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## European Copyright Law: Where Has It Been? Where Is It Going?

### An imaginary “European Copyright Code” and EU copyright policy

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#### I.

The full title of this paper would have had to be read as follows:

**Comments on draft articles prepared by a group of academics (with whom many other academics and a lot of stakeholders do not agree) on certain issues (but not on the most difficult and urgent problems) of copyright for an imaginary “European Copyright Code” in the light of EU copyright policy**

It is true that, as a title, it would have been too long. However, such a complete title – with these many words – would have been truly suitable to describe the nature of what has been presented by the “Wittem Group”<sup>1</sup> as the “European Copyright Code” – but what does not live up to this name.

Those who pay sufficient attention to the text and the introductory comments added to it can see that the drafters do not suggest either that what they have been outlined is truly a more or less complete European Copyright Code. Nevertheless, it has been published under the misleading title “European Copyright Code” and some superficial commentators have been referred to it as such without clarifying what it truly is.

What it is truly is indicated in the longer version of title inserted above.

The readiness of the group of academics forming the Wittem Group (highly respected by this commentator, even if he does not share the views of some of them on certain issues) to react to the idea of the European Commission that the issue of a “European Copyright Code” (and as a corollary, a “European copyright title”) should be studied deserves appreciation. It also should be noted with due recognition that they have made successful efforts in trying to agree *between each other* (at least, at the level of some general principles) on certain general aspects of copyright in respect of which there is traditional division between the civil law and common law systems.

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<sup>1</sup> See at [www.copyrightcode.eu](http://www.copyrightcode.eu).

In the preceding sentence, the words “between each other” are emphasized. It is true that, in the group of academics (altogether 15 people) there were representatives of both basic copyright systems and that it is already an achievement that they have agreed between each other. However, it should be seen that it is one thing that a relatively small group of academics at a friendly meeting held in a Dutch castle may agree between each other, and it would be a completely different thing to try to make their agreement accepted by all the truly interested stakeholders and also at the political level where any copyright norms might become reality.

One of the problems from this viewpoint is that the dividing line between countries with civil law tradition and others with common law tradition may not be found beyond the outer borders of the EU but within it. What are involved are not only certain ideological-philosophical issues of copyright but deeply rooted aspects of the legal systems and some weighty economic and political considerations. For the United Kingdom, the EU is certainly important (let us hope), but its economic and political relations with those many countries which share the same legal tradition (in fact, originally developed by its courts and legislators) is also important. Therefore, it is highly doubtful that this achievement of the Witten Group – which in the eyes of this commentator is truly a substantial one – obtained in the friendly atmosphere of the Wittem castle would have a good chance to be transformed into a consensus at the level of interested stakeholders and the policy makers.

Beyond this castle-level agreement on certain general aspects of copyright (which, otherwise, is expressed more in the form of textbook-style principles with some footnotes rather than in the form of sufficiently detailed norms settling at least those issues which may have major legal-practical implications), what the suggested draft norms offer is not too much and in many aspects not without problems.

#### The “Code”

- only covers some general issues of copyright, but does not address many aspects of authors’ rights either,
- does not cover related rights,
- does not include provisions on the *sui generis* rights of database makers,
- does not deal with the questions of contracts,
- does not address the issues of collective management,
- does not contain norms on the protection of technological protection measures and rights management information,
- does not extend to the obligations concerning enforcement of rights.

Furthermore – and even more importantly from the viewpoint of the truly necessary tasks of harmonization of national laws – the “Code” completely avoids dealing with certain urgent questions such as the use of orphan works, distant education, the status of mandatory and “extended” collective management, the indispensable new measures against illegal “file-sharing” systems, the liability of service providers and other intermediaries, and so on.

It might occur for someone that the reason for the apparent timidity (or reluctance?) of the drafters not to address these urgent issues is that they do not intend to be overly “activists” by intervening into the current discussions and preparatory work of the competent EU bodies. This explanation, however, probably is not the right one since, in several aspects (such as the concept of reproduction, the term of protection, the scope and conditions of application of

exceptions and limitations, the protection of technological measures, etc.), the “Code” – instead of promoting further harmonization – suggests just the opposite; namely, dismantling the existing harmonized elements of the “*acquis communautaire*” and proposing their replacement with others that the drafters prefer (which, otherwise were already proposed by some interest groups and certain academics during the preparatory work of the relevant EU norms – but rejected by the Commission, the Parliament and the Council).

Nevertheless, all these problems are not the basic ones concerning the “Code.” After all, it can be said that, if the preparation of a “European Copyright Code” were truly a necessary and timely task, it would not be bad if certain academics “tried their hands.” It can also be said that, the “Code” contains a number of principles and draft provisions which are generally acceptable and, as regards the controversial aspects, it is only a first draft; it could be further discussed, modified and improved; those who do not agree with some of its elements should simply present their views and proposals which may then be taken into account. And, as regards the important and urgent topics not covered yet, it can be said that the future “European Copyright Code” to be completed later are supposed to deal with them; we are still at the beginning of this ambitious work; the first bunch of draft provisions are now presented; the e rest will follow in due course.

The drafters have certainly acted on the basis of these kinds of considerations, and that is because their efforts deserve appreciation. However, as stressed above, the basic problem does not relate to these aspects.

## II.

The basic problem relates to the question of whether or not the preparation of a “European Copyright Code” is truly a necessary and timely task. And the appropriate answer seems to be “No.” At least, this is the view of this commentator (who, however – taking into account the long list of outstanding EU academics who have *not* signed the “Code” – hardly seems to be exposed to the danger that he might be alone with this opinion).

The preparation of such a “Code” is not timely at least for three reasons.

Firstly, even if it were found justified to begin the preparatory work on a European Copyright Code right away with the aim of completing it very quickly (“very quickly,” in a normal EU norm-setting time scale, might be within such “short” time as cca. 10 years), it would not seem to be a right method to proceed to the preparation of draft provisions as a first step. For such an important project, it would be necessary to establish and/or confirm a well-thought well-informed and well-balanced EU copyright strategy and policy.

It is said sometimes that the EU directives offer a patchwork of norms on certain issues and they do not form a coherent system. In the view of this commentator, this again is not a real problem either. The real problem is that, after the productive period of the 1990s (which was closed by the adoption of the two 2001 directives,<sup>2</sup>) when the European Community (with the Copyright Unit of the DG Internet Market as an efficient engine) followed a sufficiently

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<sup>2</sup> *Directive 2001/29/EC of the European Parliament and of the Council of 23 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* (hereinafter: the Information Society (Copyright) Directive) and *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art* (hereinafter: the Resale Right Directive).

coherent and consistent copyright policy, new trends appeared. Different DGs of the Commission volunteered to “take care” of copyright in spite of the fact that this did not fit into their portfolios. DG Information Society was particularly active in this respect. It became an overly attentive listener to the demands of the IT industry and to such populist slogans as “access to anything anywhere anytime.” Of course, this alone was not a problem. It was, however, a major problem that it seemed to have forgotten that, for the happy world of free access to valuable and attractive cultural creations and productions, those creations have to be created and those productions have to be produced, and it did not take into account appropriately the interests of those from whom this may be expected. The (un)famous “Reflection Document”<sup>3</sup> – which addressed copyright issues in the online environment but which seemed to have been prepared mainly according to the taste of DG Information Society – was a typical example of this unbalanced approach. However, there were also some other sectors of the Commission – in particular the competition sector – which intervened into the operation of the copyright system in quite a unilateral and not in a sufficiently well-informed manner. It goes without saying that all the various aspects that may be relevant from the viewpoint of an EU copyright strategy and policy – competition rules, IT industry interest, consumer protection, privacy considerations, etc. – should be taken into account, but none of these separately and in an unbalanced way. There must be a sector and a unit in the Commission that is responsible for copyright policy, that takes into account all these aspects too in due cooperation with the other sectors, but that is able to do so in a way that the weighty interests of the EU to grant adequate – well-balanced but effective – copyright and related rights protection are also fully respected. Recently – at last – it has been clearly stated that in the EU that sector (Internal Market) and within the sector that unit (the Copyright Unit) is responsible for copyright – which is responsible for copyright. It must have been obvious, but it seems that even evident things have to be clarified and confirmed again and again. (Unfortunately, what has happened around the ACTA seems to indicate that this logical principle still may not always prevail.)

It would still be worthwhile to review thoroughly what kind of copyright strategy and policy would be in the best interest of the EU. This has become much more necessary than before, since with the accelerating technological, social, cultural and business-method developments, a plethora of new interests, movements, theories and slogans have emerged in the field of copyright. As a result, copyright has become a victim of crossfire. New industries (IT companies, service and access providers, search giants, UGC platforms, social network operators, entertainment equipment and recording material manufacturers) have appeared on the scene which not only when they combine their forces but also one by one seem to be richer, more powerful and more influential than copyright industries have ever been. Many of them act in the (at least, in a longer run, probably wrong) belief that the weaker and more limited copyright is the better for them. They have found in certain populist, ultraliberal and neo-anarchist (see Pirate Parties) theories and movements what they think to be their useful allies deserving support and promotion. We know the slogans of the persistent campaign of this strange alliance: “copyright is bad; copyright is extremely overstretched; copyright has been constantly extended with no respect to other interests; copyright should be balanced (because now it is not?); copyright must be made much more flexible (meaning unlimited “flexibility”); copyright (as a human right!) undermines human rights; copyright is against freedom of expression and information; application of copyright in the online world endangers privacy; more extensive (preferably obligatory) and more open-ended exceptions

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<sup>3</sup> „Creative Content in a European Digital Market: Challenges for the Future – A Reflection Document of DG INFSO and DG MARKT;” see: [http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_2009/reflection\\_paper.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf).; for comments, [http://ec.europa.eu/avpolicy/docs/other\\_actions/content\\_online/col\\_2009/reflection\\_paper.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/content_online/col_2009/reflection_paper.pdf).

are needed; exclusive rights should be transformed into mere rights to remuneration; DRM protection should be abolished in the name of sacro-saint free access; piracy has beneficial effects, etc., etc.” Even if there are certain issues to which all this “revolutionary” and “freedom-fighter” slogans refer that deserve being considered, the way in which they are exaggerated and aggressively – sometimes hysterically – promoted undermines their credibility.

It is in this hysterical, unilaterally over-politicized and –ideologized atmosphere that the EU institutions would have to confirm and consistently apply an adequate copyright strategy and policy. No, it is not easy. The populist pressure is great and extremely powerful lobbies are in action.

It is submitted that a basically pro-copyright, the promotion and operation of a well-balanced but generous copyright protection system and an effective enforcement mechanism are the genuine interests of the EU and its Member States. The EU is not as rich of natural resources as many other parts of the world; its economic power, social situation and political influence mainly depend on what the inventiveness, creativity, talents and perseverance of its people are able to produce. Europe has particularly rich cultural traditions and great capacity of creation and production. The beneficial effects of these potentials may prevail in many aspects; thus also in economic and social aspects.

This is also recognized time and again by the competent EU bodies. For example, the 2007 “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world” (COM(2007) 242 final),<sup>4</sup> contains the following statements:

Europe's cultural richness based on its diversity is also, and increasingly so, an important asset in an immaterial and knowledge-based world. The European cultural sector is already a very dynamic trigger of economic activities and jobs throughout the EU territory. Cultural activities also help promoting an inclusive society and contribute to preventing and reducing poverty and social exclusion. As was recognised by the conclusions of the 2007 Spring European Council, creative entrepreneurs and a vibrant cultural industry are a unique source of innovation for the future. This potential must be recognised even more and fully tapped.

The copyright strategy and policy of the EU should be in accordance with these recognitions. Consequently, as stressed above, it should be of a pro-copyright nature, it should be in favor of well-balanced but sufficiently strong copyright protection and an effective enforcement mechanism both at the international level and in the various EU Member States.

If the drafters of the so-called “European Copyright Code” had been obligated to work in accordance with “terms of reference” determined on the basis of such a copyright policy, they would have had to prepare draft provisions that, in several important aspects – mainly as regards the objectives reflected in the Preamble and the provisions on exceptions and limitations – would have been fundamentally different. Unfortunately, it seems that they, in those aspects, have been rather influenced by the siren voices urging the decrease of the level of copyright protection.

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<sup>4</sup> See at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:COM:2007:0242:FIN:EN:HTML> (hereinafter: EU Cultural Agenda).

The second reason for which the preparation of a European Copyright Code is not timely is that it would be too early to proceed to a codification of the copyright norms when there are so many important issues unsettled. This is not a season of harvest yet; we have to address and try to settle many weighty and urgent issues. At present, and it seems still for quite a long time, step by step harmonization may only be a realistic objective.

The third reason for which the idea of such a “Code” is not timely is that the present stage of EU integration is not at a level that a more or less uniform regulation of a branch of law so much important from the viewpoint of such a specific field as culture might be realistic. With this third reason, we have arrived to a question that is closely linked to an even more basic aspect than timeliness; namely whether the objective of a uniform EU copyright legislation might be in harmony at all with the current EU “constitutional” norms.

### III.

The 15 academics of the „Wittem Group” are not alone with the idea of a European Copyright Code. In fact, it originally was raised by the European Commission, although not necessarily in the same form as in which the Wittem Group’s Code has been prepared. The Commission’s above-quoted ambitious “EU Cultural Agenda” published in 2007 already referred to it:

Another approach for a more far-reaching overhaul of copyright at European level could be the creation of a European Copyright Code. This could encompass a comprehensive codification of the present body of EU copyright directives in order to harmonise and consolidate the entitlements provided by copyright and related rights at EU level. This would also provide an opportunity to examine whether the current exceptions and limitations to copyright granted under the 2001/29/EC Directive...need to be updated or harmonised at EU level. A Code could therefore 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.

The Commission will also examine the feasibility of creating an optional "unitary" copyright title on the basis of Article 118 TFEU and its potential impact for the single market, right holders and consumers.<sup>5</sup>

The “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market” published by the Commission on July 13, 2011,<sup>6</sup> repeats the first paragraph quoted above more or less with the same contents, while it adds a new element concerning the possible optional “unitary” title; namely the setting up of an optional registration system to serve as a basis for such a title.

The Commission undertook in the "IPR Strategy" to examine the more far-reaching approach of the creation of a comprehensive unitary European Copyright Code. Such a unitary European Copyright Code could be based on a codification of the existing EU copyright directives where the need to go beyond the current harmonisation will be examined. It could also provide the opportunity to examine whether the exceptions and limitations to copyright allowed under the Information Society Directive... need to be updated.

In addition to such a Code, the feasibility of creating an optional unitary copyright title on the basis of Article 118 TFEU could be examined... An optional title could be made available on a

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<sup>5</sup> *Ibid.*

<sup>6</sup> See at [http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual\\_en.htm](http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm).

voluntary basis and co-exist with national titles. Future authors or producers of audiovisual works would have the option to register their works and then obtain a single title that would be valid throughout the EU. The feasibility, actual demand for, and the tangible advantages of, such a title, together with the consequences of its application alongside existing territorial protection must be thoroughly examined.

It does not seem sufficiently clear what the European Commission meant by the term European Copyright Code, and it cannot be seen clearly either whether or not there would be a necessary link between the adoption of European Copyright Code and an optional “unitary” copyright title.

The two above-quoted documents outline the idea of a European Copyright Code in a way that it would include the following elements: (i) codification of the *existing directives*; (ii) examination of *where the need may go beyond the current harmonization*; and (iii) examination of *whether the exceptions and limitations to copyright allowed* under the Information Society (Copyright) Directive *need to be updated*. Different readings are possible of these elements and, therefore, the very idea of a European Copyright Code.

A “minimalist” reading – which seems to better correspond to the meaning of the terms used in the Commission documents – is this: (i) the *codification* of the existing *directives* would not change the nature of the EU instruments (it would not transform the directives into directly binding regulation) and would not in itself involve substantial modifications and extensions; (ii) it is *possible* that the “Code” may still go beyond the current *harmonization* where it is found necessary, but the nature of the possible new elements would still have the nature of *harmonization* rather than of establishing directly applicable norms; and (iii) it is also *possible* that the provisions of the Information Society (Copyright) Directive on exceptions and limitations may be updated but the updating, apart from Article 5(1), would result in exceptions and limitations *allowed* to be applied rather than obligatorily applied.

This kind of program would seem to be realistic and might be useful. Nevertheless, in such a case the fantasy name “European Copyright Code” would not be truly appropriate; it would reflect something more ambitious to which such an updated codification of the directives would not correspond (yet).

A “maximalist” reading might be this: (i) the codification of the existing directive would be only a starting point; (ii) the expression “going beyond the current harmonization” would mean that the “Code” would go beyond mere harmonization, could cover any issues and would include directly applicable norms in the form a regulation; and (iii) this would be the case also as regards exceptions and limitations: they would not only be updated but would also be made obligatorily applicable.

It is doubtful that the text may truly be interpreted in the latter extensive manner; and, in particular, in a way that the regulation should extend to all substantial issues of copyright (and related rights). (In this improbable case, of course, what would emerge would better correspond to the name of a “European Copyright Code”).

If the idea of a “European Copyright Code” is not clear on the basis of the above-quoted documents, the idea of a “unitary” copyright title – suggested to exist side by side with the national copyright titles – is even less clear.

The EC documents refer to Article 118 of the Treaty on the Functioning of the European Union (TFEU) as a possible basis for such a “unitary” European copyright title. This article of the TFEU reads as follows:

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.

Of course, it is possible to create European intellectual property rights where there is any need and possibility of creating such rights. This is the case as regards industrial property rights which are not acquired automatically on the basis of international treaties and national (or possible regional) legislation; they have to be acquired by fulfilling certain formalities (basically registration). It is also possible to set up European registration systems and, through them, to provide unitary and uniform protection of the relevant industrial property rights. Furthermore, this is not only a possibility anymore; such systems do exist in the field of trademarks and industrial designs, and such a system is also getting reality as regards European patent protection.

However, copyright is completely different. As soon as a work is created, they are protected automatically not only in Europe but – on the basis of the Berne Convention (165 countries of the Berne Union), the TRIPS Agreement (binding the 153 Members of the WTO) and the WIPO Copyright Treaty (WCT) (89 Contracting Parties)<sup>7</sup> – practically all over the world. In a way, authors immediately have a “European title” in the sense that their works are protected throughout Europe, and, at the same time, also a “world title.” In a way, since all this is applied through territorial rights (titles) granted, protected, exercised and enforced through national laws. The national laws of the Member States of the EU may be harmonized but this would not change this fact. It would be another matter if there were not independent Member States anymore but a United States of Europe. We are not in that stage yet, and it seems, for a long while, we will not be there (many people may add: fortunately).

It is to be noted that the above-quoted Commission Green Paper refers to a specific – and more realistic – idea; namely, the establishment of a European copyright registry. Although the concrete way in which this idea is presented needs specific interpretation in order that it might be regarded to be in accordance with the international treaties. The Commission’s communication reads as follows: “Future authors or producers of audiovisual works would have the option to register their works and then obtain a single title that would be valid throughout the EU.”<sup>8</sup> This sentence sounds as if, for the acquisition of a single copyright title, such a registration would be needed. As discussed above – and as it is obvious – there is no need for registration for copyright protection; that is, for obtaining a copyright “title,” and the international treaties forbid its application as a condition of copyright protection. The usefulness of registration may rather be that it could serve as a basis for a rebuttable presumption of the facts registered.

The interested stakeholders have not welcomed the possibility raised in the Green Paper quoted above of trying to get rid of territorial rights within the European Union which would be particularly alien to the way audiovisual works are exploited, neither have they found a

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<sup>7</sup> Data on March 25, the date of completion of this paper.

good idea to establish a “unitary” European title or even to try to prepare a European Copyright Code. Let us offer a short sample of opinions (emphasis added to certain parts of the texts).

Authors (GESAC<sup>9</sup>):

As already pointed out in its submission to the consultation on the reflection document on creative content in a European Digital Single Market, of 5 January 2010, GESAC addressed the issue and put forward the following arguments:

- *The use of the expression “copyright title” seems to imply some sort of formality in order to exercise the rights associated with it, such as it is the case for patents. However, as regards copyright, such principle would be contrary to article 5.2 of the Berne Convention, which provides that copyright protection is granted without any formality;*
- *There is an uncertainty as to whether Article 118 of the Lisbon Treaty provides a sufficient legal basis for such an initiative;*
- *In any case, the creation of a single copyright title would probably not bring the Commission’s desired outcome as:*
  - o Harmonization is already quite substantial as regards exclusive rights as was acknowledged by the Reflection Document itself;
  - o A European Copyright title does not imply that rights holders should be prevented from freely delimiting the territorial scope of the licence they grant. A similar situation appears at national level where, despite the existence of national copyright titles, rights holders can delimit the territorial scope of the licenses they grant to a part of the national territory.<sup>10</sup>

Film directors (FERA<sup>11</sup>):

FERA supports the idea of a possible new EU Copyright Law, or a unitary European Copyright Code... only if it is harmonised at a high level, and in full compliance with international copyright treaties. However, *given the enormous disparities between national IP legislations, we do not believe this could possibly be delivered in time to improve online distribution in the short term. In the present context of online distribution, there are other measures that will do more to achieve our aims, and quicker...*

*An optional unitary title would seem to further complicate the situation. FERA would not be in favour of going down this road, as the benefits of such an instrument are entirely unclear.<sup>12</sup>*

Performers (Pearle<sup>13</sup>):

*A simple codification of existing EU copyright directives... would make the state of EU legislation clearer. A helpdesk with information on when and how a directive was transposed into national law in different European countries would be useful as well, as performing arts organisations have difficulties to get a good overview of 27 national copyright legislations. Also practical information about each country and its main characteristics of copyright law as well as a list of collective rights organisations and their competences could be published online...*

*Pearle would like to express its concerns regarding an optional unitary EU Copyright Title which doesn’t show a way forward: A parallel system of titles – one at a national and another one at European level – would create confusion and make the rights clearance system even more*

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<sup>9</sup> GESAC stands for “European Grouping of Societies of Authors and Composers.”

<sup>10</sup> See at [www.gesac.org/fr/homepage\\_fr/download/055AC11.pdf](http://www.gesac.org/fr/homepage_fr/download/055AC11.pdf).

<sup>11</sup> FERA stands for “Federation of European Film Directors.”

<sup>12</sup> See at [www.filmdirectors.eu/wp-content/uploads/2011/11/FERA-Green-Paper-Reply-Final-18.11.pdf](http://www.filmdirectors.eu/wp-content/uploads/2011/11/FERA-Green-Paper-Reply-Final-18.11.pdf).

<sup>13</sup> Pearle stands for “Performing Arts Employers Associations League Europe.”

complicated than it is today. The result would be a further fractioning of the value chain, resulting in more complexity, more administrative burdens and less transparency for live performance organisations.

*... This would lead in the end to less cultural diversity and a smaller offer of choice for the audience and the consumer.*<sup>14</sup>

Commercial televisions (ACT<sup>15</sup>):

Even if the Commission were convinced of the case for reform, and notwithstanding the enormous legislative effort required to consolidate all the *acquis* into one text, and the significant doubts as the legal basis for such a Code, *we are unsure that it would bring about the desired effect.*<sup>16</sup>

Public broadcasters (EBU<sup>17</sup>) reporting on a copyright conference organized under the Polish EU presidency:

*No support was expressed for the idea of a unitary European copyright title, mentioned in the Green Paper on the online distribution of audiovisual works.*<sup>18</sup>

An umbrella organization representing the associations of practically all categories of owners of copyright and related rights (British Copyright Council<sup>19</sup>):

While in the long term a European Copyright Code might seem desirable to the European Commission, *we do not see what a single European Copyright Law would contribute to the potential for creating a digital single market in the online distribution of audiovisual work.* In any case, *the audiovisual market*, reliant as it is on contracts supported by licensing, the harmonisation of which is dependent on a great many other factors and variables *does not seem the most suitable place in which to initiate this debate.* Furthermore, we think that *the nature of the current academic thinking on the subject, as represented by the Wittem code*, despite going further than the current European copyright framework, *demonstrates only too well by its incomplete nature the extreme difficulty of formulating an exhaustive European Copyright Code.* See for example Cook & Derclaye - An EU Copyright Code : What and How, if Ever? [2011] IPQ pp 259-269 at pp 267-8...

*Our response to Question 13 applies no less to the concept of a unitary EU copyright title, as to the desirability or otherwise of which we also note that the academic authors of the Wittem code expressly take no position. Moreover, as explained at pp 261-3 of the Cook and Derclaye paper there referenced, a unitary copyright title can have no effect on the consequences of territoriality unless accompanied by radical amendments to, or even repeal of, national*

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<sup>14</sup> See at [www.pearle.ws/\\_cms/files/file\\_sys\\_PDF\\_pagers\\_\\_Document\\_50.pdf](http://www.pearle.ws/_cms/files/file_sys_PDF_pagers__Document_50.pdf).

<sup>15</sup> ACT stand for „Association of Commercial Television.”

<sup>16</sup> See at [www.acte.be/EPUB/easnet.dll/exececq/page?eas:dat\\_im=025B1D&eas:template\\_im=025A59](http://www.acte.be/EPUB/easnet.dll/exececq/page?eas:dat_im=025B1D&eas:template_im=025A59).

<sup>17</sup> EBU stands for „European Broadcasting Union.”

<sup>18</sup> See at [www.ebu.ch/en/union/news/2011/tcm-6-72503.php](http://www.ebu.ch/en/union/news/2011/tcm-6-72503.php).

<sup>19</sup> Member organizations of the British Copyright Council: Artists' Collecting Society, Association of Authors, Association of Illustrators, Association of Learned & Professional Society Publishers, Association of Photographers, Authors Licensing & Collecting Society, British Academy of Songwriters, Composers and Authors, British Association of Picture Libraries & Agencies, British Computer Society, British Institute of Professional Photography, Broadcast Entertainment Cinematograph & Theatre Union, Chartered Institute of Journalists, Copyright Licensing Agency, Design & Artists Copyright Society, Directors UK, Educational Recording Agency, Incorporated Society of Musicians, Music Publishers Association, Musicians, National Union of Journalists, Periodical Publishers Association, PPL, PRS for Music, Publishers Association, Publishers Licensing Society, Royal Photographic Society, Society of Authors, Writers Guild of Great Britain.

*copyright laws*, which even if politically feasible as to the future could have only a limited effect on already acquired rights under such laws. In addition to difficulties that adoption of any such title would have in terms of application to rights and clearances relevant to copyright works existing at the time of adoption *would raise unnecessary complications*.<sup>20</sup>

Thus, it seems that the owners of rights<sup>21</sup> do not like the idea of a European Copyright Code and/or a “unitary” European “copyright title” (at least, at present and probably for a long while), and they believe that Article 118 of the TFEU is not applicable in this context (or, at least, its applicability is very doubtful).

The right approach seems to be to continue the harmonization process where and to the extent that it is justified and to concentrate on trying to solve the really important and urgent problems rather than to waste human capacity, energy and money on projects that are neither timely nor realistic. Therefore, above-outlined “minimalist” reading of the relevant parts of the Commission documents appears to be not only a “minimalist” but also an optimal reading.

#### IV.

It should also be taken into account that – in addition to the above-discussed difference regarding the way titles may be acquired (automatically and, although territory by territory but, practically with a worldwide effect, or through the fulfillment of formalities with an effect limited to the territories for which the formalities are fulfilled) – there is one more important reason for which industrial property rights and copyright do differ from the viewpoint of the justification and possibility of intensive EU-level harmonization (or uniformization).

This other reason is the close connection of copyright and related rights with culture. The creation and protection of literary and artistic works, the performing arts, the production of sound recordings and films, broadcast programs, etc., and the availability of all the related products and services in order that the members of the public may duly participate in the cultural life preferably in their mother languages – all these are indispensable elements of cultural policy.

Culture is a specific aspect of European integration and this is duly expressed by the provisions of the FTEU.

Article 3 of the FTEU lists the areas where the EU has exclusive competence (such as customs union and establishing competition rules necessary for the functioning of the internal market), its Article 4 lists areas where the EU shares competence with the Member States (such the internal market, social policy and consumer protection), and its Article 5 mentions certain areas (such as economic and employment policies) where the Member States have to coordinate their policies with the EU bodies. Culture is not covered by any of those articles; it is only mentioned in Article 6 which reads as follows:

*The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:*

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<sup>20</sup> See at [www.britiscopyright.org/pdfs/policy/2011\\_007.pdf](http://www.britiscopyright.org/pdfs/policy/2011_007.pdf).

<sup>21</sup> These comments have been available on-line. There seems to be sufficient basis to presume that the opinion of other organizations of owners of rights has not differed in substance.

- (a) protection and improvement of human health;
- (b) industry;
- (c) *culture*;
- (d) tourism;
- (e) education, vocational training, youth and sport;
- (f) civil protection;
- (g) administrative cooperation. (Emphasis added.)

Article 167 confirms these quite “soft” integration aspects in the area of culture:

1. 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.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
  - improvement of the knowledge and dissemination of the culture and history of the European peoples,
  - conservation and safeguarding of cultural heritage of European significance,
  - non-commercial cultural exchanges,
  - artistic and literary creation, including in the audiovisual sector.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. *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.*
5. 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 harmonisation of the laws and regulations of the Member States,*
  - the Council, on a proposal from the Commission, shall adopt recommendations. (Emphasis added.)

Paragraph (4) of Article 167 deserves special attention. It obligates the EU bodies to take cultural aspects into account in their actions under the “other provisions of the TFEU,” in particular in order to respect and promote the diversity of the cultures of the Member States. In this context “other provisions of the TFEU” mean *not only some* of the other provisions *but all* the other provisions. It seems to be clear, therefore, that even where the EU bodies have exclusive or shared competence in certain areas (such as competition and the integral market), they must take into account the cultural aspects and in particular the protection and promotion of cultural diversity of the Member States when they apply the relevant provisions.

One may ask the question of whether emphasizing cultural diversity is just a form of “euroscepticism;” whether it may work as an argument for those who are against European integration since they do not recognize that Europe may only have any chance to succeed in the global economic competition if it is integrated even more than until now.

In fact, this question is asked quite seriously also at academic forums. For example, it was one of the issues discussed at the second Utrecht University International Legal Research Conference on Euroscepticism and Multiculturalism held on December 7, 2009. The title of one of the papers presented at the Conference was this: „The Union shall respect cultural

diversity and national identities:’ Lisbon’s concessions to Euroscepticism – true promises or a booby-trap?’<sup>22</sup> Its abstract reads as follows:

Taking Euroscepticism that mainly concentrates on the tension between European integration and the preservation of cultural diversity and national identity as a point of departure, this contribution serves as a normative observation of the Lisbon Treaties’ competences and procedures in relation to the statement that the EU will respect cultural diversity and national identity. *The question is whether the Lisbon Treaties are giving in to Euroscepticism by respecting and protecting diversity or whether the statements are only a window-dressing formality which, in reality, is not effectuated by the Union.* When one looks at some Union developments and initiatives over the last few years, the EU’s eventual ideal of becoming a more centralised political entity becomes clear. If, when looking at the new provisions in the Lisbon Treaties, this ideal is taken into account, the Treaties seem to reflect this progressive approach. Overall, *it seems that ‘Lisbon’ has indeed considered the Eurosceptic arguments concerning a lack of democratic control and the tension concerning diversity and national identity. Nonetheless, the general signal expressed by the innovations seems to be that progressive integration by increased effectiveness is more important than the satisfaction of the Member States’ wishes with regard to respect for cultural diversity and national identity. It may well be that this effectiveness results in a counter-effect: an intensification of Euroscepticism that may negatively reflect on the Union’s progressive integration.*<sup>23</sup> (Emphasis added.)

It is submitted that it would be a symptom of absence of ability of orientation to characterize the wish of maintaining cultural diversity of the EU Member States as a manifestation of euroscepticism and to be of the opinion that the Lisbon Treaty’s above-quoted provisions would be a “concession” in this respect. And it would be counterproductive if those who are in favor of stronger integration – for “more Europe” – tried *not* to take these provisions seriously, to neglect them as “window-dressing formality,” and not to apply and respect them. While in certain areas – more or less in those where the European Union has exclusive and shared competence – the opposition to joint action and stronger integration may truly be characterized as (quite stupid) euroscepticism, in the area of culture, the position that the Treaty’s “promises” to protect cultural (and linguistic) diversity must be taken seriously may be a source of stronger support for “more Europe” (if we could apply a mirror expression, the source of “eurooptimism”). If the people in Europe had to see that these aspect of the Treaty are not taken seriously (otherwise, the very suggestion that a freshly concluded treaty should not be taken seriously would be quite surprising), it could truly produce euroscepticism which then might spread to other areas where stronger integration is undoubtedly necessary. This kind of skepticism could hardly be characterized as unjustified and stupid. The real stupidity would be to try to sacrifice unnecessarily one of the greatest values of Europe – its rich and deeply rooted cultural diversity – in a blind rush to centralize, regulate and uniformize anything anywhere as soon as possible.

The best guarantee against euroscepticism and for a strong, unified and duly integrated Europe is that what is included in the “EU Cultural Agenda”<sup>24</sup> is consistently taken into account and fully respected:

The originality and success of the European Union is in its ability to respect Member States’ varied and intertwined history, languages and cultures, while forging common understanding

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<sup>22</sup> Irene Aronstein: „’The Union shall respect cultural diversity and national identities:’ Lisbon’s concessions to Euroscepticism – true promises or a booby-trap?’; see at [www.utrechtlawreview.org/index.php/ulr/article/viewFile/143/139](http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/143/139).

<sup>23</sup> See at [www.utrechtlawreview.org/index.php/ulr/article/view/143](http://www.utrechtlawreview.org/index.php/ulr/article/view/143).

<sup>24</sup> See note 4, above.

and rules which have guaranteed peace, stability, prosperity and solidarity - and with them, a huge richness of cultural heritage and creativity to which successive enlargements have added more and more. Through this unity in diversity, *respect for cultural and linguistic diversity and promotion of a common cultural heritage lies at the very heart of the European project. This is more than ever indispensable in a globalizing world...*

World-wide, cultural diversity and intercultural dialogue have become major challenges for a global order based on peace, mutual understanding and respect for shared values, such as the protection and promotion of human rights and the protection of languages. In this respect, the entry into force of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions on 18 March 2007 is to be seen as a fundamental step, to which the EU has greatly contributed.<sup>25</sup>

*Europe's cultural richness and diversity is closely linked to its role and influence in the world. The European Union is not just an economic process or a trading power, it is already widely - and accurately - perceived as an unprecedented and successful social and cultural project. The EU is, and must aspire to become even more, an example of a "soft power" founded on norms and values such as human dignity, solidarity, tolerance, freedom of expression, respect for diversity and intercultural dialogue, values which, provided they are upheld and promoted, can be of inspiration for the world of tomorrow...*

*The basis for the action of the EU in the field of culture lies in the Treaty.<sup>26</sup> Article 151 states that:*

*"The Community 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 heritage to the fore." "Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action ...." "The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe." "The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."*

*Culture is and will therefore primarily remain a responsibility of Member States; in some countries it is largely dealt with at the regional or even local level. Article 151 does not provide, for example, for harmonisation of the laws and regulations of the Member States. Action at EU level is to be undertaken in full respect of the principle of subsidiarity, with the role of the EU being to support and complement, rather than to replace, the actions of the Member States, by respecting their diversity and stimulating exchanges, dialogue and mutual understanding... (Emphasis added.)*

## V.

Due to what is discussed above, this commentator hesitates to make comments on the concrete draft provisions presented as the "European Copyright Code," since it might create the wrong impression that he agrees with the timeliness of such a project, just he would like to see some amendments. This is definitely not the case. However, the respect for the drafters and their efforts still dictates the need for some substantive comments, even if not necessarily

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<sup>25</sup> And the Chairman of the Working Group which prepared its first draft in 2006 happened to be this commentator.

<sup>26</sup> At the time of the adoption of the Communication, still the previous Treaty on the European Union (TEU) was in force, in which Article 151 contained the same provisions; it has been just renumbered as Article 167 of the TFEU.

in such a detailed manner – in the form of article by article analysis – as in the case of the thorough commentary made, for example, by Jane Ginsburg.<sup>27</sup>

### *Preamble*

The Preamble is certainly intended to reflect the basic copyright philosophy of the drafters and the principles on which they propose to build a new EU copyright system. This commentator is of the view that the philosophy and principles reflected in the Preamble are not in accordance with the interests on which a well-thought EU copyright strategy and policy may be built. The reason for this is what Jane Ginsburg expressed in the following way:

while the rhetoric of „balance” imbues the text, on closer inspection “balance” often seems to resemble a coded version of “cutting back on exclusive rights” or, more baldly, “users’ rights.”<sup>28</sup>

If we wish to make an inventory of which considerations are reflected in the Preamble in favor of a more – or at least an adequate – effective copyright protection and which of them reflect the program of weakening it, the following picture can be seen.

The first preamble paragraph that truly relate to this issue (the preceding paragraphs are about the need for common rules and integration, the problem that copyright is only partially harmonized, the requirement of consistency and transparency of the EU rules) states this basic principle:

copyright law in the EU should reflect the core principles and values of European law, including freedom of expression and information as well as freedom of competition;

Not only the order of the preamble paragraphs but also the comparison of their language indicate quite clearly that these are the basic – the “core” – principles on which the drafters wanted to base the “Copyright Code” of the European Union. According to these principles, the first and most important objective of the European copyright system is to guarantee (i) the freedom of expression and information; and (ii) the freedom of competition. This paragraph closes the first part of the Preamble beginning with the word “considering.” The rest of the paragraphs do not identify any other principle or value of the European law that, in the eyes of the drafters, might live up to any importance that could justify its being mentioned among core principles and values.

Those people who are in favor of adequate – well balanced but effective – copyright protection (and who are optimistic enough to believe that the drafters truly take the need for due balance of interests seriously) may make some desperate efforts to try to read this preamble paragraph in a way that the core principles and values mentioned in it might offer certain arguments also for effective copyright protection and not only for exceptions and limitations of exclusive rights as they appear at the first sight.

For example, it could be said that adequately strong protection and effective enforcement of copyright is one of the most important guarantees of freedom of expression, and that this has never been so much evident than now in the digital online environment where the ever more

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<sup>27</sup> Jane C. Ginsburg: „European Copyright Code” – Back to First Principles (with Additional Detail)” (2011), Columbia Public Law & Legal Theory Working Papers; available at *Social Science Research Network*, [http://papers.ssrn.com/Sol3/papers.Cfm?abstract\\_id=1747148](http://papers.ssrn.com/Sol3/papers.Cfm?abstract_id=1747148) (hereinafter: Ginsburg).

<sup>28</sup> Ginsburg, p. 4.

generalized online infringements undermine the chances for independent creation of valuable works requiring major creative and/or financial investment. The consequence of this may be that the class of *professional* creators may drastically shrink, and that only two categories will be typical. One who can afford not to care of copyright because they have other sources (for example, academics who do create and publish works but for whom copyright is only a marginal source of income, if any; or “open-system” producers who obtain their profit from other productions and services with which their productions are combined). And the other one who are subsidized authors (and abundant experience shows how the taste, special wishes and even concrete instructions of those whose make certain creations possible through subsidies tend to bind the hands of authors and limit their freedom of expression, sometimes quite drastically).

However, when those who try to interpret the drafters’ intentions in such a well-balanced way reach the draft provisions on exceptions and limitations, they have to recognize that their optimism was baseless; those provisions (in contrast with some other parts of the draft “Code” – although not of them – about which *this* cannot be said) reflect genuine full-blooded “copyleft” (read in the present context: anti-copyright) ideology of the a most virulent kind.

In the same way, the need to protect the freedom of competition as a core value might also be interpreted in a balanced way. It could be recognized that what is happening in the online environment is a form of most unfair anticompetitive activity. The activity of those whose “business methods” consist in distributing – or facilitating the distribution of – works created and objects of related rights produced by others “free of charge” (usually accompanied by slogans about “free culture,” “file-sharing revolution,” “free speech,” etc. – where, for example, the uploading for the “tiny” internet population of a freshly released film produced as a result of big creative, labor and financial investment is also qualified as a manifestation of “free speech”). The activity of those intermediaries which tend to abolish the principle of *nemo plus iuris ad alium transferre potest quam ipse haberet* on the basis of the calculation that (i) we may get our income from advertisers; (ii) advertisers pay to us in accordance with the number of visitors of our system; (iii) there are more visitors if attractive contents are available; (iv) there are even much more visitors if they can get the attractive contents free of charge; thus, (v) we have no interest whatsoever to fight online piracy without being constrained, just the contrary, we have the interest to do everything possible using our income and lobbying power obtained in this way to weaken copyright as much as possible. Not speaking about the activity of such aberrations of human society as neo-anarchists deniers of property rights, such as the alleged fighters for access to information and free speech as the operators of the Pirate Bay or Megaupload (who, nevertheless, along with their “revolutionary” fight, pay also due attention to fill their pockets as much as possible). The drafters could have selected as an objective to work out adequate legal measures against this kind of brutal unfair competition, which is one of the most urgent tasks – if not the most urgent one – in the field of copyright. But the “Code” does not reflect such an intention. In the light of the provisions on exceptions and limitations, the emphasis on “freedom of competition” is used to express the wish of the drafters to create much broader possibilities for those who would like to compete with the authors and other owners of rights under quite open-ended and it seem unlimitedly “flexible” conditions.

If one continues reading the Preamble, at the beginning of its second part (starting with the word “Recognizing”), he or she may find, with some relief, that – although not as a core principle or value, but – also the need for the protection of authors’ interests is mentioned. However, while the freedom of speech and information and the freedom of competition are

presented as imperative “core principles and values” trumping anything else so much that it seems it has been felt by the drafters that they must not be “weakened” by balancing them with something else, the reference to authors’ interests is heavily counter-balanced by several considerations presented as indispensable bases for – as Jane Ginsburg has put it – “cutting back on exclusive rights” and trying to promote the new invention of “copyleft” ideologues: “users’ rights.” These are the principles in these “super-balancing” preamble paragraphs:

- copyright protection in the European Union finds its justification and its *limits* in the need to protect the moral and economic interests of creators, while serving the public interest by promoting the production and dissemination of works in the field of literature, art and science by granting to creators *limited* exclusive rights for *limited times* in their works;
- copyright legislation should achieve an optimal *balance between protecting the interests of authors* and right holders in their works and *securing the freedom to access*, build upon and use these works;
- rapid technological development makes future modes of exploitation and use of copyright works unpredictable and therefore *requires a system of rights and limitations with some flexibility*; (Emphasis added)

Let us analyze and interpret this interesting text: (i) in the EU, not only the justification but also *the limits of copyright protection are found in the need to protect the moral and economic interests of creators* (that is, it is alleged that the limitations of their rights are dictated by their moral and economic interests, which is quite a complicated theory; it would need great empathy to try to take it seriously in this way); (ii) thus, as it is stated, the rights of creators must be granted as *limited* rights; (iii) *the task of copyright legislation is to establish balance* between the interests of authors recognized by protecting their *limited* rights, on the one hand, and securing *freedom of access* to their works, on the other hand (through *limiting* those rights which are supposed to be *limited* since *limitation* is in their interest of authors); (iv) when carrying out this intensive *limiting* exercise, it should be taken into account that *freedom of access* – in contrast with *limited* authors’ rights – is not characterized as what might be limited on any basis whatsoever; (v) finally, after that all these *limitations* of the *limited* rights are achieved and that the “*balancing*” between *copyright characterized as limited* and the various “*freedoms*” *not qualified by any limitation* is completed, only one task remains: to guarantee that the *limitations* of the *limited* rights are *flexible* enough.

All this may sound as a caricature; but – unfortunately – this is what seems to follow from these preamble paragraphs.

This one-sided presentation of considerations suggested as a basis for European copyright legislation may hardly deserve being called “balancing.” It is like fixing one side of a see-saw in a heavy concrete block before making it available for use. This may duly reflect the views of certain groups of academics (who do not care for copyright, since they have other sources of living), but it is submitted that it is not the kind of copyright policy that would be in accordance with genuine European interests.

#### *Ad Chapter 1: Works*

This chapter – similarly to Chapters 2 and 3 and to certain provisions of Chapter 4 – is not of a primary importance from the viewpoint of the basic issues of European copyright strategy (as, in contrast, the Preamble and Chapter 5 on exceptions and limitations are). At the same time, some of its provisions are quite relevant as regards the attempt of the drafters to agree

*between each other as academics* on how the common law and the civil law systems might be brought together under the umbrella of an imaginary “Code.”

*Article 1.1(1)* on the *definition of works* is not truly new in respect of the harmonization of the key concept of originality (and the rest has been settled already by the international treaties). It may serve, however, as a good example, for how the above-discussed “minimalist” (but also optimal) form of EU copyright codification might take place and might be useful. As regards computer programs, Article 1(3) of the Computer Programs Directive;<sup>29</sup> as regards databases, Article 3(1) of the Databases Directive;<sup>30</sup> and as regards photographs, Article 6 of the Terms Directive<sup>31</sup> state that the only condition for copyright protection (as works) of these productions is that they must be the authors’ own intellectual creations. It is quite logical to consider that since, in the case of such productions, this is the condition of copyright protection, it might hardly be different in the case of other productions in the literary and artistic domain. Nevertheless, experience shows that it may be better to state even such logical things clearly. Thus, such a clarification could be helpful in case of a codification of the existing *acquis communautaire*.

In contrast, *Article 1.1(2)* which contains a *non-exhaustive list of works* not only does not make use of those elements which have been harmonized partly by the international treaties and partly by the *acquis*, but even doubts may emerge whether it is in accordance with those norms. It is stressed in a footnote that only the “core” areas of copyright are mentioned. However, it is hard to understand that, if harmonization (or perhaps even uniformization) is the purpose of the draft, why it had been decided to leave the regulation of a number of details to national laws (or, if the real objective is the abolition of national laws, to national courts and the EU court system) when those details are *already harmonized* by the international treaties and the EU directives. Why was it considered better to use only such a short textbook-style “abstract” list instead of using at least the most important elements of Article 2 of the Berne Convention? Why had the drafters decided to replace the well-established categories of the international and EU rules with new ones? For example, why the term “films” is used instead of “audiovisual works” (or cinematographic and other audiovisual works) when the international treaties do not use it and the EU directives use it in a context where (as the objects of the protection of the related rights of producers of first fixations of films) it means not only audiovisual works but also simple “moving images” that, in absence of originality, are not protected by copyright?<sup>32</sup> Why would it serve better harmonization that the useful clarifications contained in the international norms and the *acquis*<sup>33</sup> about the relationship between the protection of collections, compilations and databases, on the one hand, and the protection or non-protection of their contents (because they have fallen into the public domain or are not protectable materials), on the other hand, have been left out? And why certain other clarifications offered by the international treaties (such as that computer programs are to be

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<sup>29</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version).

<sup>30</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

<sup>31</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).

<sup>32</sup> See the definition of „film” in Article 2(1)(c) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (hereinafter: the Rental, Lending and Related Rights Directive).

<sup>33</sup> See Article 3(2) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (hereinafter: the Databases Directive).

protected both in source code and object code formats<sup>34</sup>) or by definitions included in the existing directives (such as the definition of “databases”<sup>35</sup>) are left out? Does this reflect the idea (quite strange in view of the advertised objective of the “Code”) that such concepts would be de-harmonized and left to national laws (if national laws were still tolerated) or to court practice? The questions about the incomprehensible lacunas may be continued (for example, concerning the “interface” of the copyright protection of works of applied arts – which quite strangely are mentioned just as industrial designs – with industrial design protection or the derivative works and their possible parallel protection with the original works from where they are derived). This does not appear as codification of the existing norms or as harmonization, it would rather be de-harmonization.

*Article 1.1(3)* contains a *list of objects not protected by copyright*. What it includes seems to be in accordance with the basic principles of the idea/expression dichotomy (also confirmed by international norms<sup>36</sup>). However, since it only concentrates on this dichotomy, it does not address an important issue; namely the question of status of expressions of folklore. It is submitted that it is not necessary to include in legal provisions the reasons for which they are provided the way they are provided (it is rather a matter of ministerial exposés or, in the case of EU directives, their preambles); thus, it is not necessary either to include in such an article the explanation (contrary to a university textbook) that the objects listed in points a) to c) of the paragraph are not protected as literary and artistic works just because they are only “expressions.” Expressions of folklore are not protected as literary or artistic works and not because they are not expressions (the volume of this paper does not allow elaboration on the well-known reasons for this). Nevertheless, a provision the ambition of which is to clarify what objects are not be protected by copyright certainly would also have to list this very important category.

*Article 1.2* goes beyond the Berne Convention by excluding certain works from copyright protection. Article 2(4) of the Convention leaves it to national legislation to determine the protection to be granted (read: to protect or not protect) to official texts of a legislative, administrative and legal nature, and to translations thereof. Such a provision is included in point (a) of the article. However, under point (b) of the article, also other works are mentioned the inclusion of which is not allowed by the Convention; namely “official documents published by the public authorities” which, since this provision follows point (a), necessarily are supposed to be works other than those mentioned in Article 2(4) of the Convention. In Jane Ginsburg’s view,<sup>37</sup> this is an improvement on the Berne provision. It might be so; however, improvements of the texts of international treaties are supposed to take place through agreement between the contracting parties, preferably through a revision of a treaty and not in a “code” of one contracting country or of a regional integration as the EU formed by a relatively smaller group of contracting parties. (Otherwise, Jane Ginsburg herself points out what kinds of legal problems the not duly defined nature of “official documents” may create.<sup>38</sup>)

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<sup>34</sup> See Article 10.1 of the TRIPS Agreement.

<sup>35</sup> See Article 1(2) of the Databases Directive. It contains at three important clarifications: (i) that the contents of databases are not reduced to mere data – as their name would suggest – but may also include works protected by copyright, and (ii) that their contents are supposed to be arranged in a systematic or methodical way; and, most importantly (iii) that the different parts of the contents are to be accessible [searchable] individually by electronic or other means.

<sup>36</sup> By Article 9.2 of the TRIPS Agreement and Article 2 of the WCT.

<sup>37</sup> Ginsburg, p. 8.

<sup>38</sup> *Ibid.*

### *ad Chapter 2: Authorship and ownership*

This commentator by and large could live with the provisions included in this chapter (in which it seems that, in general, the author-centric civil law approach dominates). This, however, does not necessarily mean agreement with the provisions on exceptions and limitations under Articles 5.2, 5.3, 5.4 and 5.5 to which Article 2.3(3) refers (they are discussed below). And this does not mean agreement either with the suggestion that the harmonization (or uniformization) of such rules would be justified at present. Furthermore, this commentator does not think either that the apparent agreement reached between academics representing both the civil law and common law schools in the Wittem Castle could be easily transformed into an agreement between the stakeholders and governments of the Member States of the EU. This would concern not only the civil law/common law division. For example, the EU directives<sup>39</sup> recognize the category of “collective works” existing under the national laws of some of the EU Member States following the civil law tradition (with specific rules concerning the original ownership of rights); and, by virtue of Chapter 2 of the “Code,” the specific provisions on this category of works would not be applicable anymore.

### *ad Chapter 3: Moral rights*

*Mutatis mutandis*, practically the same applies to this chapter as to Chapter 2. In this chapter, it is in particular Article 3.6 on the interests of third parties which would probably create opposition among certain stakeholders and governments (for the possible reasons, see Jane Ginsburg’s comments on the relevant provisions<sup>40</sup>).

### *ad Chapter 4: Economic rights*

Article 4.1 containing *general provisions on economic rights* would result in a certain narrowing of the scope of rights provided under the existing directives.

As a footnote added to it points out, paragraph (1) of the article includes a *closed, exclusive list of economic rights*. It would have to be seen whether this would be acceptable for those Member States that provide for an open scope of such rights. It is, however, clear that the drafters would not be satisfied with a codification of the existing directives to the possibility of which the European Commission has referred; they also suggest a quite broad revision of the *acquis* in order to reduce the present harmonized level of rights. For example, they suggest the elimination of the right of lending (which, although with various options of derogation, is basically provided as an exclusive right).<sup>41</sup> Furthermore, the drafters would like to completely leave out the resale right of authors (which is not an exclusive right but which is definitely an economic right). At first sight, it may also seem that no right of translation is foreseen either; however, when one reaches Article 4.6, it turns out that, for some – not quite easily understandable – reason, it is regarded to be covered by the right of adaptation.

Paragraph (2) of Article 4.1 reflects the intention of an even more general decrease of the level of protection in the EU. *No term of protection of copyright is indicated*, and a footnote (note 40) explains this as follows: „It was generally felt by the members of the Group that the

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<sup>39</sup> See Article 2(1) of the Computer Programs Directive, Article 1(4) of the Terms Directive and Article 4(2) of the Databases Directive.

<sup>40</sup> Ginsburg, pp. 12-16.

<sup>41</sup> See Article 3(1) of the Rental, Lending and Related Rights Directive.

current term of protection of the economic rights is too long. However views diverged as to the appropriate term.” Thus, the drafters were unable to agree even between each other on how long term of protection would be justified. Nevertheless, the relevance of this is quite limited since it has been not much time after the publication of the “Code” that the competent bodies of the EU (apparently having recognized that Europe’s interest is a well-balanced but sufficiently generous and effective copyright and related rights protection), with the increase of the terms of protection of performers and producers of phonograms (as well as, in certain cases, of the co-authors of musical works with words),<sup>42</sup> did clearly express their disagreement with the drafters’ basic premise that the protection of economic rights is too long. This issue is a good example to indicate something quite relevant for the nature and value of what has been advertised as the “European Copyright Code.” Namely, that some academics’ interests and views may – and frequently do – differ to quite a great extent from those of the real stakeholders of mainstream copyright and of the policy makers.

*Article 4.2 on the right of reproduction* does not include something that would be needed to be clearly in accordance with the international treaties (in particular with the WIPO Copyright Treaty (WCT)), and, in contrast, includes something that creates an unnecessary conflict with both the international treaties and the *acquis*.

What would have been necessary to include, if the drafters did not want – as it seems – just to repeat the relevant provisions of the Information Society (Copyright) Directive, would have been an explicit statement in accordance with the agreed statement concerning Article 1(4) of the WCT to clarify that storage of works in digital form in electronic mediums is also reproduction. Instead of this, the drafters have included something that, as mentioned above, is in obvious conflict with Articles 3(1) and 5(1) and (5) of the Information Society (Copyright) Directive and, at least in certain cases, also with the said agreed statement concerning Article 1(4) of the WCT. They have excluded from the concept of reproduction and thus from the operation of the right of reproduction a broad but quite poorly defined scope of acts of temporary reproduction in electronic memories. This is in conflict with Article 9(1) of the Berne Convention (and, therefore, also with Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT), as well as with Article 3(1) of the Information Society (Copyright) Directive under all of which the right of reproduction is applicable for *any kinds of reproduction in any manner or form*. It is another matter that, under the international treaties, certain exceptions and limitations are applicable to this right if they correspond to the three-step test as provided in Berne Article 9(2), in TRIPS Article 13 and WCT Article 10. The Information Society (Copyright) Directive is in accordance with this. Its Article 3(1) on an exclusive right of reproduction covers all kinds of reproduction in any manner or form (without the application of a legal fiction – as is the case in Article 4.2 of the “Code” – according to which certain acts of reproduction would have to be regarded as if they were not acts of reproduction due to their temporary nature). Then, in its Article 5(1), the Directive provides for an exception to the right of reproduction concerning certain precisely determined acts of temporary reproduction which is also subject to the three-step test under its Article 5(5).

One might be tempted to say that, after all, there is no substantive difference between the treaties and the Directive providing a general right of reproduction and then applying an exception for certain temporary copies, on the one hand, and the “Code” excluding certain temporary copies from the very concept of reproduction, on the other hand. This is not the

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<sup>42</sup> See Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

case, however, at least for two reasons. Firstly, the suggested Article 4.2 of the “Code” only applies a single general criterion, while Article 5(1) of the Directive includes a number of cumulative conditions to limit the exception to well-defined specific cases. Secondly, since the “Code” applies a legal fiction to exclude certain acts of temporary reproduction from the very concept of reproduction, such a provision cannot be regarded as an exception proper to the right of reproduction and, thus, it is not subject to the three-step test, while under Article 5(5) of the Directive, the three-step test is also applicable for this by virtue of Article 5(1).

*Article 4.3 on the right of distribution*, paragraph (1) offers what is essentially a circular definition: “The right of distribution is the right of distribute... etc.” It is true that it may be regarded as certain elements of a real definition that the distribution is “to the public” and that what are distributed are “the original of the work or copies thereof.” However, these elements go more or less without saying. What truly demands clarification in respect of the concept of distribution is which forms of distribution of copies are meant; whether all forms (which also include making available copies by rental or lending) or only the sale or other transfer of copies. There are national laws which apply the broader concept and then, in respect of the exhaustion of the right of distribution with the first sale of copies, they provide that it does not apply to rental and lending. Other national laws limit the concept of distribution to making available copies by sale or other transfer of property and they provide separate rights of rental and lending. Both solutions may be in accordance with the international treaties and the EU directives as long as the acts for which the rights of distribution, rental and lending are foreseen with different legal effects of those rights in accordance with the relevant norms, are duly covered.

It seems that the drafters intend to apply the narrower concept of “distribution” since, in Article 4.4 of the “Code,” a separate right of rental is foreseen. It would have been, however, justified to make this clear in the same way as it is done, for example, in Article 6 of the WCT, which provides as follows: “Authors of literary and artistic works shall enjoy the exclusive right of authorizing the *making available to the public* of the original and copies of their works *through sale or other transfer of property.*” (Emphasis added.) The “Code” does not gain anything – certainly not in clarity or in drafting elegance – because it does not include this clarification, which the 1996 WIPO Diplomatic Conference found necessary.

In paragraph (2) of Article 4.3, the lack of any reference to the first sale of copies is particularly conspicuous, since after all, in this provision, the first sale doctrine is expressed. It reads as follows: “The right of distribution does not apply to the distribution of the original or any copy that has been put on the market by the holder of the copyright or with his consent.” A footnote (note 41) is added to it: “This rule of exhaustion has to be interpreted coherently with the same concept in the law of industrial property.” No explanation is given why such coherence is indispensable here when, due to the different nature of the two main branches of intellectual property, their real harmonization, in many aspects, is impossible and, in other aspects, hardly necessary.

However, the bigger problem with paragraph (2) is that it is not clear what is the drafters’ intention concerning the territorial effect of exhaustion. In fact, the text of the provision – which does not indicate where the putting on the market (which probably means sale) of the copies has an exhausting effect – suggests that international exhaustion is foreseen (that is, no matter where on the earth a copy is sold in respect of which the right of distribution is exhausted). The EU directives, however, are not based on the principle of international exhaustion; the right of distribution is only exhausted with the first sale if it takes place in one

of the Member States of the EU.<sup>43</sup> If the drafters of the “Code” do not agree with the directives and, therefore, they suggest its modification, it would be necessary to present some reasons for this (this commentator can hardly see any justification which might justify the revision of this correct and consistently followed principle of the *acquis*). The other possibility, of course, is that they do not have such an intention; just they have forgotten to “harmonize” paragraph (2) with the harmonized EU rules.

The provisions of *Article 4.4* on the *right of rental* are in order. However, in the absence of any provision on this in the “Code,” it is not clear what is the position of the drafters concerning the various specific rules of the Rental, Lending and Related Rights Directive on the exercise of this right (in particular, in respect of the unwaivable right to remuneration maintained by the authors when they transfer their exclusive rental right to producers).<sup>44</sup>

Several comments are necessary on *Article 4.5* on the *right of communication to the public*. The crowding of so many different acts in one short provision (even if with footnotes which try to interpret it) does not seem helpful either for a possible codification of the existing directives or for further harmonization. However, before addressing the substantive issues, let us point out a strange drafting peculiarity in the “Code” which consistently appears in the provisions on economic rights. As we have seen, Article 4.3 begins in this way: “The right of distribution is the right to distribute...” The beginning of Article 4.4 follows the same structure: “The right of communication to the public is the right to communicate the work to the public...” These provisions, of course, then contain also some other elements but, in this way, they sound as circular definitions. The international treaties and national laws avoid this kind of weird language since they do not just *define* but *provide for* the rights concerned. They use such a structure: “Authors... shall enjoy the exclusive right of authorization of” [the reproduction, the communication to the public, etc. of their works]. The innovation of the drafters to have a short article (Article 4.1) listing the exclusive rights provided in the “Code” to define rather than to provide for rights and, therefore, apparently to be constrained to apply these kinds of circular-definition-type structures does not seem to be fortunate.

If one reads the text of Article 4.5 together with the footnotes added to it, he or she can see that the broad and still open-ended right of communication to the public covers the following acts: (i) public performance, (ii) public recitation, (iii) broadcasting, (iv) communication to the public by cable (of cable-originated programs), (v) rebroadcasting, (vi) retransmission by cable, (vii) public communication by loudspeaker or any other analogous instrument, (viii) (interactive) making available to the public, (ix) public display and (x) any other possible communication to the public.

Providing non-copy-related rights together in one article is not alien to the drafting technique of international treaties, EU directives and certain national laws. However, it is doubtful that such a textbook-style text would comfortably fit into the legal system of the majority of EU Member States. It is true that, from the viewpoint of the decisive elements of these acts, public recitation does not differ from public performance, but public performance (and recitation) does differ in many aspects from broadcasting (and cable-casting). Equally, the regulation of original acts of broadcasting, on the one hand, and retransmission by cable, on the other hand require different rules. The nature of the acts of (interactive) making available

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<sup>43</sup> See Article 4 of the Computer Programs Directive, Article 9(2) of the Rental, Lending and Related Rights Directive, Article 5(c) of the Databases Directive and Article 4(2) of the Information Society Copyright Directive.

<sup>44</sup> See Article 5 of the Rental, Lending and Related Rights Directive.

to the public, although they are covered by the same Article 8 of the WCT and Article 3(1) of the Information Society (Copyright) Directive as the acts of non-interactive communication to the public, is also special in many aspects (interactive transmission in compressed form in a non-real-time manner for downloading has not the same effect as, for example, broadcasting; its effect is similar to distribution of copies). Not mentioning public display in respect of which it is unclear exactly what kinds of acts the drafters intend to cover by it.

In this respect, Article 4.5 of the “Code” certainly would go much beyond a possible codification of the existing *acquis*. It would consist in a large broadening of the concept of communication to the public under Article 3(1) of the Information Society (Copyright) Directive which in accordance with the Berne Convention, as far as copyright is concerned, does not cover public performance (let aside public display). At the same time, the “Code” does not contain many important rules of the EU directives concerning the concepts and the application of the various “sub-rights” included in the Code under the umbrella of the overly broad general right of communication to the public. There is no provision on the concept of broadcasting and choice of law in the case of satellite broadcasting;<sup>45</sup> it is not clarified under what conditions encrypted transmissions may be regarded broadcasting;<sup>46</sup> the entire complex regulation concerning retransmission of broadcasts by cable is missing;<sup>47</sup> and so on. With this de-harmonization, the application of many of the “sub-rights” would become uncertain.

Paragraph (2) of Article 4.5 offers a definition of “public:” “A communication of a work shall be deemed to be to the public if it is intended for a plurality of persons, unless such persons are connected by personal relationship.” This commentator does share the doubts expressed by Jane Ginsburg about this definition. First, in connection with the language “intended for a plurality of persons,” she expresses the view (and with quite solid reasons) that “to require that a particular delivery or transmission of the work be simultaneously conveyed to a plurality of persons would substantially eviscerate the making available right.”<sup>48</sup> Then she points out the even more fundamental problem:

More problematically, however, the exclusion from “the public” of persons “connected by a personal relationship” seems exceedingly vague and potentially overbroad. What, in the digital era, is a “personal relationship”? For example, are Facebook “friends” “connected by a personal relationship”? The drafters’ choice to go beyond traditional criteria like “family circle” or “circle of family and its social acquaintance” risks opening up the category of “non-public” to an extent inconsistent with the author’s limited monopoly over the public communication of her work.<sup>49</sup>

*Article 4.6 on the right of adaptation* reads as follows: “The right of adaptation is the right to adapt, translate, arrange or otherwise alter the work.” There are no specific provisions concerning these acts in the *acquis*. However, in the Berne Convention, separate provisions cover the right of translation (Article 8) and the right adaptation (Article 12). From the viewpoint of the level of protection, there may not be any consequence of combining these two rights in one article, but it is not clear why this kind of combined provision is regarded to

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<sup>45</sup> See Article 2(f) of the WIPO Performances and Phonograms Treaty (WPPT) and Article 2(2)(a) and (b) of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereinafter: Satellite and Cable Directive).

<sup>46</sup> See Article 2(f) of the WPPT and Article 2(2)(c) of the Satellite and Cable Directive.

<sup>47</sup> See Article 11*bis*(1)(ii) and (2) of the Berne Convention and Articles 2(3) and 8 to 12.

<sup>48</sup> Ginsburg, p. 20.

<sup>49</sup> *Ibid.*

better. The nature of the two rights differ in respect of the way a work may be transformed (in the case of a translation, the genre and contents – the expressions of certain thoughts, feelings, views – normally remain the same, just they appear in another language, while amendments, etc., “by definition” involves changes in this respect). The licensing of these two rights also takes place separately and in different manner. Furthermore, there are also specific aspects, at the level of the international norms, which apply to the right of translation but do not apply to the right of adaptation.<sup>50</sup>

*ad Chapter 5: Limitations*

The TRIPS Agreement speaks about “limitations and exceptions” to exclusive rights (Article 13); the WCT also does so (Article 10), and the title of Article 5 of the Information Society (Copyright) Directive is “Exceptions and Limitations,” while in the first lines of Article 5(2) and (3) of the Information Society (Copyright) Directive, which list the various exceptions and limitations, the expression “exceptions or limitations” appear. Unless one is ready to consider such ridiculous expressions as “limitations and limitations” or “exceptions or exceptions” as logical and meaningful, he or she has to recognize that, under those provisions, “limitations” and “exceptions” simply cannot mean the same. Therefore, it is not easy to understand why the drafters of this chapter do not use the same pair of expressions as those instruments; whether they do not agree with this differentiation or are of the view that in the interpretation of international and EU norms certain terms (like these) may simply be regarded irrelevant or negligible. If we use the generally accepted rule of interpretation of legal texts (also expressed in Article 31(1) of the Vienna Convention on the Law of Treaties), we have to take into account first of all – and usually in a decisive manner – the ordinary meanings of the terms. If we do so, we should recognize that “limitation” normally means that something is modified, reduced in respect of its scope, level or otherwise, but in the modified, reduced (limited) form it still continues to exist. Thus, the expression would fit in those cases where an exclusive right is limited somehow (transformed, into a mere right to remuneration or subject to compulsory licensing or to mandatory collective management) but in that limited form, it is still applicable. In contrast, the term “exception” means – or at least may mean – much more. Like in the context of the frequently used expression “exception to the rule,” it means that the rule is not applicable. This meaning fits into a situation where a provision on a certain right exceptionally does not apply at all; no authorization is required for the performance of the acts concerned and there is no obligation either to pay remuneration. Those academics who have volunteered to prepare a “European Copyright Code” would have had to address this terminology issue and solve it either in this way – what seems to follow, *inter alia*, from the Vienna Convention – or in some other way. They have not done so.

While they have revised and overruled the above-mentioned categorization applied in the international treaties, they have introduced a more complex one. Footnote 48 added to the title of Chapter 5 announces this in the following manner: “For the sake of clarity, limitations have been brought together under several categories. The categories do not however prejudice as to the question, what interests do, or should, in a particular case or even in general, underlie the limitation. In practice, this might be a mixture of several of the interests indicated. The

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<sup>50</sup> What is meant here is not only the limitation of the exclusive right of translation under the Appendix in the form of a specific compulsory licensing system in favor of developing countries, but also the theory of “implied exceptions to the right of translation” about which there was an animated debate at the 1967 Stockholm revision conferences. For a description of this theory and the debate, *see* Mihály Ficsor: “Guide to the Copyright and Related Rights Treaties Administered by WIPO,” WIPO publication No. 891(E), 2003, pp. 53-54.

weakness in a particular case of the interest under which the applicable limitation has been categorized does not prejudice as to the (non-) applicability of the limitation.”

In this chapter of the „Code,“ exceptions and limitations are provided in five categories: (1) “uses with minimal economic significance;” (2) “uses for the purpose of freedom of expression and information;” (3) “uses permitted to promote social, political and cultural objectives;” (4) “uses for the purpose of enhancing competition;” and (5) “further limitations.” It is submitted that this categorization does not have any useful contribution to the draft provisions of the chapter; it does not make them clearer and more appropriately applicable; just the contrary. The drafters themselves admit this implicitly in the above-quoted footnote, since as they state (i) the categorization does not “prejudice” what interests are supposed to serve as a basis for an exception or limitation; (ii) in practice, a mixture of different interests may justify an exception or limitation (also others than those indicated in respect of the given category), and (iii) the weakness of an interest serving as a basis for the categorization is not an obstacle to apply an exception or limitation. If this is the case – and what follows proves that definitely it is – what is the point in introducing this textbook-style artificial categorization?

The most important problem with this chapter, however, is that, in many aspects, it is in conflict with the relevant international treaties and EU directives and that it is not in accordance with what seems to be a desirable European copyright strategy and policy.

First of all, apart from the last category of exceptions and limitations referred to as “further limitations” (which, however, raises some other problems from the viewpoint of the *acquis* on its own) none of the exceptions and limitations is subject to the three-step test or – if it is accepted that the first “step” to determine the scope of limited special cases is up to legislation and not to those who apply the law – at least to its second and third steps. And this is in spite of the fact that those exceptions and limitations are provided in a much more open-ended manner than in the international norms and in the *acquis* (neglecting certain conditions included in the treaties and the directives).

*Article 5.1* bears the title of “*Uses with minimal economic significance.*” At first sight, the three subparagraphs of this paragraph seem to cover – as the title also suggests – *de minimis* exceptions. A closer analysis, however, reveals certain problems with each of them.

Subparagraph (1) of Article 5.1 prescribes an exception for “the making of a back-up copy of a work by a person having a right to use it and insofar as it is necessary for that use.” There is one provision in one EU directive in respect of one category of works explicitly allowing such an exception; namely Article 5(2) of the Computer Programs Directive. Serious doubts may emerge whether the making of a copy of a valuable and costly computer program may duly be characterized as an act of *de minimis* importance. The reason for this exception seems to be more specific than a *de minimis* implication; namely exactly the valuable and costly nature of such a program serving a utilitarian purpose (operating a computer) which justifies such a security measure. If the EU bodies had found it justified to apply such a back-up copy exception for other categories of works (in particular those in digital format, such as in CDs, CD-ROMs or DCDs) they would have done so in the framework of the exhaustive list of exceptions and limitations provided in Article 5 of the Information Society (Copyright) Directive. They did not do so, and for good reasons. The Directive only includes two provisions, one on an exception and another one on a limitation, which may be regarded more or less similar in nature to the exception provided in the Computer Programs Directive, but both of them are subject to specific conditions and, in addition, also to the three-step test. The

exception, under Article 5(2)(c) applies “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums or by archives, which are not for direct or indirect economic or commercial advantages” which usually extend to making a copy to replace a copy lost or damaged. The above-mentioned limitation (of the exclusive right of reproduction to a mere right to remuneration) may be found in the well-known and so frequently and for so many reasons disputed Article 5(2)(b) of the Directive concerning private copying which might also serve as a basis for making back-up copies. The latter is, however, also subject to a number of conditions and, in addition, also to the three-step test. It seems the drafters are of the view that it is not elegant and not necessary to bother with such details in order to limit exceptions and limitations to special cases and/or to subject them – no matter in how open-ended and “flexible” way they are worded – to the three-step test. In this case too, the result is not a codification of the *acquis* but its revision by decreasing the level of protection.

Subparagraph (2) is on an exception for “the incidental inclusion of a work in other material.” At first sight, this seems to be an innocent provision; nevertheless Jane Ginsburg points out some problems with it too, and rightly enough:

It is not clear what “incidental inclusion” means. Accidental and unintentional incorporation of a copyrighted work when the including work’s focus was on something else? The amount of the incorporated work was of minimal quantity or duration? Must the inclusion be all of accidental, unfocused and minimal? Moreover, the scope of the exception appears to be considerably broader than the conduct exempted in Berne Conv. art. 10*bis*(2), which permits reproduction and communication of literary or artistic works seen or heard in the course of an event which is the subject of news reporting, “to the extent justified by the informatory purpose.”<sup>51</sup>

The first part of subparagraph (3) on exception for “use in connection with the demonstration or repair of equipment” is in accordance with Article 5(3)(l) of the Information Society (Copyright) Directive, and there is no problem with it. There would be no problem with the second part of the subparagraph either if it provided an exception for the reconstruction of an original or a copy of a work only in the narrow case determined in Article 5(3)(m); namely, for the reconstruction of *buildings*. However, this substantial specification which was found necessary in the Directive has been “revised” and left out by the drafters of the “Code” – again in accordance with their apparent objective: narrowing protection and broaden exceptions and limitations.

As mentioned above, the provisions on exceptions for “uses for the purpose of freedom of expression and information” listed in Article 5.2 of the “Code” are not subject to the three-step test either. This creates potential conflicts with the international treaties and the *acquis*. This is the case in particular in the case of subparagraph (2)(a) and (b).

Concerning subparagraph 2(a) on a limitation for “use of single articles for purposes of internal reporting within an organization,” it seems worthwhile quoting Jane Ginsburg again:

It is very unclear what “internal reporting within an organization” means. If the exception is meant to permit multiple reproductions of single articles for distribution within an organization, for example to convert one journal subscription into multiple copies of individual articles, it would most likely run afoul of the three-step test. If the exception is meant to concern clipping

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<sup>51</sup> Ginsburg, p. 22.

services, its phrasing does not correspond to the nature of the use, at least not to the extent that the clipping service is external to the organization that is the object of the news clippings.<sup>52</sup>

Under subparagraph (b), a limitation applies also for “use for purposes of scientific research.” Since it also covers use by commercial purposes and is not subject to any condition whatsoever, even if it is linked to the obligation to pay remuneration, it does not seem to correspond to the very first “step” of the three-step test, let aside the second and third one.

In *Article 5.3* on “*uses permitted to promote social, political and cultural objectives*,” it is also subparagraph (2)(a) and (b) on certain limitations which raise problems.

If one compares subparagraph (2)(a) with Article 5(2)(b) of the Information Society (Copyright) Directive, he or she can see that, although it includes a commendable clarification which would be an improvement in comparison of the provisions of the Directive, an important condition is missing from it. The commendable clarification is that the limitation is not applicable if the source of the reproduction is an obviously infringing copy. (Nevertheless, it may be added that although uploading a work, without the authorization of the owner of right, for its making available to the public through the Internet does result in an infringing copy, in this case, the truly relevant act is the (interactive) making available to the public; therefore, it might have been even better if reference had been made to obviously illegal *sources*.) The important condition missing is that the private use for which the copy is made must not serve either direct or indirect economic or commercial advantage.

In this case, it is a particularly conspicuous conflict with the international treaties and the *acquis* that this limitation is not subject to the three-step test, since the 1967 Stockholm revision conference considered a proposal to provide for private copying without any further condition but – wisely enough – it explicitly rejected the idea and subjected any exception or limitation for such purposes also to the three-step test.<sup>53</sup>

In respect of subparagraph 2(b), let us quote again Jane Ginsburg who has expressed, also in this case, precisely what is the problem with it:

The proposed Code’s failure to restrict the scope of this exception to non-commercial, not for profit educational purposes, its lack of definition of the nature of the “educational purpose,” as well as its absence of limitation as to the kinds of works subject to the exception, make the consistency of this exception with Berne Conv. art. 9(2) very problematic notwithstanding its requirement that the use be remunerated.<sup>54</sup>

Although there are serious problems with the above-analyzed other provisions of Chapter 5, they may still appear less weighty *if* they are compared with the suggested provisions in *Article 5.4* on “*uses for the purpose of enhancing competition*,” in particular what are included in subparagraph (2).

Although the draft provisions of subparagraph (2) of the article would create the biggest violations of the international norms and the *acquis* and they would conflict, in the most obvious way, with the objectives that an adequate European copyright strategy and policy should serve, certain comments are justified also concerning its subparagraph (1). Firstly, its

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<sup>52</sup> *Ibid*, p. 24.

<sup>53</sup> For the description of this, see Mihály Ficsor: „*The Law of Copyright and the Internet – The 1996 WIPO Treaties, their Interpretation and Implementation*,” Oxford University Press, 2002, pp. 281-284.

<sup>54</sup> Ginsburg, p. 24.

point (a) – providing an exception “for the purpose of advertising public exhibitions or sales of artistic works or goods which have been lawfully put on the market” – as Jane Ginsburg also observes it,<sup>55</sup> does not have anything to do with competition. Secondly, both points a) and b) of the subparagraph, a number of decisive conditions have been “de-harmonized” from the relevant provisions of the EU directive (Article 5(3)(j) of the Information Society (Copyright) Directive and Article 6 of the Computer Programs Directive, respectively). This is particularly spectacular in the case of point b) which provides for a reverse engineering exception in this – may be “elegantly short” but inadequate – way: “[The following uses... are permitted without authorization and without remuneration, to the extent justified by the purpose...] (b) use for the purpose of reverse engineering in order to obtain access to information, by a person entitled to use the work.” In contrast, the provisions of Article 6 of the Computer Programs Directive take 35 lines to list indispensable conditions in order that the exception for what is called more precisely “decompilation” might be in accordance with the three-step test. It is difficult to understand for what reasons the drafters of the “Code” have decided to “revise” the Directive in such a brutal way. They not only have not included a number of important provisions thereof but they have not even tried to clarify that all this only applies to computer programs and that what they call “reverse engineering” in fact means decompilation of programs from object code to source code.

Let us turn now to subparagraph (2) and, due to its specific – quite weird – nature, let us quote its full text:

- (2) Uses of news articles, scientific works, industrial designs, computer programs and databases are permitted without authorisation, but only against payment of a negotiated remuneration,<sup>56</sup> and to the extent justified by the purpose of the use, provided that:
- (i) the use is indispensable to compete on a derivative market;
  - (ii) the owner of the copyright in the work has refused to license the use on reasonable terms, leading to the elimination of competition in the relevant market and
  - (iii) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright in the work.

It is completely unclear what, in point (i), a “derivative market” may mean (in the case of this concept, it would have been particularly necessary to have some explanation by the drafters). Let us presume, however, that a derivative market means a market of derivative works (this is the most probable meaning). The provision seems to guarantee the possibility of the creators, producers and distributors of such works to compete on the market with the authors of the original works (used by them to produce derivative works) without their authorization. This would be equal to a simple transformation of the exclusive right of adaptation into a mere right to remuneration on the basis of a sort of compulsory licensing. For this, not only the modification of the *acquis* but also the revision of the Berne Convention, the TRIPS Agreement and the WCT would be necessary. Without this, such a draft provision could hardly be taken seriously.

Concerning point (ii) again the quotation of the comment made by Jane Ginsburg seems to be the most appropriate:

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<sup>55</sup> *Ibid.* p. 25.

<sup>56</sup> (Original note 54 to the “Code”) The term ‘negotiated remuneration’ means that the compulsory license fee is to be negotiated in individual cases, and therefore does not imply a role for collective rights management. The term ‘negotiated remuneration’ means that the compulsory license fee is to be negotiated in individual cases, and therefore does not imply a role for collective rights management.

If the “relevant market” is the market for the work, then this exception is either incoherent or fundamentally at odds with an essential feature of copyright law, which is to vest the author with exclusive rights.<sup>57</sup>

The best thing that may be said about this is that the drafters probably have not given sufficient thought to this before they included it in the draft “Code.”

Unfortunately, in respect of point (iii), also maximum benevolence is needed even for the friendliest possible commentators. Here, these extremely open-ended and hardly justifiable limitations are subject to a condition which has something to do with the three-step test. This, however, is not a good news, since, as it can be seen, the drafters has transformed the three-step test – for some reasons they do not explain – into a single-step test (only reproducing the third step thereof). It should be admitted that, in the context of these provisions, this even has an internal logic and a sign of consistency. This is so since points (i) and (ii) foresee limitations in certain – far from special – cases (it would be difficult to imagine even more sweeping limitations) where the acts allowed under the limitations would enter into conflict with the possibility of exercising the rights concerned by the authors – something that may be a textbook example for a conflict with a normal exploitation of the works concerned. The drafters probably were aware of, and agreed with, this. Therefore, it would have been truly a contradiction if they had subjected these limitations to all the three conditions of the three-step test. Of course, there is a problem with which it seems the drafters have not calculated. Namely that the Berne Convention, the TRIPS Agreement and the WCT do not allow such limitations and, in particular, do not permit to the countries of the Berne Union, to the Members of the World Trade Organization (WTO) and to the Contracting Parties of the WCT to introduce limitations to the economic rights concerned that do not fulfill all the three conditions of the test.

*Article 5.5* on “*further limitations*” prescribes the application not only of the third condition of the three-step test but also of its second one. The picture is, however, somewhat “colorized” because the drafters seem to intend to do justice here for the test by “compensating” it for having abolishing one of its conditions (the second one concerning normal exploitation) in the previous draft provision. They have added a condition which nowhere appears in the texts of the international treaties and the EU directives concerning copyright exceptions and limitations. This strange provision reads as follows:

Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.<sup>58</sup>

It must have been obvious for the drafters that this completely open-ended provision is not in accordance with the copyright laws of the overwhelming majority of the EU Member States which prefer and use exhaustive lists of well-determined exceptions and limitations (also subject to the three-step test) – neither with the EU directives which, in quite an understandable way, have chosen the same model as a basis for the harmonized norms. Thus, in this case too, as in many other aspects of the “Code,” it is not the objective of consolidation and codification of the *acquis* which much have guided the drafters but some ideas on the

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<sup>57</sup> Ginsburg, p. 26.

<sup>58</sup> (Original note 55 to the “Code”) See note 48. Note that art. 5.5 does not allow new limitations by blending the criteria of articles 5.1 to 5.3.

transformation of the EU copyright policy and legislation. Footnote 48 makes the intention quite clear by a statement referring to Article 5.5: “Chapter 5 reflects a combination of a common law style open-ended system of limitations and a civil law style exhaustive enumeration.”

The framework and volume of this paper would not allow elaborating on the advantages and disadvantages of these two basic systems. Two problems, however, should be mentioned. Firstly, there is no good chance that such a Copernican-size change might be easily acceptable by a great number of Member States, if any of them at all. Certainly, even the consideration and discussion about such an idea would take a lot of time and energy. It is extremely doubtful that, in the present period when a number of important copyright problems await for urgent and effective settlement, the EU and its Member States could afford using a big amount of time and energy for this purpose. Secondly, even if we presumed that an agreement might be possible on this issue, the transformation of the system at the level of practice would be extremely difficult and would involve quite substantial risks. This would be so since it should be seen that the “fair use” and “fair dealing” systems may only work efficiently and adequately due to the long and rich legal traditions and the big body of case law which make it possible. It would be difficult to introduce such a system in countries where there is no such tradition and case law. Under these conditions, it would be certainly more realistic and a more attractive option to try to accelerate the updating of the close EU system.

The last three provisions of Chapter 5 – and thus the “Code” – are on “*relation with moral rights* [of the exceptions and limitations]” (*Article 5.6*); on the “*amount and collection of remuneration*” [in those cases where exclusive rights are limited to mere rights to remuneration] (*Article 5.7*); and on “*limitations prevailing over technological measures*” (*Article 5.8*). The latter provisions are quite important; therefore, it is justified to quote them fully:

In cases where the use of copyright protected works is controlled by technical measures, the rightholder shall have an obligation to make available means of benefiting from the uses mentioned in articles 5.1 through 5.5 with the exception of art. 5.3(2)(a) [private copying], on condition that

- (a) the beneficiary of the limitation has lawful access to the protected work,
- (b) the use of the work is not possible to the extent necessary to benefit from the limitation concerned, and
- (c) the rightholder is not prevented from adopting adequate measures regarding the number of reproductions that can be made.

These provisions suggest various revisions of Article 6(4) of the Information Society (Copyright) Directive. It is commendable that the proposed article excludes the private copying limitation from its application (the issue of which is not regulated quite consistently in the Directive). At the same time, there are three negative aspects thereof.

Firstly, in contrast with the Directive which only prescribes an intervention mechanism for the case where owners of rights do not make access for the beneficiaries possible, the “Code” would directly obligate the owners of rights. Secondly, these provisions would extend this obligation to a number of exceptions and limitations that are *not* covered by the intervention mechanism under the Directive. And, thirdly, it is extremely anachronistic that the “Code” would not provide adequate protection for the technological measures used by the owners of rights as prescribed in Article 11 of the WCT and Article 6(1) to (3) of the Information

Society (Copyright) Directive, but, at the same time, it obligates them not to use it in certain cases.

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In the opinion of this commentator, these are the main problems with the draft “Code.” It is not suggested that these problems be corrected. What is suggested is that the draft should be set aside for a while. In this form, with these objectives, for quite a long while. Instead of dealing with it, the available capacity, time, and energy should rather be used for addressing the most important and most urgent current issues. Such as trying to work out and adopt further harmonized legal and technological measures that might guarantee the re-establishment of the balance by now drastically changed to the detriment of authors, other owners of copyright and beneficiaries of related rights as a result of widespread and massive online infringements.

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