

# Copyright in Europe: 20 Years Ago, Today and What the Future Holds

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# Three Phases of Copyright Harmonization in EU

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1. 1991-2001 Harmonization (directives)
2. 2001-2008 Implementation
3. 2009- ... Interpretation (CJEU)

# 1. Harmonisation Directives

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Software Directive (1991)

Rental and Lending Directive (1992)

Satellite and Cable Directive (1993)

Term Directive (1993 + 2011)

Database Directive (1996)

Artists' Resale Rights Directive (2001)

Copyright (Information Society) Directive (2001)

# Three Phases of © Harmonization

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1. 1991-2001 Harmonization
2. 2001-2008 Implementation

# Three Phases of © Harmonization

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1. 1991-2001 Harmonization
2. 2001-2008 *Nothing Much*
  - Online Music Recommendation (2005)

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  - *Infopaq* (C-5/08): infringement standard
  - *BSA* (C-393/09): work
  - *Luksan* (C 277/10): ownership of films
  - *Football Dataco* (C 604/10): no skill and labour

# What Has Harmonization Brought EU?

## *The Positive*

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- Approximation of national laws in distinct areas has enhanced legal certainty in EU commerce
  - E.g. computer software
- Emergence of common principles, despite diff. legal traditions (copyright <> author's right)
  - E.g. 'author's own intellectual creation'
- External competence EU (WIPO, WTO, bilaterals)



# What Has Harmonization Brought EU?

## *The Negative*

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- Slow response to technological development
  - Need for more flexibility!
- Harmonization always *upwards*
  - Difficult to scale back (e.g. database right!)
- Intransparency of EU process favors lobbying (viz. Term Extension Directive)

# The Blind Side of Harmonization: *Territoriality*

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- Despite 20 years of harmonization copyright law in EU has remained national law
- Single act of communication online affects multiple copyright laws
  - ✓ 27 copyright laws in EU (30 in EEA), and counting

# The Costs of Territoriality

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*[A]s a result of copyright territoriality, a content service provider has to obtain the right to make content available in each Member State. The costs incurred may be detrimental to the exploitation of a vast majority of European cultural works outside their national markets.*

European Commission: Communication on Creative Content Online, 2009

# What the Future Holds

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- Law making at EU level increasingly complex and difficult
  - Ever growing number of Member States
  - Larger role European Parliament
  - Social legitimacy of copyright in peril
  - No normative constitutional mandate in primary EU law

# What the Future Holds

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# What the Future Holds

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➤ “DO NOTHING”

# The Future: a Fourth Phase?

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1. 1991-2001 Harmonization (directives)
2. 2001-2008 Implementation
3. 2009- ... Interpretation (CJEU)
4. 20?? - .... Unification: *European Copyright Law*

# EUROPEAN COPYRIGHT CODE

## Introduction

The *European Copyright Code* is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The project has its roots in an International Network Program run by three Dutch universities (Radboud University of Nijmegen, University of Amsterdam and Leiden University), and sponsored by the government-funded Dutch ITeR Program.

The aim of the Wittem Project and this Code is to promote transparency and consistency in European copyright law. The members of the Wittem Group share a concern that the process of copyright law making at the European level lacks transparency and that the voice of academia all too often remains unheard. The Group believes that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level. Nevertheless, the Group does not take a position on the desirability as such of introducing a unified European legal framework.

The Code was drafted by a Drafting Committee composed of seven members. Each chapter of the Code was originally drafted by one or two members of the Drafting Committee, acting as rapporteurs. The rapporteurs for each chapter were: Prof. Quaedvlieg (Chapter 1: Works), Prof. Hugenholtz (Chapter 2: Authorship and ownership), Prof. Strowel (Chapter 3: Moral rights), Prof. Visser (Chapter 4: Economic rights) and Professors Dreier and Hilty (Chapter 5: Limitations).

Each draft Chapter, accompanied by an explanatory memorandum, was discussed in a plenary session with the members of the Wittem Advisory Board and other experts that were invited ad hoc. The proceedings of these plenary sessions were fed into the second versions of each chapter, and thereafter redacted and integrated into a final consolidated version by the Drafting Committee. Although discussions with the Advisory Board and experts have greatly influenced the final product, responsibility for the Code lies solely with the Drafting Committee.

While drafted in the form of a legislative instrument and thereby exceeding the level of detail normally associated with common principles of law, this Code is not comprehensive. It concentrates on the main elements of any codification of copyright: subject matter of copyright (Chapter 1), authorship and ownership (Chapter 2), moral rights (Chapter 3), economic rights (Chapter 4) and limitations (Chapter 5). The Code does not, for instance, treat such remuneration rights as public lending right and droit de suite, nor does it deal with the legal protection of technical measures. Also, the Code does not contain rules on copyright liability or enforcement, nor does it touch upon neighbouring (related) rights and database right.

- ▶ Introduction
- ▶ Drafting Committee and Advisory Board
- ▶ European Copyright Code
- ▶ European Copyright Code (pdf)
- ▶ Contact





# Unification of EU Copyright Law

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- ***European Copyright Law*** (‘Regulation’)
  - Directly binding instrument (Art. 118 TFEU)
  - Immediate Union-wide effect
  - Remove territoriality → single market for copyright goods & services
  - Increase legal certainty across EU
  - Opportunity to re-balance
  - ✓ Chance to restore legitimacy in EU copyright law