rental and Lending Rights Directive (2006).

\textsuperscript{728} Article 1 paragraph 1 of the Resale Right Directive.

\textsuperscript{729} Pfeffer 2004 at 534-535, 547-550, argues, in relation to the resale right, that its unwaivability also makes it closer to a moral right than to an economic one, which again stands for a proximity to the *droit d’auteur* tradition.

\textsuperscript{730} See Recital 28 of the Satellite and Cable Directive; Recital 20 and Article 9 of the Term of Protection Directive (2006); Recital 28 of the Database Directive; and Recital 19 of the Information Society Directive.

\textsuperscript{731} Article 10 paragraph 2 of the Rental and Lending Rights Directive (2006).

\textsuperscript{732} Article 6 paragraph 2 (d) of the Database Directive.
Information Society Directive, more significantly, puts forth a list of 20 optional exceptions to the exclusive rights, from which Member States can pick and choose the exceptions they want to implement. They are rather free, too, in deciding the way in which to implement them. Member States can thus shape the exceptions to fit their national systems, adapting the specific limitations to their national culture. While it is true that this is a closed list - Member States are not allowed to either maintain or add exceptions that are not on the list – the exceptions comprised therein cover a wide range of uses “reflecting the diversity of national copyright traditions.” Some exceptions existed only in a few Member States, which speaks highly of the attempt to include national idiosyncrasies in the harmonization program. The extension of the list, coupled with the broad wording of the exceptions contained therein, suggest that Member States have enough flexibility to accommodate most of their national specificities.

In addition, the so-called grandfather clause – Article 5 paragraph 3 (o) of the Information Society Directive – allows Member States to keep previous exceptions that they had in their national laws, provided that the use in question is analogue and irrelevant for internal market purposes. This too abides by this benchmark, although the fact that the exception covers only analogue uses means that its scope is rather narrow.

One problem with the system of exceptions, from the point of view of accommodation of national features, lies in their articulation with technological protection measures in the Information Society Directive. In some cases, the exercise of the exception may clash with a technological measure. Member States are rather free to decide on the appropriate measures to take to ensure that right holders allow users to benefit from certain exceptions, and when to take such measures. But Member States can only intervene where some exceptions are at stake, and not others. What is more, in the case of on-demand services, the

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733 See Article 5 paragraphs 2 and 3 of the Information Society Directive.
734 See Recital 32 of the Information Society Directive: “This list [of exceptions] takes due account of the different legal traditions in Member States (…).” See also van Eeckoud et al. 2009 at 104-106.
735 Except for “use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in [Article 5]” (Article 5 paragraph 3 (o) of the Directive).
736 Hugenholtz & Senftleben 2011 at 14. The CJEU has also ruled that Article 5 enables Member States to exercise their powers (e.g., in the fields of education and teaching) and concluded that the Information Society Directive has fully taken into consideration “the cultural aspects specific to the Member States” – see case C-479/04 – Laserdisken at 78, 80.
737 See, e.g., the exception for use in connection with the demonstration or repair of equipment (Article 5 paragraph 3(l)) or the exception for use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building (Article 5 paragraph 3(m)).
738 See Article 6 paragraph 4 of the Information Society Directive.
739 Article 6 paragraph 4 first and second indent.
exceptions can be overridden by contract. That is, contractual freedom can actually trump manifestations of national traditions that are expressed in certain exceptions to the exclusive rights, such as, e.g., the use of protected material during religious or official celebrations (Article 5 paragraph 3 (g)). Since the Directive mandates that it is up to private parties (right holders) to decide on how technological measures work with copyright exceptions, it can happen that national culture is thwarted in this particular aspect.

It is noteworthy, however, that there are some examples in the acquis where the EU legislator permits exceptions to the harmonized rule to the benefit of national culture. As mentioned, the Term of Protection Directive set the general duration of copyright on 70 years after the death of the author. This is not the highest denominator possible, but is instead the highest general rule. Article 10 paragraph 1 of the Term of Protection Directive (2006), however, safeguards longer terms of protection that existed previously in the Member States. Surely, this provision derives mainly from the principle of respect for acquired rights. Yet, it has the effect of protecting certain features that are close to national cultures and traditions, such as the longer terms of protection in France that are related to war.

Admittedly, one way to accommodate national specificities is to leave some room for national policy choices, which can be done, as seen above, through measures of partial harmonization. In that sense, catering for national specificities, both from a cultural and legal point of view, can in some points be at odds with the previous benchmark of harmonization of national laws. In other words, measures of partial harmonization – which leave regulatory room to the Member States – might comply to a great extent with this benchmark, while ranking low vis-à-vis the harmonization of national laws.

Conversely, measures of total harmonization might score low in this benchmark and high in the previous one. This will happen mainly where the measure of total harmonization does not take into account national cultures and traditions – for example, where the harmonization measure does not integrate elements from national cultures and/or legal systems. Such is the case of the sui generis regime introduced by the Database Directive. The sui generis right is intrusive upon the national legal orders, in that it is a new kind of exclusive right, with an unprecedented regime. The Database Directive not only obliges Member States to adopt this right, but also makes its regime mostly mandatory, causing it to score quite low in this benchmark.

6.5. Protection of creators

The third benchmark is the protection of creators, which are here to be understood as natural persons only. Chapter 2 highlighted that the protection of creators (i.e.,

\textsuperscript{740} See Article 6 paragraph 4 fourth indent.
authors and/or performers) has been one of the goals of legislative activity. This goal is moreover constant in all directives. At the outset, this is hardly surprising, as the creator is supposed to be at the centre of copyright law.\footnote{Although admittedly a different argument could be made in relation to the place of performers in the realm of related rights.} Both the natural rights theory and the utilitarian theory, though resorting to different arguments, entail the grant of rights (as either “rewards” or “incentives”) to creators. It follows that, just like the other goals of legislative activity, the objective of protecting creators should also reflect upon the substantive provisions of directives.

This benchmark is comprised of two elements, each representing different aspects of protecting creators: the guarantee of income and recognition to creators (6.5.1.); and the facilitation of further creative uses (6.5.2.).

6.5.1. GUARANTEE OF INCOME AND RECOGNITION TO CREATORS

Guaranteeing income and recognition to creators is the main way of concretizing this benchmark. It has been widely defended that the \textit{acquis} shows a general tendency to strengthen copyright protection – this is apparent from, e.g., the increase of the term of protection of copyright or the grant of broad exclusive rights.\footnote{Quaedvlieg 1998 at 435; Hugenholz et al. 2006 at 212; Lüder 2007 at 6-13; van Eechoud et al. 2009 at 299-300; Bently & Sherman 2009 at 47; Ohly 2009 at 212; Rosati 2013 at 47-48; Mylly 2013 at 100.} Several directives refer to the need for an adequate level of protection of copyright and related rights.\footnote{See e.g. Recital 5 of the Rental and Lending Rights Directive (2006), Recitals 10 and 12 of the Information Society Directive, and Recital 4 of the Resale Right Directive. See also Recital 22 of the Information Society Directive, which makes it clear that the protection of exclusive rights should be prioritized, by stating that “the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights.”} It also flows from the \textit{acquis} that such “adequate protection” is set at a high level.\footnote{See Recital 24 of the Satellite and Cable Directive, Recital 11 of the Term of Protection Directive (2006) and Recitals 4 and 9 of the Information Society Directive.}

Yet, such a protectionist trend takes place regardless of who the owner of the rights actually is. As pointed out in chapter 2, this makes it difficult to pinpoint the true beneficiary of an enhanced protection. The same problem identified in relation to the goal of protecting creators shows up in the corresponding substantive provisions throughout the \textit{acquis}: the lack of regulation of both rules on authorship\footnote{Exception made to the minimum harmonization of authorship of a cinematographc or audiovisual work – Article 1 paragraph 5 of the Satellite and Cable Directive, Article 2 paragraph 1 of the Term of Protection Directive (2006) and Article 2 paragraph 2 of the Rental and Lending Rights Directive (2006) mandate that the principal director of a cinematographic or audiovisual work be considered at least as one of its authors. However, as noted in the Report on Authorship of Cinematographic or} and contracts leads to uncertainty regarding the identification of the
real beneficiary of enhanced copyright protection. Further assessments of how this benchmark is present in the acquis must therefore be seen against this backdrop.

The element of guaranteeing income and recognition to creators is spotted in two indicators. The first indicator is the grant of rights to creators (A.). Because of the uncertainty derived from the lack of regulation of authorship and contracts, however, this is theoretical to some extent. The second indicator is the strength of the rights granted (B.). This comprises an assessment of the scope of the rights granted, but also of its solidity in protecting creators, which amounts to the ability of a right to “stick” to the original creator. Here, a more realistic assessment can be done regarding the real benefits that the rights granted can bring to creators.

A. GRANT OF RIGHTS TO CREATORS

There is a theoretical link between granting rights to creators and ensuring them income and recognition. Recognition can be achieved through moral rights. Income, on the other hand, can be derived from either exclusive or remuneration rights.

Moral rights have not been tackled so far by the EU legislator. Directives either do not mention moral rights at all or, where they do, it is to expressly exclude such rights from their scope. Nevertheless, some substantive provisions cater for aspects of moral rights – the Database Directive and the Information Society Directive establish as a condition for the lawful exercise of some exceptions the indication of the source. The moral right to claim authorship seems thus to underlie these provisions. That being the case, even though there is no regulation proper of moral rights in the acquis, it can be argued that concerns with moral rights’ protection were present to some extent in these particular examples.

By contrast, the harmonization program has covered a wide range of economic rights, both in relation to specific subject matter (e.g., computer programs, databases) and generally regarding all kinds of protected works or subject matter

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746 Audiovisual works (2002) at 8-10, there are still differences among Member States regarding who is to be considered as co-author.

747 This was already a subject of debate in the framework of discussions on the Rental and Lending Rights Proposal – as noted by Schricker 1989 at 481: “The first comments on the Commission’s proposal from the authors’ point of view in Germany reveal the fact that the intended rental right would be good for industry, but that it would probably give the authors less money than a legal levy on rentals. If and to what degree authors would participate in the income from rental licences would depend on contracts between authors and industry.”


749 See Article 6 paragraph 2 (b) of the Database Directive and Article 5 paragraph 3 (a), (c), (d) and (f) of the Information Society Directive.

750 See also Walter & von Lewinski 2010 at 1472-1474.
6. FIELD-TESTING THE NORMATIVE BRIDGE: THE EU COPYRIGHT ACQUIS

(see, for instance, the Information Society Directive). Those rights are granted to the umbrella category of “right holders” (which can thus be natural or legal persons) or to authors and/or performers individually. In total, the directives mandate the implementation of eight rights in national laws: reproduction, communication to the public (including making available), distribution, resale, lending, rental, broadcasting, adaptation/alteration (of computer programs and of copyright-protected expressions of databases). The widespread regulation and grant of economic rights could stand for an effective protection of creators, thus showing that this benchmark is met to a great extent in the acquis. However, as noted above, the lack of regulation of the related subjects of contracts and authorship dictate that this might not be the case in many instances.

One way to discern who the real beneficiary of exclusive rights might be is to focus on the goals and context of a particular measure, which can give guidance regarding the justification behind specific provisions. In particular, where harmonization addressed a specific subject matter, such as computer programs or databases, it is likely that the exclusive rights granted over that subject matter benefit the main players in the respective market – which, in the case of computer programs and databases, are the corresponding industries. This view is reinforced, in relation to computer programs, by Article 2 paragraph 3 of the Computer Programs Directive (2009), which sets a default rule of ownership of rights in favour of the employer of the creator; and by Article 7 of the Database Directive, which grants the sui generis right to the maker (i.e., investor) of the database. Following that argument, the exclusive rights granted in the Computer

750 The Information Society Directive horizontally harmonized the three exclusive rights of reproduction, distribution and communication to the public. However, some aspects of the regime of exclusive rights are still governed by the previous directives – for example, the rights of communication to the public and distribution conferred to performers are not regulated by the Information Society Directive, and instead continue to be governed by the Rental and Lending Rights Directive (see Article 1 paragraph 2 of the Information Society Directive).
751 As is the case in Article 4 of the Computer Programs Directive (2009).
752 As made clear by e.g. Article 3 of the Computer Programs Directive (2009), stating that “protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.”
753 As in Articles 3 paragraph 1(a) and (b) and 5 to 9 of the Rental and Lending Rights Directive (2006); Article 2 of the Satellite and Cable Directive; Article 5 of the Database Directive; Articles 2 to 4 of the Information Society Directive; Articles 1 paragraph 1 and 6 paragraph 1 of the Resale Right Directive.
754 See Lucas Schloetter 2012 at 116, pointing out that nevertheless Member States have the option of grouping these rights together. It should be noted also that whether the right of reproduction, broadly interpreted, could include an adaptation right is still a contentious issue (see van Eechoud 2012 at 65 ff.). This research sides with the opinion that the right of reproduction does not include a right of adaptation, the latter thus not being harmonized transversally at the EU level (see for arguments to support this stance van Eechoud et al. 2009 at 83-84; Walter & Lewinski 2010 at 964; Hugenholtz & Senftleben 2011 at 26).
755 See chapter 2 at 41-43 and infra 6.7. See also Bing 2009 at 409-412 and Derclaye 2008 at 45-46.
The strength of the rights granted relates both to their scope and to their solidity in protecting creators. If the rights granted have a broad scope, and if their link to creators is effective, then this benchmark will be reflected in the measure at stake.

756 See table 2.1. in chapter 2. See also Stokes 2004 at 6 ff; Dreier & Hugenholtz 2006 at 263-264, 274-275; Seville 2009 at 34-37, 49-50; Walter & von Lewinski 2010 at 403-404.

757 The CJEU has however strengthened the case for creators in the context of the Information Society Directive. In case C-277/10 – Luksan, at 47, the Court has ruled that “articles 2 and 3 of Directive 2001/29 must be interpreted in such a way that the copyright of the principal director of a cinematographic work which those articles lay down is secured.” The Court followed to establish that the principal director of a cinematographic work is entitled to a fair compensation under the private copying exception (Article 5 paragraph 2 (b) of the Information Society Directive), and that he must therefore necessarily receive payment of that compensation (which means that waiving it should not be possible – see Luksan at 95, 105-108).

758 Articles 3, 5 and 6 of the Rental and Lending Rights Directive (2006). Note however that the equitable remuneration for rental is due to both authors and performers, while the equitable remuneration for lending can be due only to authors.

759 Article 1 paragraph 1 of the Resale Right Directive.

760 Reinbothe & von Lewinski 1993 at 7; Cohen Jehoram 1994 at 839; Walter & Lewinski 2010 at 834-838. See also Resale Right Proposal at 2, and Rental and Lending Rights Proposal at 5-8.
With regard to scope, the rights granted in the several directives are rather broad, despite the fact that the list of rights in the *acquis* is short and closed.761 A prime example is the duration of the rights – in theory, a lengthy duration favours creators. The establishment, by the Term of Protection Directive (1993), of a general duration of 70 years p.m.a. for copyright works and 50 years for related rights represented an increase for most countries762 and has thereby strengthened copyright and related rights protection. The same can be said of the extension of the related right of performers from 50 to 70 years, operated by the Term of Protection Amending Directive (2011).763 Another example is the range of acts that are permitted under the exclusive rights. Usually, the exclusive rights granted are to be interpreted broadly.764

An additional factor that strengthens the rights granted is the protection of technological measures that are applied to a copyright work. The Information Society Directive affords legal protection to technical mechanisms that prevent or restrict certain acts in respect of works or other subject-matter.765 As a result, not only do creators and other right holders have the right to authorize or prohibit certain acts, but the technological measures used to technically enforce that right are also protected by law. The protection of technological measures allows right holders to control virtually all uses made of works, including non-infringing uses.766 The control of the work and other subject matter facilitated by technological

761 Ohly 2009 at 235 ff; Lucas Schloetter 2012 at 116-117.
762 See Explanatory Memorandum to the Term of Protection Proposal at 4-13.
763 Recital 7 and Article 1 paragraphs 2(a) and 2(b) of the Term of Protection Amending Directive (2011). One of the reasons pointed out for extending the term of protection was expressly the protection of performers, and particularly the fact that the current lifespan has increased in the EU. According to the Staff Working Document - Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union (2008), since many musicians and singers start their careers in their early 20s, a 50 year term of protection counting from the date of the performance would mean that they would stop receiving income at a time in their lives where they are more vulnerable – see Term of Protection Amending Directive (2011), Recital 4, and Staff Working Document - Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union (2008) at 13-15.
764 See, e.g., in relation to the reproduction right, case C-145/10 – Painer at 96 and case C-5/08 – Infopaq at 41-43, and in relation to the right of communication to the public, case C-306/05 – SGAE v. Rafael Hoteles at 36 and joined cases C-403-429/08 – Premier League at 186. See, however, in what concerns the distribution right, case C-456/06 – Peek & Cloppenburg at 40, where the CJEU stated that the distribution right only covers transfer of ownership and in that sense it is not to be interpreted widely.
766 Vinje 2000 at 555; Koelman 2000 at 279. Article 6 paragraph 4 first indent states that right holders must take “voluntary measures” to ensure that beneficiaries of some exceptions can profit from them, but the Directive does not define what such voluntary measures should consist of. This, grouped with the fact that the scope of many exceptions of the Directive is rather undefined as well, may have the effect of leaving it to right holders to shape the scope of some exceptions, deciding the degree of permissible uses. Only if right holders don’t allow for the use of the work under an exception are Member States to take “appropriate measures,” and even so Member States are not obliged to take such measures in the case of the private copy exception.
measures enables right holders to receive payment for almost any use, thereby having the potential to increase their income.

However, while the broad scope of the rights and the protection of technological measures undoubtedly favour copyright owners, they do not guarantee that individual creators are in fact protected. Normally, it is the distributor, rather than the creator, who uses technological protection measures to protect his investment.\footnote{Hilty 2004 at 764-765.} The lack of regulation of the rules on authorship and contracts pointed out above generates uncertainty as to who the real beneficiaries of protection actually are. In this scenario, the protection of creators will most likely be dependent on contractual practice, where the main exploiter of the work will often not be the original creator but instead a creative industry to which he has assigned his rights.\footnote{See, e.g., Hilty 2005 at 132; Dreier & Hugenholtz 2006 at 387; Gowers 2006 at 51; CUP 2008 at 2; van Eechoud et al. 2009 at 213 ff; Guibault 2009 at 517-519; Geiger 2009 at 78-79; Walter & von Lewinski 2010 at 1067. See also Schricker 1989 at 481, noting that “freedom of drafting and concluding contractual agreements is often used by industry as the stronger partner to get a bigger share of the cake.”} Nevertheless, a possible positive factor here is the fact that the assignment or transfer of ownership is usually made against the payment of a fee, either in terms of a lump sum or recurrent royalties. In the latter case, the royalties will usually continue to be paid until the expiry of the right, which stands for a guarantee of income.\footnote{Such payments will, from a certain moment, benefit creators’ heirs. Nevertheless, this accounts for social benefits being afforded to performers and their families, which could eventually be factored in as an element of their global protection – see, for the historic perspective of this argument, Bentley 2008 at 99-101. Contra, arguing that there are doubts regarding the impact of these social benefits on the creators’ life quality and on their drive to produce more and better cultural goods, Parrinder 1993.} Moreover, creators also benefit from the revenues collected by collecting societies while their rights are protected.

Still, in order to perform an assessment of the strength of the rights granted as an indicator in the protection of creators, the broad scope of the rights has to be seen in tandem with the ability of those rights to actually favour individual creators. Therefore, it is necessary to examine whether the broad rights granted are able to “stick” to creators, i.e., whether there is an effective link between the right and the creator. One way to ensure this is to create unwaivable remuneration rights. This however has not been common practice at the EU level. Notable exceptions include Article 5 of the Rental and Lending Rights Directive (2006);\footnote{Article 5 of the Rental and Lending Rights Directive (2006) prescribes that, where an author or a performer transfers or assigns his rental right to a producer, he shall have the unwaivable right to obtain an equitable remuneration for the rental.} Article 3 paragraph 2 (b) of the Term of Protection Directive (as amended by Directive 2011/77/EU);\footnote{The provision entitles performers to an unwaivable annual remuneration right in case of transfer or assignment of his rights to a producer against a one-off payment, payable from the 50th year after the phonogram was lawfully published or, if unpublished, communicated to the public.} and Article 1 paragraph 1 of the Resale Right Directive.\footnote{This article grants an unwaivable resale right for the benefit of the author of an original work of art.} In all of these cases, the
unwaivability of rights counteracts the fact that creators are typically the weaker party in contracts, thereby guaranteeing them a share of the income.

6.5.2. FACILITATION OF FURTHER CREATIVE USES

Very often, creators are also users of protected works, in the sense that they rely on existing works and other materials to create their own. Being able to use existing works for purposes of further creation not only assists creativity, but it also fosters the right to freedom of expression of (future) creators. This is possible if the level of protection of existing subject-matter is not excessively high, which means that there are good arguments to build a favourable framework for the creative process to work. If the protection granted to existing works or other subject-matter is too broad, there can be a negative impact on the creation of new works, as future creators are then unable to use current cultural material to build on. In other words, there should be a balance between the rights granted to creators and the permissible use of protected works for purposes of further creation.

This element of the protection of creators is met where rules are in place that enable creators to legally use existing works for their creative endeavours. In order to determine how the facilitation of further creative uses is materialized in the acquis, a single indicator will be used: the unencumbered use of existing works for creative purposes (A.).

A. UNENCUMBERED USE OF EXISTING WORKS FOR CREATIVE PURPOSES

Creating works or other protected subject matter using existing protected material can be an act covered by the exclusive rights granted to copyright owners, namely the right of reproduction or the right of adaptation, which makes the creation of derivative works dependent on the authorization of the right holder. The facilitation of further creative uses by exempting them from the sphere of exclusivity would then also depend on how the scope of the exclusive rights is defined. In this regard,

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774 Geiger 2010 at 541 ff.
775 See the argument put forth by Landes & Posner 1989, at 332-333, stating that, because creating a new work often involves building on existing material, “copyright holders might therefore find it in their self-interest, ex ante, to limit copyright protection.” See also Nimmer 1970 at 1190-1191; Van den Bergh 1998 at 22; Bently 2008 at 99-100.
776 The Green Paper on Copyright in the Knowledge Economy seems to advocate such balance. It reads (at 19): “The obligation to clear rights before any transformative content can be made available can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated. However, before any exception for transformative works can be introduced, one would need to carefully determine the conditions under which a transformative use would be allowed, so as not to conflict with the economic interests of the rightsholders of the original work.”
the *acquis* does not cater much for acts of further creation: as noted in the previous section, the right of reproduction is construed broadly. On the other hand, the right of adaptation is not harmonized at EU level,777 except in relation to computer programs778 and copyright protection for databases.779 This means that the scope of the right of adaption differs from one Member State to another.780 As a result, the concrete acts comprised therein – and consequently the extent to which they affect the unencumbered use of existing material for creative purposes – depends on the specific country at stake.

In addition, the broad scope of the reproduction right stands in sharp contrast with the lack of a specific exception in the *acquis* allowing for the use of protected works or other subject matter for further creative purposes. Although the Green Paper on Copyright in the Knowledge Economy (2008) launched a consultation on the eventual introduction of an exception for user-created content,781 the outcome of that consultation was that it was too early to regulate the subject according to a majority of the stakeholders.782 Nevertheless, as also recognized by the Commission, the use of protected works for further creation can come under some of the existing exceptions in the *acquis*,783 namely quotations for purposes such as criticism or review,784 incidental inclusion of a work or other subject-matter in other material,785 or use for the purpose of caricature, parody or pastiche.786 The re-use of protected works for creative purposes can also be facilitated by the new exception to the reproduction right added by the Orphan Works Directive, in so far as the orphan works problem was a hindrance for those who wanted to reuse pre-existing content in their new creative efforts787 – Article 6 paragraph 1 of that Directive ensures that certain establishments, such as publicly accessible libraries or archives,

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778 Article 4 paragraph 1 (d) of the Computer Programs Directive (2009) establishes the right of alteration of a computer program (which comprises also translation, adaptation and arrangement).
779 Article 5 (b) of the Database Directive permits the translation, adaptation, arrangement and any other alteration of the expression of the database which is protectable by copyright.
780 Even though all Member States recognize this right, some place it within the exclusive right of reproduction – see van Eechoud et al. 2009 at 83-84.
782 See Communication on Copyright in the Knowledge Economy (2009) at 9: “The outcome of the consultation shows that most of the stakeholders consider that it is too early to regulate UCC [user-created content]. It is also unclear whether both amateurs and professionals should benefit from special rules on UCC and how a distinction between those groups can be drawn or how rules on UCC would relate to existing limitations, such as quotations, incidental use, and caricature, parody or pastiche.”
784 Article 5 paragraph 3(d) of the Information Society Directive.
785 Article 5 paragraph 3(i) of the Information Society Directive.
786 Article 5 paragraph 3(k) of the Information Society Directive.
787 Van Gompel 2007 at 677-678.
are allowed to reproduce and make available to the public works whose right holders are not identified or located. Finally, in relation specifically to computer programs, Article 6 of the Computer Programs Directive (2009) protects further acts of creation by enabling a programmer to reproduce the code and translate a program’s form in order to create software that is interoperable with that existing program.\textsuperscript{788}

However, the fact remains that these are isolated cases that do not give cover to every use of protected works for further creative purposes.\textsuperscript{789} There is no consistent policy for allowing such reuse, which shows that this element does not find much expression in the current \textit{acquis}, especially if one considers the contrasting broad scope of exclusive rights.

6.6. Protection of end users

As explained in chapter 5, the protection of end users as a benchmark is based on principles of consumer protection and protection of fundamental rights. However, the intersection between copyright law and consumer protection, on the one hand, and the introduction of fundamental rights considerations in the realm of copyright law, on the other hand, are rather recent. In fact, the end user has gained visibility in recent years in view of the new interactions with copyright works that are permitted by technology and digital networks – the possibilities of end users’ action impacting on the right holders’ sphere of exclusivity are much greater in the digital world, due to the ease of reproduction and dissemination of cultural goods in that context. By contrast, before the advent of the digital environment, the importance of the end user in copyright was limited.\textsuperscript{790}

Moreover, while chapter 2 has showed that the protection of end users has been one of the goals of the EU legislator, this goal is not seen consistently throughout the \textit{acquis}. First, the terminology differs from one directive to another. So, for example, the Computer Programs Directive uses the notion of “lawful acquirer”\textsuperscript{791} and the Database Directive refers to the “lawful user,”\textsuperscript{792} while the Information Society Directive resorts to the concept of “lawful use”\textsuperscript{793} or merely to acts

\textsuperscript{788} This is however a limited possibility, so that existing creators of software are also protected: certain conditions must be met to render the acts lawful. See van Rooijen 2010 at 86-91, arguing that it is too limited, not achieving a balancing of interests.

\textsuperscript{789} See van der Noll et al. 2012 at 15, noting in relation to user created content that “while some of the expressive uses might fall within the scope of one of these exceptions, the strict interpretation commonly given by courts to these provisions would probably result in many cases in a finding of infringement”.

\textsuperscript{790} Ginsburg 1997 at 6-7; Cohen 2005 at 347-348; Hugenholtz et al. 2006 at 22; Synodinou 2010 at 820.

\textsuperscript{791} Recital 13 and Article 5 of the Computer Programs Directive (2009).

\textsuperscript{792} Recitals 34, 49 and 51, and Articles 6, 8 and 9 of the Database Directive.

\textsuperscript{793} Recital 33 and Article 5 paragraph 1 of the Information Society Directive.
exempted from the exclusive rights, some of which benefit the end user. The difference between all of these concepts is unclear. It has been pointed out that the term “lawful acquirer” implies that the act of acquisition ought to be legal in order for exceptions to apply. The notion of “lawful user”, in turn, appears to be similar to the one of “lawful acquirer.” A lawful user may be someone who acquired the database lawfully, such as a purchaser or a licensee, but also someone who is authorized to use it (for example, through public lending). The Information Society Directive, on the other hand, defines lawful use as one that “is authorised by the right holder or not restricted by law.” While all these concepts seem to come under the notion of end user employed here – i.e., the individual who is the passive recipient of copyright goods and services - the contrary is not necessarily true, as, e.g., not all end users will be lawful acquirers or lawful users. The uncertainty surrounding these definitions makes it more difficult to map the place and evolution of the end user throughout the acquis.

Secondly, because the harmonization of national copyright laws has been carried out in a piecemeal fashion, not all directives deal with issues directly related to the end user or to the consumption of copyright goods and services. For example, there is no provision in the Term of Protection Directive that is aimed at protecting the end user, but it can be argued that such absence is due more to the subject-matter of this directive and less to an oversight of the European legislator - the Term of

794 See Article 5 paragraphs 2 and 3 of the Information Society Directive.
795 See, for an analysis of the concepts of “lawful acquirer”, “lawful user” and “lawful use”, van Eechoud et al. 2009 at 114-116.
796 Van Eechoud et al. 2009 at 115. The CJEU has in addition considered that the resale of the copy of a computer program by the first acquirer renders the new acquirer “lawful” due to the exhaustion of the right by virtue of the first sale of that copy – see case C-128/11 – UsedSoft at 80.
797 See Report on the Implementation of the Computer Programs Directive (2000) at 12, stating that Articles 6 and 8 of the Database Directive, which use the term “lawful user”, “were modelled along the lines of Article 5 (1) of the Computer Programs Directive.” See also Vanovermeire 2000 at 79-81; Derclaye 2008 at 120-126 (holding that equating lawful user as a lawful acquirer is the most convincing alternative, even if it leads to over-protection to some extent); Synodinou 2010 at 824 (for whom the notions of “lawful user” and “lawful acquirer”, more than similar, are interchangeable).
798 Derclaye 2008 at 123-126.
800 An exception is made to the lawful acquirer of a computer program, whose passivity is more diluted since he can translate, adapt, arrange or alter the computer program, including for error correction, where such acts are necessary for using the program in accordance with its intended purpose – see Article 5 paragraph 1 of the Computer Programs Directive. The same comment is applicable, to some extent, to the lawful user of a database. Article 6 paragraph 1 of the Database Directive reads: “The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 [which include the translation, adaptation, arrangement and any other alteration of the copyright-protected expression of the database] which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database (…).”
801 Synodinou 2010 at 829.
Protection Directive purported to harmonize the term of protection for copyright and related rights and it does not concern the interaction between the rights themselves and exceptions thereof.

Therefore, the assessment of this benchmark vis-à-vis the acquis has to be performed against the backdrop of, on the one hand, the evolution of the end user as a player in copyright law and, on the other hand, the inconsistencies pointed out above, derived from differences in terminology and in the subject-matter of each directive.

The protection of end users in the acquis finds its expression in the single element of this benchmark, which is the grant of access to copyright goods and services that takes into account the rights of end users. As made clear in chapter 5, and at least according to the utilitarian justification for copyright, the protection of creators can have the effect of increasing the number of cultural goods on the market, in so far as such protection amounts to an incentive to produce more works. The same holds true in relation to rights granted to creative industries. In short, if the grant of rights inherent to copyright is an income generator for creators and creative industries, it could be argued that their gains function as an incentive for further creation and dissemination of cultural goods. This, in theory, benefits the end users as well.

However, a high number of cultural goods on the market does not necessarily mean that end users will in effect have access to those goods. Therefore, although measures that foster the production of cultural goods are a starting point for the access of end users to more cultural goods, such measures do not, in and of themselves, guarantee that access.

Because the end user does not stand at the centre of copyright law, as a rule the access of end users to cultural goods and services is enabled through the granting of exceptions to the exclusive rights (although admittedly some limits to the scope of exclusive rights, without granting access to copyright works, can reflect positively on end users as well). The first indicator in the context of this element is thus the establishment of exceptions to the exclusive rights (A.). In order to reflect the content of this benchmark, the exceptions granted to end users must take account of their rights (namely, their fundamental rights). Similar to what happens in the context of protecting creators, however, putting forth exceptions that benefit the end user has to be seen in tandem with a second indicator, which is the strength of those exceptions (B.). This second indicator is essential to determine the extent to which access is in effect guaranteed. The strength of the exceptions can be assessed, namely, by analysing their scope and their overridability.

802 A case in point is the doctrine of exhaustion, which limits the exclusive right of distribution to the first sale or other transfer of ownership. Since the exclusive right of the right holder is exhausted with the first sale or other transfer of ownership of the work or other subject matter, the end user is free to resell or transfer that particular work or subject matter. This favours the seller, who does not incur in copyright or related rights infringement, but also the end user who buys the particular work or material, who ends up having more available cultural goods.
6.6.1. ESTABLISHMENT OF EXCEPTIONS TO EXCLUSIVE RIGHTS

The safeguard of the end users’ position in copyright is usually achieved through exceptions to the exclusive rights of the right holders. The exceptions are a tool used to balance the interests of right holders with other competing interests — including those of end users.803

Several directives establish exceptions to the exclusive rights — it is the case of the Computer Programs Directive (2009) (Articles 5 and 6), the Rental and Lending Rights Directive (2006) (Article 10), the Database Directive (Articles 6 and 9), the Information Society Directive (Article 5), and the Orphan Works Directive (Article 6). Mostly, the list of exceptions contained in these provisions is exhaustive,804 which can work against the interests of end users: for instance, it has been pointed out, in the context of the Information Society Directive, that a closed list of exceptions would prevent a timely adaptation to technological changes, which would in turn be detrimental (inter alia) to consumers of copyright works.805

Moreover, this “map” of exceptions is sketchy, revealing the absence of a consistent policy vis-à-vis the protection of end users in copyright lawmaking. In fact, just as the goal of protecting the end user is not consistent throughout the acquis, the provisions establishing exceptions to the exclusive rights confirm that lack of consistency. This is partly linked to the piecemeal harmonization, which puts the existence of exceptions in a particular directive (or lack thereof) into perspective. The protection of end users through exceptions depends on the subject matter being harmonized - for there to be exceptions to rights, the harmonization measure needs to be geared towards establishing rights in the first place, which is not always the case. In the directives mentioned above, which do contain exceptions, those exceptions are specific to the subject matter being harmonized by each particular directive,806 which is again a consequence of the fragmentary approach to EU harmonization.807 So, for example, the Computer Programs Directive introduces, in its Article 5, exceptions to the exclusive rights that amount

803 Guibault 2002 at 27 ff; Geiger & Schönherr 2012 at 133-134.
804 This is however not the case regarding the exceptions to copyright in databases, where Member States can establish other exceptions to copyright that are traditionally authorized under national law, without prejudice to the exceptions introduced by the Database Directive (Article 6 paragraph 2(d) of that Directive); and the “grandfather clause” of the Information Society Directive (Article 5 paragraph 3(o)), which allows Member States to have an exception for certain de minimis cases, again without prejudice to the other exceptions and limitations contained in the same article.
806 As recognized, e.g., by Recital 50 of the Information Society Directive, which states that Articles 5 and 6 of the Computer Programs Directive “exclusively determine exceptions to the exclusive rights applicable to computer programs,” and by the Staff Working Paper on the Review of the EC Legal Framework in the Field of Copyright and Related Rights (2004), at 6-7.
807 Although the exceptions of the Information Society Directive, because of the horizontal character of the measure, apply in principle to any protected work or subject-matter, except for computer programs and databases – see Janssens 2009 at 328 and van Eechoud et al. 2009 at 98.
to a right to use the program – a concept unknown to copyright law that relates to the specific nature of computer programs as protected works.\textsuperscript{808} Also connected to that fragmentary approach are the differences in terminology ("lawful user" versus "lawful acquirer", for example), which make it difficult to define who the beneficiary of exceptions is and add a layer of legal uncertainty that does not advance the interests of end users.

Moreover, not all the exceptions in the \textit{acquis} have the objective of guaranteeing to end users access to protected works.\textsuperscript{809} Some are in place, e.g., for purposes of regulating competition or to address specific market failures, although it is possible that certain limitations are based on more than one ground.\textsuperscript{810} Some only favour end users indirectly by benefiting museums, libraries and other similar institutions that are open to the public, thereby in principle guaranteeing access to cultural goods and services.\textsuperscript{811}

By contrast, other exceptions are more relevant to end users. It is the case, for instance, of the (mandatory) transient copy exception of Article 5 paragraph 1 of the Information Society Directive, which exempts from the scope of the exclusive reproduction right certain temporary acts of reproduction.\textsuperscript{812} The same goes for exceptions relating to private use, a subject contained in most of the directives that deal with exceptions,\textsuperscript{813} which is in addition partially rooted in the fundamental right to privacy.\textsuperscript{814} Providing for a private use exception, therefore, enables access to protected works by end users, while at the same time taking into account their fundamental right to privacy – at least in theory, as the guarantee of privacy depends on the legislative design of the private use exception. Exceptions for private use as a token of protection of end users are especially relevant in the digital environment, since the ease of reproduction and dissemination of protected works by end users is met with the increased possibility of right holders to control uses of the works. Technological protection measures and digital rights management

\textsuperscript{808} Hugenholtz 1992 at 323.
\textsuperscript{809} Guibault 2002 \textit{id.}; Dreier 2007a at 234-236.
\textsuperscript{810} See Guibault 2002 \textit{id.}; Quaedvlieg 2007 at 450.
\textsuperscript{811} See, for example, Article 6 of the Orphan Works Directive, which creates an exception to the right of reproduction and the right of making available that enables public libraries, museums, archives, and similar institutions to make orphan works available to the public without incurring into copyright infringement.
\textsuperscript{812} Article 5 paragraph 1 of the Information Society Directive: "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."
\textsuperscript{813} See Article 10 paragraph 1 (a) of the Rental and Lending Rights Directive (2006); Articles 6 paragraph 2 (a) and 9 (a) of the Database Directive (see however Article 6 paragraph 2(a), which forbids the reproduction for private purposes of an electronic database); and Article 5 paragraph 2 (b) of the Information Society Directive.
\textsuperscript{814} Hugenholtz 1996 at 94; Bygrave & Koelman 2000 at 97 ff; Senftleben 2004 at 23.
systems used by the right holders to that end might clash with the end users’ right to privacy and protection of personal data. Technological measures have the potential to gather large amounts of data about the end users that acquire, use and access copyright goods. Digital right management systems, on the other hand, may provide valuable information about consumption patterns and allow for tracing of online behaviour.

The issue of exceptions in the digital environment is mainly dealt with in the Information Society Directive, whose Recital 57 declares that right management information systems should “incorporate privacy safeguards in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data”[i.e., the Directive on Data Protection]. This indicates that safeguarding end users’ privacy in the digital environment is a matter to be found at the intersection between copyright and data protection laws. The protection of end users’ privacy will thus depend much on the way that Member States implement the Information Society Directive and the Directive on Data Protection, as the former does not contain self-standing privacy guarantees.

6.6.2. STRENGTH OF EXCEPTIONS

The second indicator relating to the access of end users to cultural goods is the strength of the exceptions, which can determine the extent to which such exceptions in fact enable access to cultural goods. Just as in relation to the strength of rights, the strength of exceptions concerns both their scope and their solidity in protecting their beneficiaries (in this case, the end users).

The lack of a consistent policy in protecting the end user is also evident upon an analysis of the scope of exceptions, which seems to be dependent on a number of factors, inter alia the subject matter at stake - for example, in relation to computer

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815 See Recital 57 of the Directive. See also Cohen 1997 at 183 ff and Guibault 2002 at 55-56.

816 The Directive on Data Protection permits the processing of data in a number of situations, among which if the processing is necessary to the performance of a contract (between, in this case, the right holder and the end user); or if the legitimate interests of the processor (i.e., the right holder) justify that processing, unless these interests are overridden by the privacy interests of the user (see Article 7 (b) and (f), respectively, of the Directive on Data Protection). This last condition requires a balancing of interests on a case by case basis – see Büllesbach et al. 2010 at 58. If these provisions of the Directive on Data Protection are broadly interpreted, and given that the Information Society Directive (or any other copyright directive for that matter) does not provide for autonomous, self-standing privacy guarantees, privacy rights of end users might in practice be imperilled, since the number of situations where the right holder is allowed to process end users’ data will then be quite large. Nevertheless, in case C-275/06 – Promusicae, the CJEU has ruled that, when transposing directives, the Member States should take care to rely on an interpretation of the directives “which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order” (including, in that case, intellectual property, effective judicial protection, right to respect for private and family life, and right to the protection of personal data).
programs and databases, the exempted uses rely on the qualification as, respectively, a “lawful acquirer” and a “lawful user”. Indeed, it is not possible to define a common scope of exceptions, as these vary widely throughout the *acquis*. Even the same exception can have different scopes from one directive to another, as is the case with the private copy exception. 817 Moreover, while it is true that some directives adopt only narrow exceptions, others seem to give them a broad scope. An example of the former is the Computer Programs Directive, where the few exceptions in number are mostly circumscribed to particular cases. 818 As a result, some acts of minor importance are barred to users (e.g., upgrading computer programs to make them compatible with new versions of operating systems, or carrying out minor adaptations such as changing certain parameters like tax rates), making them dependent on maintenance contracts with the right holder and on how well the right holder executes those. 819 An example of a directive that gives a broader scope to exceptions is the Information Society Directive. The list of exceptions it puts forth is mostly comprised of certain types or abstract categories, rather than strictly defined exceptions. 820 It can however be argued that in practice the general principle of strict interpretation of exceptions to rights 821 dictates that all the exceptions in the *acquis*, whether broader or narrower, have to be interpreted restrictively (i.e., to the disadvantage of the end user). 822

Another matter is the solidity of the exceptions, which amounts to their mandatory or non-mandatory nature and therefore to the possibility of them being set aside by right holders. It was mentioned above that the scheme of exceptions in the *acquis* is sketchy, revealing a lack of a consistent policy vis-à-vis the protection of end users. This argument is reinforced by the fact that, as a rule, the exceptions in the *acquis* are not mandatory and can be overridden by contract. There are only two cases in the *acquis* where the exceptions are mandatory: Article 8 of the Computer Programs Directive (2009) and Article 15 of the Database Directive, both providing for the non-overridability of certain exceptions by contract. These provisions make some exceptions that are relevant to the end user mandatory – such as, for example, the making of a back-up copy of a computer program or extracting and/or re-utilizing insubstantial parts of the contents of a database. However, the

817 For example, the lawful user in the Database Directive cannot make a private copy of an electronic database, while the Information Society Directive prescribes that a natural person may reproduce any work (except computer programs and databases) on any medium for private use and for non-commercial ends. See also van Eechoud et al. 2009 at 117-118.
818 See Articles 5 and 6 of the Computer Programs Directive.
819 Alkemade & Berkvens 1991 at 477.
820 Hugenholz & Senftleben 2011 at 14; Senftleben 2009 at 4; Hart 2002 at 59.
821 See, in the field of copyright, the application of this principle in case C-5/08 – Infopaq, at 56, and case law cited therein.
822 Nevertheless, as argued by Hugenholz & Senftleben 2011 at 24-26, the principle of strict interpretation might be applied rather flexibly by the CJEU on a case-by-case basis, in order to reach a balance between the interests of right holders and users.
exceptions made mandatory are confined to specific subject matter (i.e., computer programs and databases, respectively).

Moreover, Article 6 paragraph 4 first indent of the Information Society Directive selects seven out of 21 exceptions that right holders are obliged to facilitate to their respective beneficiaries, in spite of the protection of technological measures.\textsuperscript{823} According to the fourth indent of the same provision, however, those seven exceptions may be overridden by contract in the case of interactive on-demand services. Given the increasing tendency for the online distribution of works to be interactive and on demand,\textsuperscript{824} the Information Society Directive therefore allows right holders to set aside exceptions to the exclusive rights in the most relevant situations, since usually right holders are the stronger party in contracts and can decide which uses are allowed.\textsuperscript{825}

Connected to the mandatory or non-mandatory nature of the exceptions is the question of whether the Member States are obliged to implement them. This can also be telling of the EU policy in relation to end users. However, here too the acquis shows no homogeneity. The Member States shall implement the exceptions of the Computer Programs Directive, of the Orphan Works Directive and of part of the exceptions in the Database Directive. By contrast, the Member States may implement the exceptions of the Rental and Lending Rights Directive, of part of the exceptions in the Database Directive and of most exceptions of the Information Society Directive (where all but one exception are optional). The lack of consistency also in this particular matter goes at least to show that the protection of end users was not coherently pursued throughout the acquis.

One possible explanation for the different approaches of the directives is that the optional exceptions correspond to national exceptions that many Member States had. Granting a broad leeway to national legislators regarding the implementation of such exceptions is thus in line with the respect for the national traditions of the Member States and for the principle of subsidiarity. Conversely, the exceptions that Member States are obliged to implement concern matters that were alien to, or at least not well rooted in, many national legal systems: the copyright protection for computer programs and the status of the lawful acquirer; copyright and sui generis protection for databases and the status of the lawful user; transient or incidental acts of temporary reproduction; permitted uses of orphan works. As a result, these

\textsuperscript{823} The seven exceptions are: reprography (Article 5 paragraph 2 (a)); specific acts of reproduction made by libraries, museums and similar institutions (Article 5 paragraph 2 (c)); ephemeral recordings made by broadcasting organizations (Article 5 paragraph 2 (d)); reproduction of broadcasts made by social institutions pursuing non-commercial purposes (Article 5 paragraph 2 (e)); use for the sole purpose of illustration for teaching or scientific research (Article 5 paragraph 3 (a)); use for the benefit of people with a disability (Article 5 paragraph 3 (b)); and public security uses (Article 5 paragraph 3 (e)).

\textsuperscript{824} See on this point Mazziotti 2008 at 97-98 and van Eechoud et al. 2009 at 106-109.

\textsuperscript{825} Elkin-Koren 1997 at 104; Guibault 2002 at 2-3; Quaedvlieg 2007 at 451; Janssens 2009 at 333-334.
subjects could be dealt with at the EU level more easily without interfering with Member States’ sensitivities.

In any case, it seems clear that the choice for total or optional harmonization of exceptions was not made out of deference (or lack thereof) for the beneficiaries of the exceptions. This means that the interests of end users were in the background of EU lawmaking in copyright, or that they were, at best, not high on the priorities of the EU legislator.

6.7. Promotion of competitiveness of EU industries

As explained in chapter 5, promoting the competitiveness of EU industries implies affording them a moderate protection. Thus, the advantages given to industries, which will allow them to recoup their investment in creating and disseminating works or other subject matter, cannot prejudice eventual or actual competitors if this benchmark is to be met. Likewise, the grant of rights to creative industries should not jeopardize the activity of intermediaries.

Chapter 2 has demonstrated that the goal of protecting industries, in particular content industries, figures high on the EU agenda. For instance, directives that aim at harmonizing a particular subject-matter, such as computer programs or databases, favour the respective industries by enabling them to enjoy broad exclusive rights. The provisions in the Computer Programs Directive and the Database Directive confirm this protective approach.826 The Computer Programs Directive grants to right holders the exclusive rights of reproduction, alteration and distribution, all of them having a broad scope.827 The Database Directive creates a pan-European sui generis right granting to makers of databases the right to prevent extraction of substantial parts of the database and the right to prevent re-utilization of those substantial parts,828 both being exclusive rights with a wide scope.829 Other

826 Apart from provisions in the directives clearly benefiting the industry as the owner of rights (see, e.g., Article 2 paragraph 3 of the Computer Programs Directive (2009) and Article 7 of the Database Directive, both mentioned in section 6.5.1.A. above), the intention to favour these industries is apparent from the Explanatory Memoranda: see the Explanatory Memorandum to the Computer Programs Proposal, inter alia paragraphs 1.2. (“the size and growth of the computer industry is such that its importance in the economy of the Community cannot be over-emphasized”) and 1.3. (“[p]rotection must therefore be strengthened and made uniform throughout the Community as much in the interests of the specialized small and medium sized software firms which can contribute so much to the future success of the European software industry as in the interests of existing major producers”). In relation to databases, see Explanatory Memorandum to the Database Proposal, inter alia paragraphs 1.2. (“[T]his new and growing sector is of considerable importance to the economic development of the Community”) and 2.2.11. (“[I]nvestment in the sector cannot be sustained as the database industry comes to maturity unless Community databases are at least as well protected as those of its major trading partners”).


828 Article 7 paragraph 1 of the Database Directive. See however paragraph 5 of the same article, which forbids the extraction and/or re-utilization of insubstantial parts in certain cases.
directives, such as the Satellite and Cable Directive or the Information Society Directive, seek to protect the interests of both creators and industries, but because there is no harmonization of the rules on contracts the rights granted therein might shift the balance in favour of the latter, given that they are usually the stronger party in contractual negotiations. The same is applicable to the Term of Protection Amending Directive (2011), which extended the term of protection for sound recordings to the benefit of performers and phonogram producers. Even the Rental and Lending Rights Directive, which is more geared towards the protection of creators, grants exclusive rights to phonogram and film producers, and to broadcasters.

The protection of content industries in the acquis is thus usually pursued by conferring them broad rights. The protection of intermediary industries, by contrast, amounts to facilitating their clearing of the rights in the works and other subject matter that they convey to the public, or to exempting them from potential liability for copyright infringement – this latter case is visible, for example, in the Orphan Works Directive, which provides for an exception to the rights of reproduction and making available of orphan works in favour of publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organizations; in Article 5 paragraph 1 of the Information Society Directive, providing for a transient copy exception that is also aimed at exempting intermediaries from potential infringement of the reproduction right; or in Article 5 paragraph 2 (d) of the same Directive, establishing an exception for ephemeral recordings made by broadcasters. However, because this type of protection is not about granting proprietary rights,

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829 As confirmed, e.g., in case C-304/07 – Directmedia Publishing at 31-34 and case C-203/02 – BHB v. William Hill at 51.
830 See table 2.1. in chapter 2. See also Stokes 2004 at 6 ff; Dreier & Hugenholtz 2006 at 263-264, 274-275; Seville 2009 at 34-37, 49-50; Walter & von Lewinski 2010 at 403-404.
831 Nevertheless, in the context of this Directive, the EU legislator inserted three provisions aimed at correcting the eventual advantages of industry in relation to performers: the “use it or lose it” clause (Recital 8 and newly introduced Article 3 paragraph 2a); the unwaivable remuneration right granted to performers in case of transfer or assignment of rights against a one-off payment (Recitals 11 and 12 and newly introduced Article 3 paragraph 2b); and the “clean slate” provision (Recital 14 and newly introduced Article 3 paragraph 2e).
832 Reinbothe & von Lewinski 1993 at 7; Cohen Jehoram 1994 at 839.
834 Such is the case, e.g., of the Satellite and Cable Directive, which contains several rules aimed at enabling the licensing of protected material for purposes of cross-border broadcast and cable retransmission.
835 Article 6 of the Orphan Works Directive.
836 Walter & Lewinski 2010 at 1025-1026.
837 Article 5 paragraph 2 (d) of the Information Society Directive allows for an exception to the reproduction right “in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts (…)”. 

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competition concerns regarding intermediary industries are less apparent in the realm of copyright law.

Yet, the same cannot be said of the protection of content industries through the grant of exclusive rights. In that regard, it should be recalled that protecting the industry does not equal promoting its competitiveness. There seems to be a mismatch between the legislator’s goal of industry protection and the benchmark of promoting the competitiveness of EU industries. In particular, the protection afforded to content industries in some of the directives does not always comply with the criterion of “moderate protection of industry.” The recoupment of investment implied in this benchmark can require the legislator to grant rights to industry, but not at the expense of competitors or other industry sectors, which means that either such rights should not have too broad a scope, or that competition-related exceptions to them should be devised.

As explained in chapter 5, the harmonization of national laws is a precondition for competitiveness to exist, since the legal certainty derived from harmonized laws contributes to a favourable framework for firms to carry out their activities. However, harmonization alone does not yield an active promotion of competitiveness. Two other indicators are used in the context of this benchmark, which can reflect a compliance with it. The first one is the grant of limited rights (6.7.1.). Granting rights to certain industries enables them to recoup investments made in creators and the dissemination of their works and other materials. Limiting the scope of those rights, on the other hand, secures an adequate level of competition on the market. The second indicator is the establishment of competition-related exceptions to rights (6.7.2.). Having inroads into exclusive rights by way of exceptions is another way to ensure competition, provided that such exceptions are carefully designed having competition goals in mind.

6.7.1. GRANT OF LIMITED RIGHTS

Granting rights to industry that are limited in scope allows it to recover its investment in the creation and dissemination of works and other subject matter. The scope of the rights can be limited in a myriad of ways, namely in duration. So, for instance, this could amount to giving short-term neighbouring rights to certain industries, such as producers or publishers. The exclusivity of the rights enables them to recoup their investment, while the short duration makes sure that other market players will be able to compete with the original right holder within a reasonable period of time.
As a rule, the EU legislator has not opted for such short-term rights. Still, the acquis displays a few examples of this type of rights. The Term of Protection Directive (2006) provides two models: the protection of the lawful publication or communication to the public of previously unpublished works (25 years from the time when the work was first lawfully published or lawfully communicated to the public)\(^{839}\) and the optional protection of critical or scientific publications of public domain works (maximum of 30 years from the time when the publication was first lawfully published).\(^{840}\)

The sui generis right granted to database producers can also be equated with a short-term neighbouring right (15 years from the first of January of the year following the date of completion of the database)\(^{841}\) that could in theory qualify as a “limited right” for the purposes of this benchmark. However, as a result of Article 10 paragraph 3 of the Database Directive, an updated database will benefit from an extended, potentially eternal, term of protection,\(^{842}\) widening the scope of the sui generis right. Moreover, alongside its (potentially) long duration, the conditions for a database to qualify for sui generis protection – namely, the requirement of a qualitatively and/or quantitatively substantial investment in either the obtaining, verification or presentation of the contents of the database\(^{843}\) – also add up to its wide scope.\(^{844}\)

Apprehension regarding the possible damages to competitors were in any case already expressed in the Directive itself.\(^{845}\) Furthermore, the Report on the

\(^{841}\) Article 10 paragraph 1 of the Database Directive.
\(^{842}\) Hugenholtz 1998 at 192-193, pointing out that, according to Recital 55, a mere substantial verification of the contents of the database can qualify as a substantial new investment that would trigger the application of Article 10 paragraph 3 of the Directive. See also Chalton 1994 at 97; Stamatoudi 1997 at 473-475; Davison 2003 at 93; Edwards 2004 at 228; Derclaye 2008 at 139-144; Leistner 2009a at 443-446.
\(^{843}\) See Article 7 paragraph 1 of the Database Directive.
\(^{844}\) The CJEU has to some extent remedied this situation in relation to sole-source databases, as the one who creates the data is in principle the sole source of that data (see Davison & Hugenholtz 2005 at 113 ff.). The Court safeguarded the position of competing interests by ruling that creating data does not per se amount to obtaining data for purposes of qualification for protection under the sui generis right (Case C-203/02 – BHB v. William Hill, at 30-33, Case C-46/02 – Fixtures Marketing I at 34, Case C-338/02 – Fixtures Marketing II at 24 and case C-444/02 – Fixtures Marketing III at 45, 53). In other words, according to the Court, the investment in creating data had to be conceptually separated from the investment in obtaining, verifying or presenting data – only the latter can qualify a database for sui generis database protection. See in addition, for an analysis of how the problems of updated databases and conditions of qualification for sui generis protection might endanger competition, Leistner 2009a at 429 ff.
\(^{845}\) Article 16 paragraph 3 of the Directive mandates the Commission to submit a report on its application no later than three years after the date of implementation, verifying in particular whether the application of the sui generis right “has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements.” Moreover, Recital 47 of the Directive reads:
Database Directive (2005), carried out by the Commission, states that “there is no clear indication as to whether the sui generis right has helped businesses in the database sector to improve their competitiveness,” which confirms that it is at least doubtful that the sui generis right promotes the competitiveness of the EU database industry.

An additional way of granting limited rights is to opt for remuneration rights instead of exclusive rights. Both enable their respective right holders to derive revenues from copyright works and other materials, but while exclusive rights allow their holders to control the relevant acts of exploitation, remuneration rights merely entitle them to a remuneration for use – much like a statutory license. However, as a rule, remuneration rights in the acquis actually benefit creators more than industry, and they are normally granted in the context of non-commercial uses. A significant exception to this rule is Article 8 paragraph 2 of the Rental and Lending Rights Directive, which provides for a single equitable remuneration right for acts of broadcasting and communication to the public to be paid to both performers and phonogram producers. Article 8 paragraph 2 constitutes an exception granted for commercial uses, which implies that the phonogram producer does not have the exclusive right to authorize or prohibit broadcast and communication to the public; instead, he will merely have the right to claim a remuneration for such use.

6.7.2. ESTABLISHMENT OF COMPETITION-RELATED EXCEPTIONS TO RIGHTS

A few directives show competition concerns by stating that their provisions are without prejudice to competition rules, but they do not necessarily internalize those concerns. That is to say, the fact that a given directive expressly states that competition rules are fully applicable does not mean that the same directive contains competition-inspired norms. More often than not, the regulation of competition is done externally to copyright, i.e., through the application of competition law rules. Alternatively, the CJEU can also play a role by securing competition on the market through the interpretation of potentially broad norms – that was the case with the interpretation of “obtaining data” for purposes of

“[…] in the interests of competition between suppliers of information products and services, protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services […]”

847 Von Lewinski 2008 at 55-56.
848 See, e.g., the fair compensation for non-commercial reproduction of broadcasts by social institutions (Article 5 paragraph 2 (e) of the Information Society Directive).
850 Dreier 2007a at 242.
qualification for sui generis database protection, in the case of sole-source databases.851 Having a sui generis right over sole-source databases could theoretically result in a quasi-monopoly of information and consequently be at odds with competition principles,852 exactly because the Database Directive did not have such an exception for sole-source databases in the first place.

Most of the exceptions to the rights in the acquis do not derive from competition concerns. Rather, the majority of exceptions addresses the needs of users, including end users, for non-commercial purposes. In contrast with this rule, however, the Computer Programs Directive has an exception for decompilation that has competition at its core. Article 6 of that Directive permits a programmer to reproduce and translate the code of a computer program for interoperability purposes, if certain conditions are met. This rule allows others to create an independent program whose purpose is to interact or to be technically compatible with the protected program. Therefore, it can be argued that it fosters a competitive, non-monopolistic market.853

6.8. Conclusion

Considering the way that each benchmark is reflected in the acquis, on the one hand, and the extent to which the benchmarks as a whole are manifested therein, on the other hand, some examples of good and bad practices can be collected.

In what concerns the benchmark of harmonization, the acquis reveals that all directives are at least partly justified, as the intervention of the legislator is legitimate in terms of the need for legislative action. Yet, in some cases, only part of the subject matter harmonized actually corresponded to a need for harmonization, which could weaken the case for the particular design of harmonizing measures in such situations. Moreover, the quilt harmonization of national copyright laws has tainted the harmonizing effect of directives – e.g., because some harmonizing rules are linked to non-harmonized concepts, or because of inconsistencies between the different directives. So far, it is mainly specific aspects of copyright that have been harmonized and there is no consolidation of the directives. The consolidation of the existing acquis could have been done by the more recent directives. For example, the Information Society Directive could have consolidated pre-existing notions that were already partly present in the acquis via previous directives. Instead, it chose to leave those directives intact, with the exception of certain provisions.854 This means inter alia that different types of works follow different regimes in some aspects, but not in others. As a consequence

851 See footnote 844 above.
852 Hugenholtz 2005a at 208 ff.
853 Bing 2009 at 422; Dreier 1991a at 323 ff. See also, less optimistic, van Rooijen 2010 at 68 ff.
854 See Article 1 paragraph 2 of the Information Society Directive.
of the harmonization patchwork, the harmonizing effect of directives decreases, since some Member States might consolidate the harmonization rules themselves, while others do not. Still, the harmonization endeavours of the EU legislator have achieved some level of harmonization in certain aspects of copyright, and in fact the harmonization benchmark seems to be concretized in the **acquis** to a certain extent.

The **acquis** also shows that national cultures and traditions have been taken into account on occasion, although there seems to be no consistent policy for that. The respect for national cultures and traditions is in general well achieved in the balance between the systems of copyright and *droit d’auteur*, however, in so far as exceptions to the exclusive rights can be representative of national cultures, and since the exceptions vary from one directive to another, it can be argued that the consideration of national cultures and traditions has in that respect been irregular.

In what concerns the benchmark of protecting creators, the **acquis** pursues in general a high level of protection. This is in line with the case law of the CJEU, which established that the specific subject matter of copyright is the economic and moral rights of its holder. Several directives bestow upon creators exclusive or remuneration rights, some of which are unwaivable. For the ones that are not, however, there are no harmonized rules regulating the assignment of rights from creators to industries, which can work to the disadvantage of the former. Moreover, a strong protection of creators can also have the effect of making further creative uses cumbersome, which is detrimental to other creators as well. The **acquis** contains a few norms that facilitate further creative uses, but those can hardly amount to a consistent policy in ensuring the use of existing works for creative purposes.

The lack of a consistent policy in that realm is probably due to that same lack in relation to users in general (and not only regarding the user-creator). The EU legislator has put forth several exceptions to the exclusive rights throughout the **acquis**, which could in theory guarantee users’ access to works. But the extent to which the interests of end users were in reality taken into account is not clear – in some cases, such exceptions are not mandatory, which means that the Member States are not obliged to implement them. In addition, most exceptions can be overridden by contract. The empirical indicators that relate to this benchmark reveal a sketchy picture, which can also, to some degree, be a side effect of the piecemeal approach to harmonization.

Finally, the benchmark of promoting the competitiveness of EU industries is not seen consistently throughout the **acquis** either. This benchmark required a balance between protectionism of industries and compliance with competition principles, which would ideally result in mechanisms that foster a moderate protection of industries. However, the **acquis** grants broad rights to certain industries, while exceptions favouring competition or other industries are scarce. The protection afforded to creative industries outweighs the consideration of competition principles in the current **acquis**.
In comparison, it appears that the benchmark of harmonization is the one that is more coherently manifested in the *acquis*. This is not surprising, as it is also the benchmark that more closely relates to the main competence norm used in the field of copyright: the approximation of national laws for the establishment and functioning of the internal market. By contrast, the respect for national cultures and traditions, the protection of end users and the promotion of competitiveness all seem to miss the guidance of a consistent policy agenda. Particularly in the case of national cultures and traditions, the absence is striking in so far as there is a “cultural mandate” since 1992. Moreover, unlike for example the end user – whose place in copyright was not traditionally acknowledged or recognized – the connection of copyright to cultural matters is more evident.

The *acquis* also reveals a lack of balance between the different benchmarks in other respects – for example, based on the empirical indicators, the benchmark of protecting creators seems to be more represented in the *acquis* than the benchmark of protecting the end user. However, the *acquis* provides as well some examples which show that a balance between the benchmarks can be achieved. This is the case, for instance, with the benchmarks of harmonization and respect for national cultures and traditions. Some options taken by the EU legislator indicate that there are specific solutions to make these benchmarks compatible, such as the use of harmonized concepts that are a middle ground between the different copyright traditions. This suggests that, through the use of particular legislative techniques, it is possible to reach a balance between the different benchmarks, even if they are at first sight contradictory. This question will be looked into in more depth in the next chapter.
This book aimed at inquiring into the competence of the EU to legislate in the field of copyright. The underlying reason for this research was the observation that copyright lawmaking at the EU level has so far been based on internal market objectives – a scenario that lacks normative guidance. In fact, the main competence norm used to harmonize national copyright laws has been Article 114 TFEU, which relates such harmonization to the establishment and functioning of the internal market. In European law jargon, this type of norm is called a “functional competence,” as it grants power to the EU to achieve a certain result (the establishment and functioning of the internal market), while being silent regarding the concrete subjects that should be addressed. In other words, Article 114 TFEU does not provide any guidance as to what the substantive content of harmonization measures should be in order to further internal market goals.

Following this status quo, two main research questions ensue: has this functional character of Article 114 TFEU resulted in a normative gap in copyright lawmaking? And, if so, how ought the EU legislator address that gap? I have concluded that indeed the lack of normative guidance has given rise to a normative gap in copyright lawmaking.

To address that gap, I have proposed the creation of benchmarks of legislative activity, based on an argument of hierarchy of sources, or the principle of constitutional legality.

This final chapter discusses some of the implications of using benchmarks of legislative activity in the field of copyright. For that purpose, it starts by summarizing the main findings of the research (7.1.). It then presents the problems of having a normative gap in copyright lawmaking (7.2.) and the challenges inherent to the benchmarking exercise (7.3.). Finally, section 7.4. discusses the application of the benchmarks to future copyright legislation.

### 7.1. Summary

In order to answer the research questions referred to above, chapter 2 demonstrated the existence of a normative gap in copyright lawmaking. The chapter mapped the objectives of legislative activity in the field of copyright. The data retrieved showed that the main policy goals pursued by the EU legislator were mostly of an economic nature, with a predominance of the goal of protecting content industries.
Consequently, it was possible to conclude that there is indeed a normative gap in copyright lawmaking, since neither the protection of specific interests nor the prevalence of some of those interests over others are grounded in Treaty norms or other higher sources of law. Having already identified the normative gap, the following chapters looked into two possible sources for dealing with that problem: the activity of the CJEU in the pre-legislative era (chapter 3) and the EU treaties (chapter 4).

The early CJEU decisions established concrete solutions for the conflict between Treaty provisions on free movement and national copyright laws. Due to the territorial nature of copyright and to the differences between national laws, copyright could indeed qualify as an obstacle to the free movement of goods and services. An analysis of the Court’s solutions revealed that copyright’s specific subject matter could justifiably restrict cross-border trade. According to the Court, that specific subject matter amounts to the protection of the moral and economic rights of its holders. However, in the Court’s view, this has to be seen against the social function of the right and implies a balance between the different interests at stake. Such a balance is achieved through the application of the principle of proportionality – as a result, the exploitation rights that are part of the specific subject matter of copyright should consist of a “normal exploitation” of the right, that is, one that guarantees an adequate income to its holder. It also flows from the Court’s jurisprudence that the principle of non-discrimination plays a central role in the Treaties, serving as a guiding proposition when assessing free movement of goods and services vis-à-vis restrictions thereof. As a consequence, the principle of non-discrimination ought to be considered in the context of harmonizing national copyright laws.

Another source of normative inspiration are the EU treaties, since they are the equivalent to a constitutional charter in the EU legal order. This was the object of chapter 4. There, having the evolution of the EU as a background, it was highlighted that two elements can contribute to the normative content of EU competences: the objectives of the EU and certain principles that govern the application of competence rules. The objectives of the EU should work in tandem with its competences, as they are what justified the grant of powers to the EU in the first place. The EU objectives considered relevant for copyright were the establishment of an internal market; the promotion of EU’s values (which include the respect for fundamental rights and the rule of law); and the respect for cultural diversity. These objectives, which are not hierarchized in the Treaties, yield both economic and non-economic elements. Consequently, it was concluded that, in so far as the objectives of the EU are used to provide Article 114 TFEU with normative content, the latter ought to reflect a balance between those different objectives. This conclusion reflects the need to integrate the different EU policies and the fact that functional competences should also be used to achieve specific objectives of the Union. At the same time, the principles that underlie the competence system – conferral, proportionality and subsidiarity – provide...
guidelines for the use of the EU’s competence, but also for the creation and operationalization of benchmarks for copyright lawmaking.

The conclusions reached in chapters 3 and 4 paved the way for chapter 5, which established benchmarks of legislative activity. This chapter provides a concrete answer to the research question of how the legislature can address the normative gap in copyright lawmaking. The solution proposed there was to create benchmarks that the legislator should meet when designing copyright legislation at the EU level, since such benchmarks can supply the normative content missing from the main competence norm (Article 114 TFEU). The challenge was then to choose the benchmarks, in order to have an adequate normative content that is in accordance with EU law. This was done through a strict abidance by the principle of constitutional legality and the rule of law, both implying that benchmarks of legislative activity should be derived from the highest possible source of law. In the EU legal order, that would be primary law, which consists of the Treaties, fundamental rights and general principles of law, including the ones developed by the CJEU. However, other CJEU jurisprudence was also weighed in, since – besides defining general principles of law – the case law of the Court determines the scope and meaning of norms of primary law. The benchmarks for copyright lawmaking were thus derived from the normative basis established by chapters 3 and 4 and defined as follows: harmonization of national laws; respect for national cultures and traditions; protection of creators; protection of end users; promotion of competitiveness of EU industries.

The first benchmark – harmonization of national laws – comprises two elements, which are the need for harmonization measures and the harmonizing effect of such measures. Secondly, the respect for national cultures and traditions as a benchmark carries an obligation to take those cultures and traditions into consideration when drafting copyright legislation. Importantly, the definition of “national cultures and traditions” comes down to cultural diversity in the traditional sense of “cultural expression,” but also to legal cultures and traditions. Hence, this benchmark mandates that both national cultures and national legal systems should be taken into account in EU legislation. The third benchmark is the protection of creators, where “creators” include authors and performers. It entails both guaranteeing income and recognition to creators, as well as facilitating the use of existing works for further creative purposes. The fourth benchmark is the protection of end users, which is achieved by granting them access to cultural goods and services while taking into account their rights. Finally, the fifth benchmark – the promotion of competitiveness of EU industries – requires a moderate protection of industry, i.e., one that fosters both competitiveness and competition concerns. The five benchmarks can point in opposite directions, since the underlying rationales represent different interests that can at times be in conflict with one another. This may cause a given legislative measure to rank high vis-à-vis one benchmark and to score low in another one. Ideally, however, a balance between the benchmarks should be reached.
Chapter 6 followed to field-test the benchmarks in order to assess how copyright legislation might in practice operationalize the benchmarks. By applying the benchmarks to the copyright _acquis_, some examples of good and bad practices were examined. The analysis suggests that the benchmark of harmonization is the one which finds more expression in the _acquis_. Legislative practice shows that the use of total harmonization techniques (together with the occasional employment of mechanisms of mutual recognition) are a good starting point to achieve a high harmonizing effect, although care should be taken to avoid certain practices that decrease it (such as the permeability of harmonized rules vis-à-vis non-harmonized areas and the use of undefined key concepts).

The protection of creators also seems to be high on the EU policy agenda: as a rule, the total harmonization technique is used to harmonize rights, thus ensuring that certain acts of exploitation are covered by exclusive rights. Moreover, the scope of the rights granted is broad. However, due to some legislative shortcomings, the rights granted to creators might end up favouring creative industries instead. In the absence of harmonization of rules on authorship and contracts, this shift of benefits can be avoided by conferring unwaivable remuneration rights to creators, as demonstrated (although not very frequently) by the _acquis_. Another problem in this realm is that the high level of protection sought has the disadvantage of disregarding the interests of the user-creator, who is often prevented from using protected works for creative purposes.

Unlike the benchmarks of harmonization and the protection of creators, the benchmarks that relate to the respect for national cultures and traditions, the protection of end users and the promotion of competitiveness of EU industries reveal a lack of consistent policies in pursuing those subject matters. The respect for national cultures and traditions can be achieved by finding a middle ground between the systems of copyright and _droit d’auteur_, which does not seem to constitute a problem in general regarding EU copyright legislation, since a compromise has often been reached. However, this benchmark is materialized in other legislative aspects that do not seem to be as present in the _acquis_, such as, for instance, a well-devised system of exceptions that can accommodate national specificities. The map of exceptions in the _acquis_ lacks consistency.

Importantly, the way in which exceptions are designed is a relevant factor not only for the benchmark of respect for national cultures and traditions, but also for the protection of the end user and for facilitating further creation in the interest of the user-creator. A scattered and inconsistent system of exceptions does not favour the end user, as his access to copyright works is usually enabled through exceptions to the exclusive rights. The same is applicable to the user-creator. In this respect, it is noteworthy that the harmonization of exceptions, mostly carried out through partial harmonization techniques, stands in sharp contrast with the total harmonization of economic rights. Moreover, if the exceptions are made non-mandatory – as is mostly the case in the _acquis_ –, the right holder can override them by contract and effectively prevent access.
With regard to the promotion of competitiveness of EU industries, there seems to be an overprotection of creative industries in the acquis, rather than a promotion of competition on the market. The strengthening of copyright protection through the grant of broad rights, together with a lack of regulation of contracts and authorship, concentrates much of the available protection on creative industries, with the result of the standard of moderate protection of industry being overstepped in relation to creative industries.

Chapter 6 concluded that the acquis displays examples of a lack of balance between the different benchmarks, although there are also cases where the EU legislator has succeeded in making apparently contradictory benchmarks compatible.

7.2. The problem of having a normative gap in copyright lawmaking

This research showed that there is a normative gap in copyright lawmaking, as the global scheme of goals pursued by the EU legislator is not based in the Treaties or other higher source of law. While some goals of legislative activity, such as the establishment of an internal market or fostering culture, derive from the Treaties, others, such as the protection of specific interests, are pursued without resort to any Treaty norms. Moreover, the goals of legislative activity do not all bear the same weight, with some figuring more prominently than others in the copyright acquis.

The main problem with this scenario is that such a normative gap is at odds with the principle of constitutional legality, which mandates that directives be compliant with the totality of higher ranking law. However, the lack of normative guidance in copyright lawmaking also opens room for arbitrariness, which might in turn reflect on the quality of legislation. It can furthermore make the legislative process vulnerable to the influence of private interests. The protection of content industries is a case in point. Chapter 2 has shown that the goal of protecting content industries is the one most present throughout the acquis, while chapter 6 has provided some examples of where that protection went overboard. The overprotection of industries is not grounded in any higher source of law, and it does not seem to be sheltered by copyright’s own goals and rationales either. The natural rights theory focuses on the relation between the author as the original source of creation and his work. The utilitarian theory, on the other hand, seeks to promote social welfare by giving incentives to both the creation and the dissemination of works. However, even if the utilitarian theory can support the grant of rights to creative industries as disseminators of works, the ultimate goal of copyright according to this theory is to promote societal interests. It is not readily apparent how a high level of industry protection can achieve that objective.

855 Von Bogdandy & Bast at 229-230.
Another example of arbitrariness derived from the normative gap is the terminological inconsistencies between the directives, which decrease the quality of legislation. The lack of normative guidance means that the pursuit of interests in copyright legislation is not founded in higher sources of law, which can define and rationalize the interests worth pursuing. Thus, for instance, because there is no normative objective of protecting the end user in the *acquis*, several directives employ terms (such as “lawful user” or “lawful acquirer”) that are not necessarily coincidental with a unitary concept of “end user” that could be based in the Treaties or other higher source of law. The terms used by the EU legislator are new to the EU legal order and detached from normative foundations, which can result in legal uncertainty that does not foster the interests of end users or harmonization objectives.

An additional concern regarding the existence of a normative gap is the potential mismatch of copyright legislation with the broader vision of Europe. Chapter 4 provided an historical background that described the evolution of the EU from an entity with economic objectives and concerns to one that also has a non-economic dimension. A predominance of economically driven goals enabled by the lack of normative guidance does not seem compatible with a European Union characterized by the combination of economic and non-economic considerations. For instance, going back to the example of the overprotection of creative industries as mentioned above, it is not clear how such a high level of protection of industry fits within the framework of a EU that now furthers both economic and non-economic values.

The theory presented in this book – that the creation of benchmarks from higher sources of law infuses normative content into the functional competence of Article 114 TFEU, thereby bridging the normative gap – ought to provide a starting point for tackling the problems that result from the normative gap. The establishment of benchmarks for copyright lawmaking complies with the principle of constitutional legality, reduces arbitrariness (having therefore the potential to increase legislative quality) and is aligned with a modern vision of Europe. However, the benchmarking exercise is not, in and of itself, a blanket solution. Some challenges surrounding it should be handled in order to strengthen the contribution of the benchmarks to copyright lawmaking.

### 7.3. Challenges in the benchmarking exercise

Since the benchmarks are derived from EU primary law and the case law of the CJEU, and because both sources encourage the promotion of a balance between the interests at stake, the EU legislator should also reach a balance between the different benchmarks of legislative activity when drafting copyright legislation. The need to coordinate between different policy areas, and to achieve a balance between them, also derives from Article 7 TFEU, which states that the EU “shall ensure
consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.”

This in turn is also in line with copyright’s own goals and rationales. While the protection of copyright can be grounded in both the natural rights and the utilitarian theories, the same holds true for the consideration of other interests. In fact, neither theory endorses an absolute conception of property, and both allow for a restriction of copyright in the name of competing interests. However, the application of the benchmarks to the copyright **acquis** has made it clear that such a balance is at times hard to achieve.

There are a few reasons that might explain this difficulty. The first one is the piecemeal-type of harmonization. The directives have so far dealt with specific aspects of copyright. Even the Information Society Directive – arguably, the only one that is “horizontal” –, does not approach copyright in a holistic fashion and leaves most of the previously harmonized terrain unaltered. As each of the directives has a specific purpose and vision, which relate mainly to the subject matter being harmonized, the balance between the different benchmarks is also dependent on the context of each directive. So, for example, the Term of Protection Directive, which is mainly aimed at harmonizing the term of protection of copyright and certain related rights, focuses primarily on establishing the duration of such rights. It therefore does not touch upon substantive questions that concern the end user (e.g., exceptions that favour access of end users to copyright works). In other words, the fragmentary way in which the harmonization of national copyright laws is pursued allows for the occasional disregard for some of the benchmarks, resulting in a lack of balance between them.

Connected to this question is the fact that there seems to be no consistent policy in the context of some of the benchmarks, notably the respect for national cultures and traditions and the protection of the end user. This might also explain the irregular manifestation of such benchmarks throughout the copyright **acquis**, leading as well to an imbalance between these benchmarks and others that are more commonly pursued, such as the harmonization of national laws. In a similar fashion, the particular policy in relation to creative industries, which is often characterized by a protection trend, is at odds with the moderate protection of industry implied in the benchmark of promoting its competitiveness. The fact that the protection of certain industry interests went overboard in some occasions had an impact on the protection of competing interests (mainly those of creators and end users), which in turn also led to a lack of balance between the corresponding benchmarks.

This relates to yet another reason that might account for the difficulty in reaching a balance between the benchmarks, which is the fact that some of them point in opposite directions. The proposed benchmarks have different, and sometimes

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856 However, the Directive also contains a provision – Article 6 – that harmonizes the protection of photographs by copyright.
conflicting, rationales. Reconciling competing rationales and interests is admittedly not an easy task – it can be challenging to define how they ought to interact with one another and to what extent one benchmark should be met to the detriment of others. In this regard, it should be noted that most conflicts concern either the relation between the two first benchmarks (i.e., harmonization of national laws versus respect for national cultures and traditions) or between the last three (protection of creators, protection of end users, promotion of competitiveness of EU industries). That is, the conflicts between the benchmarks will usually relate to questions of balance between harmonization goals and the national cultures and traditions of the Member States, on the one hand, or balance between the interests of the different stakeholders (creators, end users, industries), on the other hand. Hence, for example, a directive that carries out the total harmonization of national laws, while complying with the benchmark of harmonization, might be in conflict with the respect for national cultures and traditions if the latter are not sufficiently accounted for in the context of the harmonized rules. Likewise, a directive setting the protection of creators at a high level will abide by the creator’s benchmark, but will likely not do so regarding the benchmark of protecting end users (unless their access to protected works is enabled through, for example, exceptions to the exclusive rights).

Another factor that disturbs the balance between the different benchmarks, which is also linked to the harmonization patchwork, is the impact of non-harmonized aspects of copyright on (supposedly) harmonized rules. As chapter 6 has demonstrated, this of course decreases the harmonizing effect of the norms, but it can also tip the scales in favour of one benchmark to the detriment of another. Such is the case of the non-harmonized rules on authorship and contracts, which can change the beneficiary of a harmonized norm from the creator to the creative industry that ends up owning the rights.

In short, the main challenge of having benchmarks of legislative activity as a stronghold of normativity is the need to achieve a balance between the different benchmarks, making them in line with the higher sources of law that supported their creation. The next section discusses a few recommendations having that goal in mind.

7.4. The stream that lies beyond

The way to achieve a balance between the different benchmarks is not straightforward and entails particular choices to be made by the EU legislator. There seems, however, to be a reason that underlies many of the imbalances found when field-testing the benchmarks, which is the piecemeal approach to harmonization.

Accordingly, and as a starting point, the application of benchmarks to future copyright legislation can be made easier if there is an overhaul of the existing
acquis. The overhaul of the acquis can be achieved either by codification or by recasting. Codification replaces existing directives by one single act, but it does not alter their substance, nor does it imply a change in policy: it deletes overlapping provisions, harmonizes terms and definitions and corrects errors. More ambitiously, recasting implies codification, but it also purports to amend the directives in one single act.

The codification of existing directives has already been broached by the Commission as one of the alternatives for the overhaul of copyright at the EU level, as a way to “help to clarify the relationship between the various exclusive rights enjoyed by rights holders and the scope of the exceptions and limitations to those rights.” Codifying the directives in one single act could be an opportunity to check the application of the benchmarks as a whole, thereby providing some clarity regarding the balance between them. It would eliminate the problems of applying the benchmarks to sectorial legislation, the subject matter of which sometimes does not allow for the consideration of all the benchmarks. It would also do away with conceptual overlaps (e.g., between the exclusive rights) and contradictions in terminology (e.g., regarding the beneficiaries of exceptions) that do not further harmonization aims, nor the protection of interests of the relevant stakeholders. In short, codification would be the first step to achieving a balance between the benchmarks of legislative activity.

Still, recasting presents additional advantages in relation to codification, as it gives the EU legislator the opportunity to modify substantive provisions of the acquis and correct imbalances. Recasting the EU acquis caters for the clarification of certain key concepts that remain undefined, thus increasing the harmonizing effect of directives, but also the protection of private benchmarked interests. This could be done, inter alia, by integrating the CJEU case law where relevant, with the added benefit of aligning positive with negative integration. One example is the currently undefined concepts of fair compensation and remuneration, which have to some extent been clarified by the CJEU. The advances made in the field of negative integration – for example, the determination that the word “equitable” in equitable remuneration refers to the economic value of the use – could therefore be incorporated in the recasting act. Another example is the definition of originality as the “author’s own intellectual creation,” which was extended by the CJEU from
the realm of computer programs, databases and original photographs to all types of works, and which could be introduced in a recasting act.

With a view to achieving a balance between the benchmarks, the recasting of EU copyright law should be done through a consistent application of the principle of proportionality, which is central to the notion of balance between opposing benchmarks. The application of a proportionality test to future copyright legislation will probably imply that such legislation meets all the benchmarks to a relative extent, instead of complying with only some of them to a large extent. Nevertheless, if the balance between the benchmarks is achieved by taking the proportionality principle into account, then the legislation will respect the benchmarks as a whole to the highest degree possible.

While the proportionality test should be applied having the totality of benchmarks in mind, it should also be taken into account that most of the compromises between benchmarks that proportionality requires will likely take place where conflicts are found to begin with. The conflicts between benchmarks usually occur in two separate spheres: on the one hand, the harmonization of national laws might be at odds with the respect for national cultures and traditions; on the other hand, the benchmarks that relate to private interests – creators, end users, and industry – can also be incompatible with one another. In other words, special attention should be given to achieving a balance between the first two benchmarks, on the one hand, and between the last three, on the other hand.

Chapter 6 has pointed out that the EU legislator has been more successful in achieving a balance in the first sphere, as compared to the second. This is due to particular formulae that should continue to be employed in future copyright legislation, namely the use of harmonized concepts that are middle ground between the two copyright traditions, which can reach a high harmonizing effect while taking into account national cultures and traditions.

Another way to balance the harmonization of national laws with the respect for national cultures and traditions is to choose the legislative technique according to the subject matter being harmonized. The legislative technique used (total harmonization or partial harmonization) should comply with the principle of proportionality, and therefore the combination of several legislative techniques is not only possible but also advisable: it can happen that total harmonization complies with the proportionality test in relation to certain subject matter where there is broad political consensus between the Member States (because, for instance, it is an aspect of copyright common to most Member States, such as the main exclusive rights). Conversely, total harmonization will not be the adequate technique in matters where the disparities between national laws are rooted in cultural differences that are not material to the building of an internal market (as is the case with some exceptions). Therefore, a legislative act can (and should) prescribe certain measures of total harmonization while leaving some room for Member States in other aspects that are not as relevant for the building of the internal market.
The policy space left for Member States can be defined either through partial harmonization techniques or through the use of the mechanism of mutual recognition. There is nothing that prevents the use of mutual recognition – a mechanism that stems traditionally from the field of negative integration – in the context of a harmonizing measure. On the contrary, mutual recognition has the ability to foster cross-border trade without calling into question national cultures and traditions. It should be resorted to where political consensus proves hard to reach. Using mutual recognition clauses allows for the consideration of national cultures and traditions. At the same time, it provides a means of achieving a compromise in relation to sensitive issues, which helps not to jeopardize a harmonizing measure altogether.

The balance between the remaining benchmarks, on the other hand, should be achieved by rethinking the scope of protection afforded to the interests of each group of stakeholders (creators, end users and industries). The granting of a benefit to a group of stakeholders should be suitable in the context of the particular benchmark. That is, it should be appropriate to achieve either the protection of creators, the protection of end users or the promotion of competitiveness of EU industries. It should also, however, be the least restrictive way to meet the benchmark and be weighed against the restrictions it brings to the other benchmarks. Tipping the scales by granting rights or other benefits to one group of stakeholders should be accompanied by the guarantee that the balance with the interests of other stakeholders is preserved.

The rights granted to creators and industry are a case in point. While the specific subject matter of copyright stands for a cluster of core rights, what ought to be understood by “core rights” is something to be weighed against other interests. Here, emphasis should be put on the concept of “normal exploitation.” As argued in chapter 3, it can be concluded from the case law of the CJEU that “normal exploitation” ought to be the threshold that guarantees an adequate income to right holders.862 It can also be extracted from the Court’s case law that copyright does not guarantee the opportunity to demand the highest possible remuneration, as the right holder is only ensured an “appropriate remuneration.” 863 Moreover, the adequateness of the remuneration should not be considered as an absolute concept, in so far as such adequateness will depend on the right holder concerned. The creators’ benchmark relates to their protection, while the industry one concerns the promotion of competitiveness and therefore a moderate protection of industry. Consequently, it is to a certain degree arguable that the exploitation rights granted to creators should carry more weight than the ones given to industry.

The balance between the three last benchmarks can furthermore be achieved through the establishment of solid, mandatory exceptions to the rights granted to

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862 See chapter 3 at 73 and case 402/85 – Basset v. SACEM at 16 (cited therein).
863 See chapter 3 at 64-65. See also joined cases C-403-429/08 – Premier League at 108 and case C-128/11 – UsedSoft at 63.
certain stakeholders. For instance, limitations and exceptions to rights can allow for the protection of end users to be weighed in, although such protection should also be viewed against the interests of the other stakeholders – in that respect, the protection of end users should not be unlimited either, as it has to be balanced vis-à-vis the interests of the right holders.

Another factor that can contribute to a balance between the benchmarks that relate to private interests is the regulation of further key aspects of copyright – such as copyright contracts and authorship –, in order to avoid the shift of benefits from one group of stakeholders to another. As chapter 6 has demonstrated, the lack of regulation of these particular subjects has resulted in a deviation of protection from creators to creative industries (although admittedly such deviation can also be avoided, to a certain extent, through the grant of unwaivable remuneration rights to creators).

An additional question that should be considered in order to achieve a balance in the realm of the three last benchmarks is the fact that the benchmarks of protecting creators and promoting the competitiveness of EU industries entail, in and of themselves, an internal balance. In relation to the protection of creators, a balance should be achieved between guaranteeing income and recognition to creators, on the one hand, and facilitating the use of existing works for further creative purposes, on the other hand – this could be done, for example, in the framework of harmonization of the right of adaptation or by creating a normative exception for further (non-commercial) creative purposes.

In what concerns the promotion of competitiveness of EU industries, it should be recalled that this benchmark implies that competitors are somehow safeguarded,  

864 Suggestions as to how a EU map of exceptions should be designed have already been presented in academic circles – see e.g., van Eechoud et al. 2009 at 128-130, 304-305; Janssens 2009 at 335-348. See also chapter 5 of the European Copyright Code drafted by the Wittem Group (Wittem Group 2010).

865 To the extent that end users are consumers, it has also been pointed out that the “high level of protection” dictated by the Treaties does not equal the highest level of consumer welfare – see Stuyck 2000 at 392.

866 See, for a discussion on the harmonization of copyright contracts, Dietz 1979 at 409-410; Walter & Lewinski 2010 at 1520. See however Hilty 2004 at 764-765, 772 ff (raising doubts regarding the EU competence to carry out such harmonization); and Von Lewinski 2012 at 243 ff, who admits that “many typical problems of authors and performers regarding their protection could be solved by a strong contract law,” but also states that “the problem of copyright contract law seems too hot to be tackled,” concluding that there seems to be no urgent need to fully harmonize copyright contract law. See also Guibault 2009 at 525-527, presenting arguments against the harmonization of contracts between creators and industry and holding that “issues of authors’ contract law are best addressed at the national level.”

867 See, for a discussion on the harmonization of authorship and initial ownership, Hugenholtz et al. 2006 at 168 ff; Walter and von Lewinski 2010 at 1468-1471; Quaedvlieg 2012 at 198 ff.
7. THE NORMATIVE GAP: WATER UNDER THE BRIDGE

e.g., through the establishment of competition-related exceptions.\textsuperscript{868} However, the benchmark also implies that one industry sector does not put at risk the economic activity of other industry sectors. Therefore, the rights granted to creative industries should be accompanied by certain safeguards that enable intermediaries to carry out their activity – for instance, through specific clauses exempting them from liability for copyright infringement.

In short, the blueprint for a solid normative bridge is given, first, by considering what each benchmark entails, and by reaching an internal balance within each benchmark where needed. Second, it is necessary to reach a balance between the different benchmarks, and especially within the two groups of benchmarks mentioned above. Only then can both a constitutional balance and a balance between the different private interests be guaranteed, thereby giving rise to a sound EU copyright legislation.

\textsuperscript{868} See, for a suggestion of further competition-related exceptions, Article 5.4. of the European Copyright Code (Wittem Group 2010). For a critical account of this blueprint, however, see Ginsburg 2011 at 294-296).
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Samenvatting

Dit boek is erop gericht om onderzoek te doen naar de bevoegdheid van de Europese Unie (EU) om wetgeving te maken op het gebied van het auteursrecht. Met dat doel zijn twee onderzoeksvragen geformuleerd: heeft het functionele karakter van artikel 114 VWEU geresulteerd in een normatieve leemte in het maken van wetgeving op het gebied van het auteursrecht? En, als dit het geval is, hoe dient de EU-wetgever dat hiat aan te pakken? Om deze onderzoeksvragen te kunnen beantwoorden, wordt in hoofdstuk 2 het bestaan aangetoond van een normatieve leemte bij het tot stand brengen van wetgeving op het gebied van het auteursrecht. Het hoofdstuk brengt de doelstellingen in kaart die worden gehanteerd bij de wetgevende activiteiten op het gebied van het auteursrecht. Uit het verrichte onderzoek komt naar voren dat de belangrijkste beleidsdoelstellingen die worden nastreefd door de EU-wetgever overwegend van economische aard zijn, met een bijzondere nadruk op de doelstelling om content industries te beschermen. Er blijkt indertijd een normatieve leemte te bestaan bij het maken van auteursrechtwetgeving, omdat noch de bescherming van andere specifieke belangen noch het prevaleren van sommige van die belangen boven andere zijn vastgelegd in verdragsnormen of in andere rechtsbronnen van hogere orde. Na de normatieve leemte te hebben geïdentificeerd, gaan de volgende hoofdstukken nader in op twee mogelijke bronnen voor het aanpakken van dat probleem: de activiteiten van het Hof van Justitie van de EU in het pre-wetgevingstijdperk (hoofdstuk 3) en de EU-verdragen (hoofdstuk 4).

De allereerste uitspraken van het Hof van Justitie hebben gezorgd voor concrete oplossingen voor conflicten tussen verdragsbepalingen inzake vrij verkeer en nationale auteurswetten. Vanwege het territoriale karakter van het auteursrecht en de verschillen tussen nationale wetten is het auteursrecht inderdaad te kwalificeren als een obstakel voor het vrije verkeer van goederen en diensten. Een analyse van de oplossingen van het Hof toont aan dat het specifieke voorwerp van het auteursrecht het grensoverschrijdend handelsverkeer mag beperken. Volgens het Hof resulteert het specifieke voorwerp van het auteursrecht in het waarborgen van de bescherming van de morele en economische rechten van de rechtshouders. In de visie van het Hof moet dit echter worden bezien in relatie tot de maatschappelijke functie van het recht en impliceert dit een evenwicht tussen de verschillende relevante belangen. Een dergelijk evenwicht wordt bereikt door toepassing van het
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evenredigheidsbeginsel. Het resultaat daarvan is dat de exploitatierechten die deel uitmaken van het specifieke voorwerp van het auteursrecht, uit een “normale exploitatie” van het recht moeten bestaan, in de zin dat met die exploitatie een adequaat inkomen van de rechthebbende is gegarandeerd. Uit de jurisprudentie van het Hof vloeit ook voort dat het beginsel van non-discriminatie een centrale rol speelt in de verdragen, en dat dit dient als richtinggevend kader voor het beoordelen van het vrije verkeer van goederen en diensten vis-à-vis beperkingen daarvan. Als gevolg daarvan, moet rekening worden gehouden met dat beginsel van non-discriminatie binnen de context van het harmoniseren van nationale auteurswetgeving.

Een andere bron van normatieve inspiratie bestaat uit de EU-verdragen, aangezien zij het equivalent zijn van een grondwet binnen de EU-rechtsorde. Dit is het onderwerp van hoofdstuk 4. Met de ontwikkeling van de EU als achtergrond, wordt daarin benadrukt dat twee elementen kunnen bijdragen aan het normatieve gehalte van EU-bevoegdheden: de doelstellingen van de EU en bepaalde beginselen die de toepassing van bevoegdheidsregels reguleren. De doelstellingen van de EU hangen samen met de bevoegdheden van de EU, omdat die doelstellingen in de eerste plaats de toekenning van bevoegdheden aan de EU rechtvaardigen. De doelstellingen van de EU die relevant zijn voor wat betreft het auteursrecht zijn het realiseren van een interne markt; de bevordering van EU-waarden (waaronder het respect voor fundamentele rechten en de rule of law) en het respect voor culturele diversiteit. Deze doelstellingen, die geen hiërarchische volgorde kennen in de verdragen, leveren zowel economische als niet-economische elementen op. Daarom is geconcludeerd dat, voor zover de doelstellingen van de EU worden gebruikt om artikel 114 VWEU van een normatieve inhoud te voorzien, er een balans tussen de verschillende doelstellingen zal moeten worden gevonden. Deze gevolgtrekking laat de noodzaak zien om de verschillende beleidsuitgangspunten van de EU te integreren en om de functionele bevoegdheden ook te gebruiken om specifieke doelstellingen van de EU te realiseren. Tegelijkertijd bieden de principes die aan het bevoegdheidssysteem ten grondslag liggen – toekenning, proportionaliteit en subsidiariteit – Richtlijnen voor het gebruik van EU-bevoegdheden, maar ook voor het creëren en operationaliseren van benchmarks voor het tot stand brengen van auteurswetgeving.

De conclusies in de hoofdstukken 3 en 4 hebben de weg gebaand voor hoofdstuk 5, waarin benchmarks voor wetgevende activiteiten worden vastgesteld. Dit hoofdstuk biedt een concreet antwoord op de onderzoeks vraag hoe de wetgever de normatieve leemte bij het opstellen van auteursrechtelijke wetgeving kan aanpakken. De voorgestelde oplossing is om benchmarks te creëren waaraan de wetgever zich dient te houden bij het ontwerpen van auteursrechtswetgeving op EU-niveau, aangezien dergelijke benchmarks kunnen voorzien in de normatieve inhoud die ontbreekt in de belangrijkste bevoegdheidsnorm (artikel 114 VWEU). Vervolgens zijn de benchmarks gekozen, zodat adequate, normatieve content kan worden gerealiseerd die in overeenstemming is met EU-wetgeving. Dit is gedaan door een
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strikte naleving van de principes van het grondwettelijke legaliteitsbeginsel en de rule of law, die beide impliceren dat benchmarks voor wetgevende activiteiten moeten worden afgeleid uit de hoogst mogelijke rechtsbron. In de rechtsorde van de EU zou dat het primaire recht zijn, bestaande uit de verdragen, grondrechten en algemene rechtsbeginselen, waaronder de door het Hof van Justitie ontwikkelde rechtsbeginselen. Ook andere jurisprudentie van het Hof van Justitie is meegewogen, omdat – naast het definiëren van algemene rechtsbeginselen – de rechtspraak van het Hof ook de omvang en betekenis van de normen van het primaire recht bepaalt. De benchmarks voor auteursrechtelijke wetgeving zijn dus afgeleid van de normatieve basis zoals vastgesteld in de hoofdstukken 3 en 4 en zijn als volgt gedefinieerd: harmonisatie van nationale wetgeving; respect voor nationale culturen en tradities; bescherming van makers; bescherming van eindgebruikers; bevordering van het concurrentievermogen van de EU-industrieën.

De eerste benchmark – harmonisatie van nationale wetgeving – bestaat uit twee elementen: de noodzaak van harmonisatiemaatregelen en het harmoniserende effect van dergelijke maatregelen. Vervolgens brengt het respect voor nationale culturen en tradities als benchmark de verplichting met zich mee om rekening te houden met nationale culturen en tradities bij het opstellen van auteurswetgeving. Belangrijk is dat de definitie van "nationale culturen en tradities" zich uitstrek tot culturele diversiteit in de traditionele zin van "culturele expressie", maar ook tot juridische culturen en tradities. Vandaar dat deze benchmark vereist dat er zowel met nationale culturen als nationale rechtsstelsels rekening moet worden gehouden in EU-wetgeving. De derde benchmark is de bescherming van "makers", waaronder zowel auteurs als uitvoerende kunstenaars vallen. Deze benchmark heeft zowel betrekking op het garanderen van inkomen en de erkenning van makers als op het faciliteren van het gebruik van bestaande werken voor verdere creatieve doeleinden. De vierde benchmark is de bescherming van eindgebruikers, die wordt bereikt door hen de toegang te verlenen tot culturele goederen en diensten, waarbij rekening wordt gehouden met hun rechten. Tenslotte, de vijfde benchmark – de bevordering van het concurrentievermogen van EU-industrieën – vereist een redelijke bescherming van de industrie, dat wil zeggen, één die zowel een sterk concurrentievermogen van ondernemingen als een gezonde mededinging koestert. De vijf benchmarks kunnen wijzen in tegengestelde richtingen, omdat de onderliggende ratio’s verschillende belangen vertegenwoordigen die van tijd tot tijd met elkaar in strijd kunnen zijn. Dit kan ertoe leiden dat een bepaalde wettelijke maatregel beter voldoet aan de ene benchmark dan de andere. Idealiter moet echter een evenwicht worden bereikt tussen de verschillende benchmarks.

In hoofdstuk 6 worden de benchmarks aan de praktijk getoetst om te kunnen beoordelen hoe auteursrechtwetgeving de benchmarks in de praktijk zou kunnen operationaliseren. Door de benchmarks toe te passen op het auteursrecht acquis, zijn enkele voorbeelden van goede en slechte ervaringen onderzocht. Uit de analyse volgt dat de harmonisatie-benchmark het beste tot uitdrukking komt in het acquis. De wetgevende praktijk laat zien dat het gebruik van technieken tot volledige
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harmonisatie (samen met het incidenteel aanwenden van het mechanisme van wederzijdse erkenning) een goed uitgangspunt is om een hoge mate van harmoniserend effect te realiseren, al moet ervoor worden gewaakt dat bepaalde praktijken dit effect verlagen (zoals de effectiviteit van geharmoniseerde regels die kan worden beperkt door niet-geharmoniseerde gebieden en het gebruik van ongedefinieerde kernbegrippen).

De bescherming van makers lijkt ook hoog op de beleidsagenda van de EU te staan: in de regel wordt de techniek tot volledige harmonisatie ingezet om rechten te harmoniseren om daarmee te garanderen dat bepaalde exploitatiehandelingen worden beheerst door exclusieve rechten. Bovendien is de omvang van de toegekende rechten ruim. Echter, als gevolg van tekortkomingen in de wetgeving, zouden de aan makers toegekende rechten uiteindelijk begunstiging van de creatieve industriën in de hand werken. Bij gebreak aan harmonisatie van regels inzake auteurschap en contracten kan deze begunstiging worden voorkomen door aan makers onvervreemdbare vergoedingsrechten toe te kennen, zoals het acquis (hoewel niet heel vaak) demonstreert. Een ander probleem op dit punt is dat het nagestreefde hoge beschermingsniveau van makers als nadeel heeft dat de belangen van de gebruiker-maker worden veronachtzaamd, waardoor deze vaak wordt belet om voor creatieve doeleinden gebruik te maken van beschermde werken.

Anders dan de benchmarks met betrekking tot harmonisatie en de bescherming van makers, onthullen de benchmarks die betrekking hebben op het respect voor nationale culturen en tradities, op de bescherming van eindgebruikers en op de bevordering van het concurrentievermogen van Europese industrieën een gebrek aan consistent beleid bij het tot hun recht laten komen van deze onderwerpen. Het respect voor nationale culturen en tradities kan worden bereikt door het vinden van een middenweg tussen het common law copyright systeem en het droit d’auteur systeem, dat in het algemeen geen probleem lijkt op te leveren ten aanzien van EU-wetgeving inzake het auteursrecht, daar een compromis vaak is bereikt. Deze benchmark is echter gerealiseerd in andere wetgevende aspecten die niet zo aanwezig lijken te zijn in het acquis, zoals, bijvoorbeeld, een goed doordacht systeem van uitzonderingen dat tegemoet komt aan bijzondere nationale eigenaardigheden. Het geheel aan uitzonderingen in het acquis mist consistentie.

Belangrijk is dat de wijze waarop uitzonderingen zijn ontworpen niet alleen relevant is voor de benchmark van het respect voor nationale culturen en tradities, maar ook voor de bescherming van de eindgebruiker en voor het faciliteren van gebruik van beschermde werken ten behoeve van de gebruiker-maker. Een versnippert en inconsistent systeem van uitzonderingen is niet in het voordeel van de eindgebruiker, aangezien zijn toegang tot auteursrechthebbende werken meestal mogelijk wordt gemaakt op basis van uitzonderingen op de exclusieve rechten. Hetzelfde geldt voor de gebruiker-maker. In dit verband is het opmerkelijk dat de harmonisatie van de uitzonderingen, meestal bewerkstelligd door minimale harmonisatiemaatregelen, in schril contrast staat met de volledige harmonisatie van economische rechten. Daar komt bij dat als de uitzonderingen niet verplicht worden
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gesteld – zoals meestal het geval is binnen het acquis – de rechthebbende ze dus kan negeren door het maken van contractuele afspraken en dat hij daarmee de toegang tot beschermde werken kan voorkomen.

Met betrekking tot de bevordering van het concurrentievermogen van EU-industrieën, lijkt er in het acquis sprake te zijn van een overbescherming van de creatieve industrie, in plaats dat de mededinging op de markt wordt bevorderd. De versterking van de bescherming van het auteursrecht door de toekenning van ruim gedefinieerde rechten, samen met een gebrek aan regulering van contracten en het auteurschap, leidt ertoe dat een groot deel van de beschikbare bescherming zich concentreert bij de creatieve industrie, met als resultaat dat de redelijke bescherming van de industrie in het niet valt in relatie tot die van de creatieve industriën.

Hoofdstuk 6 heeft laten zien dat het acquis voorbeelden toont waarbij een evenwicht tussen de verschillende benchmarks ontbreekt, maar er zijn ook gevallen waarin de EU-wetgever er wel in is geslaagd om ogenschijnlijk tegenstrijdige benchmarks met elkaar te verenigen. De belangrijkste uitdaging die inherent is aan de benchmark-oefening wordt dan ook het bereiken van een evenwicht tussen de verschillende benchmarks. In hoofdstuk 7 wordt in dit kader een aantal aanbevelingen gedaan. Ten eerste is geconcludeerd dat een van de belangrijkste oorzaken van het gebrek aan evenwicht tussen de benchmarks de fragmentarische aanpak van de harmonisatie is. Daarom zou een herziening van het acquis een eerste noodzakelijke stap zijn. De belangrijkste uitdaging die inherent is aan de benchmark-oefening wordt dan ook het bereiken van een evenwicht tussen de verschillende benchmarks. In hoofdstuk 7 wordt in dit kader een aantal aanbevelingen gedaan. Ten eerste is geconcludeerd dat een van de belangrijkste oorzaken van het gebrek aan evenwicht tussen de benchmarks de fragmentarische aanpak van de harmonisatie is. Daarom zou een herziening van het acquis een eerste noodzakelijke stap zijn. Dit moet gebeuren door middel van een strikte naleving van het evenredigheidsbeginsel, dat impliceert dat de wetgever alle benchmarks tot op zekere hoogte tot hun recht moet laten komen in plaats van slechts een paar in grote mate.

Hoewel, de evenredigheidstest moet worden toegepast met het geheel aan benchmarks in gedachten, dient er ook rekening mee te worden gehouden dat de meeste van de compromissen tussen de benchmarks waarschijnlijk zullen moeten worden gesloten juist waar conflicten bestaan. De conflicten tussen benchmarks komen meestal voor in twee aparte sferen; enerzijds kan de harmonisatie van nationale wetten in strijd zijn met het respect voor nationale culturen en tradities, en anderzijds kunnen de benchmarks die te maken hebben met private belangen – die van makers, eindgebruikers en industriën – onverenigbaar met elkaar zijn. Met andere woorden, er moet bijzondere aandacht zijn voor het bereiken van evenwicht tussen de eerste twee benchmarks aan de ene kant en tussen de laatste drie, aan de andere kant. Een bijkomende kwestie die in overweging moet worden genomen om een evenwicht te creëren tussen de drie laatste benchmarks is het feit dat de benchmarks van de bescherming van makers en het bevorderen van het concurrentievermogen van de EU-industrieën uit zichzelf al een interne balans met zich meebrengen (zo zal bijvoorbeeld met betrekking tot de bescherming van makers een evenwicht moeten worden gevonden tussen de inkomensgarantie en erkenning van makers enerzijds en het faciliteren van het gebruik van bestaande werken voor verdere creatieve doeleinden anderzijds). Om zowel een intern als een extern evenwicht te bereiken, zal de wetgever moeten terugkrijgen op goede en slechte
ervaringen uit het verleden, die zijn beschreven in hoofdstuk 6.

Kortom, de blauwdruk voor een stevige normatieve brug is gegeven. Allereerst door te kijken naar wat iedere benchmark inhoudt, en door het bereiken van een interne balans binnen iedere benchmark waar nodig. En vervolgens is het noodzakelijk om een evenwicht te bereiken tussen de verschillende benchmarks, en dan in het bijzonder tussen de twee hierboven beschreven groepen benchmarks.
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