European Union's competence in adopting legal acts on copyright protection

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Abstract

The European Union (EU) needs to have the necessary legislative competence in order to enact legal acts in any given area.[1] Whenever the Treaties empower it to act, the EU will be granted legislative competence in order to achieve the objectives set therein[2]. It follows that any legislative act must be based on a Treaty provision that justifies an action by the European legislator. So to say, legislative acts must have a legal basis. Copyright was faced with the provisions of the EEC Treaty (1957) at a relatively late stage and it is firmly based on the principle of territoriality. This means that national rules govern copyrighted subject matter within the territory of a given Member State. That's why EU had the necessity to adopt legislative acts to harmonize the copyright laws of member states. This paper will analyze the legislative competence of EU in approving legal acts on copyright area and how the TFEU is legally interpreted to allow it.

Keywords: European Union, Directive, Regulation, Competence, Copyright, Treaty.

Introduction

Copyright was an issue that came later on the focus of European Union. The main reason was probably due to language barriers and Member States' differing cultural traditions. Trans-border exploitation of copyrighted works was for a long time not of major economic importance[3]. This, however, changed with the advent of some innovations such as computer programs and databases, that in general can be used irrespective of differences in language and culture on one hand, and of new communication technologies such as satellite, cable and internet on the other. At the beginning the EU Treaties did not contain any reference to competence in the field of copyright. The Treaty of Lisbon, which entered into force on 01.12.2009, amended the previous EC and EU Treaties and included a new article that allowed the EU to create European intellectual property rights[4], that is, intellectual property titles valid in all

[1] Ramalho A., (2016) The competence of the European Union in Copyright Lawmaking, A normative perspective of EU powers for copyright harmonization, Springer International Publishing Switzerland, pp. 9-10;

[2] This is the so-called principle of conferral, enshrined in Article 5 paragraph 2 TFEU: "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."

[3] Annette Kur, Thomas Dreier, European Intellectual Property Law (2013), Edward Elgar Publishing Limited, p. 243;

[4] Article 118 of the Treaty on the Functioning of the European Union ("TFEU") foresees: "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 au-

EU Member States. The provision thus opened the door on establishing a European unitary copyright legislation. The process and the end result of this "unification" are different from the harmonization of pre-existing national laws. 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.[5] 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. That is closely related with the existence of two major systems of copyright 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.[6] 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.

I. The EU's competences established in the Treaty on the Functioning of the European Union (TFEU)

The competences of the European Union are defined in various Articles of the Treaty On the functioning of the European Union – TFEU[7]. Article 3 of TFEU foresees EU exclusive competences in different areas i.e. in establishment of the competition rules necessary for the functioning of the internal market; monetary policy for the member states whose currency is the euro; conservation of marine biological resources under the common fisheries policy; common commercial policy as well as in concluding international agreements.[8] Article 4 of TFEU has established EU shared competences with member states which include internal market; social policy, limited to the aspects defined in the TFEU; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, common safety concerns in public health matters, limited to the aspects

thorisation, 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."

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

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

[7] http://ec.europa.eu/citizens-initiative/public/competences/faq#q3;

[8] Concluding International Agreements when some criteria are met: when their conclusion is required by a legislative act of the EU; when their conclusion is necessary to enable the EU to exercise its internal competence; in so far as their conclusion may affect common rules or alter their scope.

defined in the TFEU; research, technological development and space; development cooperation and humanitarian aid. "Shared competence" means that both the EU and its member states may adopt legally binding acts in the area concerned. However, the member states can do so only where the EU has not exercised its competence or has explicitly ceased to do so. EU has also the competence to support, coordinate or supplement actions of the member states according to Article 6 TFEU, in such areas as protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation. Legally binding EU acts in these areas cannot imply the harmonisation of national laws or regulations. Under Article 5 of TFEU, European Union has the competence to provide arrangements within which EU member states must coordinate policy i.e. economic policy, employment, social policies. In most policy areas where the EU can act, the Commission is empowered to submit a proposal for a legal act. However, in some of them, like the common foreign and security policy, the Commission does not have this power.

II. Rationales on the harmonisation process of EU member states' laws in the field of copyright

The establishment of an internal market among member states was considered as the main reason for the EU's process of harmonizing the member states' internal copyright laws. In its *Patricia* decision of 1989, the ECJ referred to '*the present state of Community law*, which is characterised by a lack of harmonisation or approximation of legislation governing the protection of literary and artistic property'[9].

However, many authors point out that the EU legislative history in copyright is not originally connected to internal market goals only. Several additional factors also played a role, both economic and political. So in the mid-1980[s], the growing economic importance of the copyright industries for national economies and hence growth, innovation and development was recognised. In 1994, this led to the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as an integral part of the WTO Agreement. In 1996, the two WIPO Treaties[10] followed suit. In essence, developed countries undertook to effectively protect, on a worldwide scale, but also within the EU, their competitive industries against misappropriation and free-riding. This rationale is well formulated in Recital 4 of the Information Society Directive 2001/29/EC.[11]

Others highlight that 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

[9] ECJ Case C-341/87, EMI Electrola v. Patricia, [1989] ECR 79, Paragraph 11 (emphasis added).
[10] WIPO Copyright Treaty, WCT; WIPO Performances and Phonograms Treaty, WPPT.
[11] Annette Kur, Thomas Dreier, European Intellectual Property Law (2013), Edward Elgar Publishing Limited, p. 247.

a number of areas, including "the protection of the cultural heritage, royalties and other related intellectual property-rights."[12]

III. EU's competence on adopting legal acts in copyright area

As mentioned above EU 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 rights[13]—that is, intellectual property titles valid in the EU Member States, much like the current Community Trade Mark[14] or Community Design[15]. 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.

As Ana Ramalho highlights in her book "The competence of EU in copyright lawmaking –A normative perspective of EU powers for copyright harmonization" (2016), 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.[16] Whether the unified copyright title will ever become a reality is hard to predict, but even in the case that it does, it has been argued that working towards such an endeavor should run parallel to the improvement of the current copyright legal framework, namely through further harmonization.[17] 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

[12] Resolution of the European Parliament on the protection of Europe's cultural heritage (1974), p. 6.
[13] 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."".
[14] Instituted by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.
[15] Instituted by Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.
[16] See van Eechoud et al. (2009), pp. 317 ff.; Cook and Derclaye (2011), pp. 261–263; Hilty (2012), pp. 360–361.
[17] Hugenholtz (2013), For a more skeptical view on combining unification with further harmonization p. 291.

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."[18] 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. That's why most harmonization measures in the field of copyright so far have 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.[19] However, while conferring the EU competence to harmonize national laws, Article 114 of 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 of 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.[20] In the field of copyright, for example, differences in the term of protection can hinder cross-border trade and can thus fall under the competence of Article 114 of TFEU. The provision, however, gives no indication as to how the legislator should decide on the optimal harmonized term of copyright protection.

Even at Ana Ramalho's work "The competence of EU in copyright lawmaking – A normative perspective of EU powers for copyright harmonization" (2016) is noticed the fact that due to its functional character, Article 114 of 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.[21]

The CJEU has partly addressed this problem, although it has done so by focusing

[18] Article 26 paragraph 2 TFEU.

[19] 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."

[20] Quadra-Salcedo Janini (2006), pp. 68 ff. Weatherill (2004), pp. 6–7.

[21] 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, p. 21.

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 of 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.[22] 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.[23] The Court seems thus to imply that it is admissible to build up normative content in the context of Article 114 of TFEU, even though it gives no indication regarding what that content ought to be in any given policy area.[24] 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.[25]

Legislative measures aimed at harmonizing divergent national laws are just one way to achieve that objective; 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.[26] 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.[27]

[22] See case C-376/98—Tobacco Advertising I, p. 84, and case C-380/03—Tobacco Advertising II, p. 41.

[23] See case C-376/98—Tobacco Advertising I, p. 78, and joined cases C-465/00, C-138/01 and 139/01—Osterreichischer Rundfunk, p. 41.

[24] This was too hinted by Advocate General Fennelly in case C-376/98—Tobacco Advertising, p. 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 . . .").

[25] Article 3 paragraph 3 TFEU 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."

[26] 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, p. 76). In what concerns subsequent literature on this subject, see inter alia Scharpf (1996), p. 15; Steiner et al. (2006), p. 324; Pelkmans (1984), p. 4; Lohse (2011), pp. 293 ff.

[27] Ana Ramalho, (2016) The competence of the European Union in Copyright Lawmaking, A normative perspective of EU powers for copyright harmonization, Springer International Publishing

Doctrinal views on this matter generally agree that both types of integration are complementary.[28] 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 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.[29] 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. For now, suffice it to say, the activity of the CJEU has, to a certain extent, influenced the development of the EU copyright legislation.

IV. Harmonization of Copyright law in EU member states

The EU's regulatory framework for copyright and neighbouring rights (*acquis*) is a set of eleven directives[30] and two regulations[31]. They are all based on the need to further an internal market for copyright goods and services. 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

Switzerland, pp. 12.

[28] See e.g. Weatherill (2010), p. 484, Kurcz (2001), pp. 288 ff. de Vries (2006), p. 319; Jarvis (1998), pp. 328 ff.

[29] See Tridimas (2006), pp. 199 ff. Cappelletti (1981), pp. 16 ff. see more generally on the impact of CJEU decisions on subsequent policy-making Stone Sweet (2011), pp. 147–148.

[30] Directive on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"), 22 May 2001;Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property ("Rental and Lending Directive"), 12 December 2006; Directive on the resale right for the benefit of the author of an original work of art ("Resale Right Directive"), 27 September 2001;Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ("Satellite and Cable Directive"), 27 September 1993;Directive on the legal protection of computer programs ("Software Directive"), 23 April 2009;Directive on the enforcement of intellectual property right ("IPRED"), 29 April 2004;Directive on the legal protection of databases ("Database Directive"), 11 March 1996;Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive ("Term Directive"), 27 September 2011;Directive on certain permitted uses of orphan works ("Orphan Works Directive"), 25 October 2012;Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ("CRM Directive"), 26 February 2014;Directive on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Directive implementing the Marrakech Treaty in the EU), 13 September 2017;Regulation on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Regulation implementing the Marrakech Treaty in the EU), 13 September 2017;Regulation on cross-border portability of online content services in the internal market (Portability Regulation), 14 June 2017

[31] https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation;

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 that are binding on all the EU countries, as EU Members,"* thereby comprising *"the legislation adopted in application of the treaties and the case law of the Court of Justice of the EU."*[32] 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.[33]

Harmonization in copyright law has taken a cautious step-by-step approach. Each directive reveals a particular vision and deals with specific aspects of copyright. The individual directives 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. 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.

Conclusions

Article 95 EC Treaty, which is now Article 114 TFEU, has been the main competence norm used so far to harmonize national copyright laws. Article 114 of 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.

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[32]Proposed definition of acquis communautaire on the official website of the European Union at http://eur lex.europa.eu/summary/glossary/acquis.html;

[33] It has been widely accepted that the acquis communautaire, as the European legal patrimony, comprises a "judicial acquis" as well: see Pescatore (1981), pp. 619 f. and Gialdino (1995), p. 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.

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