

## EU copyright reform: Revisiting the principle of territoriality

### SUMMARY

Copyright protection is territorial since rights are normally acquired and enforced on a country-by-country basis, and exceptions and limitations to copyright protection vary from one Member State to another. However, the new digital environment increasingly characterised by the use of the internet to deliver content across borders has an impact on both users and the creative industries, and represents a challenge to the implementation of coherent copyright legislation throughout the EU.

The European Commission has announced it will put forward plans for reform before the end of 2015. Parliament adopted a resolution in July 2015 on the harmonisation of certain aspects of copyright and related rights to steer the debate on the forthcoming reform.

A key issue for policy-makers to address is how to mitigate the hindrance to the internal market caused by territorial protection of copyright. Several approaches have been discussed in this respect. One approach is to foster cross-border online access and the portability of content across borders and to prohibit some specific territorial restrictions (for instance, the unjustified practice of geo-blocking). Clarifying copyright rules applicable to online transmissions on the model of the Satellite and Cable Directive has also been proposed. Further harmonising throughout the EU the exceptions and limitations which allow the limited use of copyrighted works for certain purposes without the authorisation of the author or of other rights-holders has also been discussed. Finally, the introduction of a unified legal framework for EU copyright law has been proposed, and requires a comprehensive, evidence-based assessment of the cost and benefits involved.



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## Background

[Copyright](#) and related rights are exclusive intellectual property rights (IPR) that protect the authors' (or creators') original literary, scientific or artistic works (novels, films, computer programs, software, etc.) and/or the interests of other rights-holders such as publishers and broadcasting organisations who contribute to making the works available to the public. As a matter of principle therefore, copyright protection ensures that those who have created (such as composers, writers, film directors, musicians, and software developers) or invested in the creation of works (book and newspaper publishers, film and record producers, broadcasters, etc.) can determine how these works can be reproduced, distributed or communicated to the public. To that end, copyright grants economic rights to rights-holders, giving rise to remuneration for the use of the protected works. Copyright also confers to the author non-economic rights, i.e. moral rights such as the rights of paternity (right to be identified) and to prevent destruction.

In the EU, copyright protection has largely been based on principles enshrined in the [Berne Convention](#) and in a set of [directives](#) developed on the basis of Article [114 TFEU](#) (ex Article 95 TEC) allowing the EU to adopt measures for the harmonisation of national legislation to ensure the functioning of the internal market. On this basis, the main instrument governing copyright protection in the EU, the [2001 Copyright Directive](#) was enacted in order to harmonise copyright rules within the internal market and to adapt copyright legislation to technological developments, especially to the emergence of the digital environment.

However, despite the harmonisation process, EU copyright law has struggled to [adapt](#) to the digital, online environment. The emergence of new business models and of new consumption patterns increasingly characterised by the use of the internet to deliver content cross-border has a strong impact on users and on the creative industries, and represents a challenge to copyright protection within the internal market.

Against this background, the question of whether the EU copyright legal framework, including the 2001 Copyright Directive, remains appropriate in the digital world has long been raised by the [European Commission](#) and also by the [European Parliament](#). While the Commission has announced it will adopt a [legislative proposal](#) to modernise EU copyright law by the end of 2015, a central issue which is debated is whether, and if so how, the principle of territoriality – under which copyright is normally acquired and enforced on a country-by-country basis – should be implemented to ensure the development of the [digital single market](#) is not hampered.

### Creative industries: figures and trends

Copyright-based creative industries (e.g. films, software, books and newspapers) contribute today more than [3% of EU GDP](#).

Consumption patterns are [changing](#) and users increasingly do not see significant differences between digital and traditional media content.

[e-Commerce](#) is growing rapidly in the EU at an average annual growth rate of 22%, surpassing €200 billion in 2014 and reaching a share of 7% of total retail sales.

[e-learning](#) is expected to transform the education environment profoundly over the next ten years.

The traditional creative industries are affected. For instance, the [rise of OTT video services](#) affects the penetration of [TV subscriptions](#) and is changing the shape of [advertising revenue](#), given the upward trends in use of mobile platforms and digital networks.

## Territoriality of copyright

### Principle

The territoriality of copyright and related rights enshrined in [Article 5 of the Berne Convention](#), and confirmed as a core principle of the EU copyright law by the Court of Justice (CJEU) in its 2005 [Lagardère](#) ruling, means that each Member State grants and recognises copyright protection in its own territory by virtue of national legislation. As a result, copyrights are acquired and enforced country by country in the 28 Member States.

The principle of territoriality also applies to a number of exceptions and limitations listed at [Article 5 of the Copyright Directive](#) which allows the use of copyrighted works for certain purposes without the authorisation of the author or other rights-holders. As a result, a Member State can implement in its territory a number of exceptions and limitations from the list when the '[three-step test](#)' is passed, i.e. when this is only for a special case, which does not conflict with normal exploitation of the copyrighted work, and does not unreasonably prejudice the legitimate interests of the rights-holder.

However, the list is optional, which means that – apart for the exception for temporary copying which is mandatory and excludes internet service providers from being held liable for copyright infringement in respect of the data they transmit – Member States can decide which exceptions and limitations they want to implement. Since the rules remain largely national, an act covered by an exception in one Member State may still require the authorisation of the rights-holder in another.

### Legal consequences

[Hugenholtz](#) has emphasised that, despite the implementation of harmonisation directives, important disparities in the scope of copyright protection remain since copyright rules and exceptions vary from one Member State to another. This is amplified by the fact that the three-step test is applied in a [different](#) way in the various Member States, creating discrepancies between the type and scope of exceptions to copyright protection permitted throughout the EU.

Territorial protection also leads to legal fragmentation since copyrights (for instance for music) can be owned or exercised for each national territory by a different rights-holder, for example composers, song writers, music publishers or [collective rights management organisations](#).

### List of exemptions and limitations

- [temporary copying](#)
- photographic reproductions on paper or any similar medium
- reproductions for [private copies](#)
- reproduction made by [libraries](#), educational establishments, museums or archives, which are non-commercial
- archival reproductions of broadcasts
- reproductions of broadcasts made by social institutions for non-commercial purposes
- illustration for [teaching or scientific research](#)
- use for the benefit of people with a [disability](#)
- reporting current events
- quotations for purposes such as criticism or review
- use for the purposes of public security or in the context of administrative, parliamentary or judicial proceedings
- use during religious celebrations or official celebrations organised by a public authority
- use of works such as architecture or sculpture located permanently in public places (i.e. [freedom of panorama](#)).
- incidental inclusion of a work in other material
- advertising the public exhibition or sale of artistic works
- caricature, [parody](#) or pastiche
- for demonstration or repair of equipment
- use of an artistic work, drawing or plan of a building for the purposes of reconstruction
- use for non-commercial research or private study
- use of political speeches and extracts of public lectures or similar works
- use in certain other cases of minor importance where exceptions or limitations already exist under national law.

Furthermore, the territorial nature of copyright protection [entails](#) that the law of the country in which protection is sought governs copyright-infringement procedures. In practice, this rule implies that making a work available online (i.e. over the internet) requires copyright clearance in all Member States from which the posted work can be accessed. Therefore the implementation of different rules for online copyright enforcement across the EU [gives rise](#) to national disparities and legal uncertainty.

### **Economic consequences**

The territorial nature of copyright determines the economics of the creative industries in many ways. For instance, [territorial licensing](#) is often the result of commercial decisions by rights-holders and providers of services – even though creators grant worldwide rights to their publishers, collecting societies or producers – and is widely used by the music and audiovisual industries. In particular, the [audiovisual and cinematographic financing](#) system is essentially based on the territoriality principle, and the financing of film and television productions – largely based on cultural and linguistic preferences – often depends on selling distribution rights to national distributors, based on exclusive rights to exploit the piece of work in a specific territory.

Territorial licensing restrictions also induces [transaction cost](#) for some stakeholders such as the authors and related rights-holders (including publishers, film producers, and music publishers) who may face increased costs for licensing and enforcing their rights across the EU. Similarly, it is challenging for libraries engaged in [mass digitisation](#) to securing pan-European licences.

Furthermore, the territorial nature of copyright heavily influences the contractual arrangements between authors and other stakeholders. As a result, the legal framework for [copyright contracts](#) is fragmented, and many disparities in the [remuneration](#) of authors remain, especially with regard to the digital exploitation of their works.

### **Consequences for the internal market**

As a matter of principle, the free movement principle which is at the core of the internal market objective, prohibits Member States from maintaining 'quantitative restrictions' and provisions 'having equivalent effects' on trade of goods and services, pursuant to Articles [34 TFEU](#) and [56 TFEU](#). However, Article [36 TFEU](#) carves out an exception allowing the restriction of trade between Member States when justified on grounds of the protection of intellectual property rights. Against this background, the Member States should ensure a balance between their different legal traditions and the proper functioning of the internal market when implementing the Copyright Directive, for instance when defining the exceptions and limitations applicable in their territories ([CJEU, C-435/12 ACI Adam and others, 2012](#)).

However, such a balance is more and more difficult to strike in today's digital environment, and some disturbing effects on the internal market of territorial protection of copyright have been identified. For instance, the lack of harmonisation of copyright rules which obliges parties to negotiate the terms of use of the protected work with every rights-holder and in every territory is particularly burdensome in an online environment where content providers are required to clear all relevant rights for all Member States for which these services are made available.<sup>1</sup> Also, a growing concern in the EU relates to [geo-blocking practices](#) that amount to the refusal to sell, or measures which discriminate between online shoppers and result in markets segmented along national borders (territorial restrictions) without a valid justification provided by national legislation (such as consumer law) or by acceptable business

practices (for instance, higher delivery costs). Those practices which prevent consumers from using content services (e.g. video services) when they travel from one Member State to another, or deny them the possibility of purchasing content online are often the result of the territorial dimension of copyright, which is commonly granted and protected for the territory of individual Member States.

In order to reconcile copyright territoriality with the free movement principle, the CJEU has traditionally implemented the so-called '[doctrine of exhaustion](#)' along the lines of the [Coditel](#) case. Under this doctrine, once goods subject to IPR protection have been placed on the market of one Member State by or with the consent of the owner of the rights in that country, the rights-holder cannot prohibit the export, import or resale of such goods in other parts of the EU. As an example, the owner of the French copyright may not prevent the import into France of a DVD lawfully marketed in the UK. But, while it is assumed that the doctrine of exhaustion applies to offline (or tangible) distribution of goods in the EU, it is questionable whether it also applies to online [internet-based services](#), which are increasingly the means to deliver creative content. [Recital 29](#) of the Copyright Directive indeed establishes that the principle of exhaustion of rights does not arise in the case of online services, which in principle means that copyright licences need to be cleared in all countries of reception. Although in its [UsedSoft v Oracle](#) (2012) ruling the CJEU applied the exhaustion principle to the download from internet of a computer program (therefore requiring to clear the rights only once) it remains uncertain if the same conclusion applies to e-books, mp3 files, streaming or cloud computing services.<sup>2</sup> In this regard, it has been [stressed](#) that balancing copyright-enforcement measures with the protection of fundamental rights and civil liberties in an online environment is becoming one of the main challenges confronting law-makers in the EU environment, which is still politically and legally very much fragmented.

As a result, although the [case law](#) of the CJEU can help to bring the implementation of exceptions and limitations throughout the EU further into line, the provisions of the Copyright Directive leave national law-makers so much leeway that their actual harmonising effect has been [called](#) into doubt. In this context, several approaches for mitigating the consequences of the increasing tension between the principle of territoriality of copyright and the internal market objective for the development of the digital single market are being discussed.

The **principle of territoriality** as implemented today contributes to the **fragmentation** of the rules governing copyright in the EU although it is still largely behind the business models of the creative industries. As a result, copyright territorial protection increasingly **clashes with the internal market objective**, creates **legal uncertainty** and entails important **transaction, licensing and enforcement costs** for some stakeholders. Furthermore, the territoriality principle also **affects the harmonisation objective** sought by the Copyright Directive. In the context of modernisation of the EU copyright framework, several approaches for reform are under discussion: **limiting territorial restrictions, adapting copyright rules to the online environment, further harmonising exceptions and limitations** and **introducing a single European copyright framework**.

### Limiting territorial restrictions

One approach to fostering [cross-border online access and 'portability'](#) of content across borders is to limit the overly stringent territorial restrictions sometimes prompted by copyright protection.

### Rationale and Commission approach

While the CJEU has explicitly confirmed the territorial nature of copyright, including in the context of cross-border provision of services – [Lagardere](#) (2005), [Stichting De Thuiskopie](#) (2011), [Donner](#) (2012), [Sportradar](#) (2012) – it has also adopted positions limiting exclusive territorial restrictions.

In [Murphy](#) (2011), the CJEU found that a system of licences for the broadcasting of football matches which grants broadcasters territorial exclusivity on a Member State basis, and which prohibits television viewers from watching the broadcasts with a decoder card in other Member States is contrary to EU law. In this respect, it has been [stressed](#) that the Court tried to find a balance between the protection of copyright, which may be based upon **territorial exploitation**, and the **freedom to provide and receive services across borders**. Furthermore, on the basis of this ruling, scholars have argued that **absolute territorial protection** granted to licensees would rarely be found compatible with the internal market objective<sup>3</sup> and that contractual provisions that **block or limit cross-border access** to online services on geographic grounds or where access to online service are **not portable** (i.e. when end-users cannot access a service subject to copyright protection when they travel) may create **illegal absolute territorial exclusivity**.<sup>4</sup> The *Murphy* ruling concerns broadcasting of sport content but it could trigger a broader **reform of the current system of cross-border distribution of audiovisual and media content** – including geo-blocking practices – in order to better strike a balance between the principle of free movement of services and the exercise of intellectual property rights.<sup>5</sup>

Following a similar line of reasoning, while making clear that it will [not](#) want to modify the principle of territoriality of rights, the Commission proposes to tackle [unjustified geo-blocking](#) and its undesirable effects on cross border e-commerce, and to facilitate the [licensing of rights](#) for online distribution of audiovisual content at cross-border scale in order that consumers who have legally paid for an online service may access it in any another EU country (i.e. full portability of legally acquired content).

This approach requires differentiating between territorial restrictions to be prohibited and territorial restrictions which are acceptable. In this respect, existing EU competition law principles can be useful to provide legal criteria for differentiation. In particular, under the [Block Exemption Regulation](#) and the [Guidelines on Vertical Restraints](#), a differentiation is generally drawn between '*active sales*' (i.e. actively approaching individual customers) and '*passive sales*' (i.e. responding to unsolicited requests from individual customers). Accordingly, exclusive distribution agreements are generally accepted if the restriction concerns only active sales, i.e. if it does not prevent distributors making passive sales outside the territory and the group of customers they originally serve. Against this background, it has been [argued](#) that restrictions of passive sales run against consumers' freedom of access to goods and services in a digital single market and as such should not be permitted under EU law. With regard to online transactions, this would [mean](#) that the obligation imposed on retailers to implement geo-blocking by either refusing a deal or re-routing customers located outside its exclusive territory could be seen as unlawful prohibition of passive sales. This approach would however require stakeholders to revise their [licensing practices](#) in order to limit the exclusivity. Some lessons could be drawn in this respect from the [on-going investigations](#) into the cross-border provision of pay-TV services.

### Stakeholders' views

Users and organisations representing consumers welcome measures to ensure cross-border online commerce is not impeded. They argue that [geo-blocking](#) contradicts the very notion of a single market and therefore must be removed to build a modern

European online marketplace. Providers of services such as online platforms support the Commission's approach but [warn](#) that a balanced approach to geo-blocking is required, and the fundamental principles that guarantee the freedom to conduct business must be observed. In addition, the [film industry](#) has pointed out the implications of the legislative proposal for the audiovisual sector, the financing of which (both for paid services and for public broadcasting) depends very much on setting distribution agreements and broadcast rights separately for different European territories.

### Parliament's position

In a [resolution on the implementation of the Copyright Directive](#) adopted on 9 July 2015 the Parliament supported the Commission's initiative to enhancing the portability, within the EU, of online services for content legally acquired and made available, whilst fully respecting copyright and the interests of rights-holders. The EP emphasised that industry geo-blocking practices should not prevent cultural minorities living in EU Member States from accessing existing content or services in their language that are either free or paid for. However the resolution also points out that the existence of copyright and related rights inherently implies territoriality and recalls the importance of territorial licences in the EU, particularly with regard to the financing of audiovisual and film production. Therefore measures to ensure the portability of content should not contradict the territoriality of copyright principle.

### Clarifying copyright rules applicable to online transmissions

Another way to adapt EU copyright law to a cross-border context is to address the uncertainty regarding the application of copyright law to online transmissions.

### Rationale and Commission approach

The Copyright Directive grants to authors and other rights-holders the right of 'making available' their protected works regardless of the technology used to make the protected works available to the public (internet, television...) or to access the protected materials (computers, television sets, portable devices...). However, the Directive does not specify what the 'making available' right covers (upload of content, accessibility to the public or actual reception by the public?) nor where the act of 'making available' takes place (in the country of upload alone, in each country where the content is potentially accessible, or where the content is effectively accessed?). The lack of a definition leaves a considerable margin of interpretation for deciding how national copyright law applies to online transmissions, for example to decide if providing a [hyperlink](#) to a work constitutes a communication to the public (e.g. CJEU, [BestWater](#), 2014). This situation creates some [legal uncertainty](#) as to the territorial reach of the online accessibility of protected works. To remedy this issue one approach is to extend to the online environment the [Satellite and Cable Directive](#) rules which provide a mechanism for rights clearance with respect to cross-border broadcasting services provision. Accordingly, a satellite broadcaster must only [clear rights](#) in the country of transmission to provide broadcasting services in any country of reception.

Two [scenarios](#) have been discussed. A '**country of origin**' principle for the right of communication to the public could be introduced. Under this scenario, a service provider would only have to obtain a license from the Member State where the copyright work occurs (country of origin) in order to make available the copyrighted work in the EU. Under a second scenario, the '**targeting approach**' developed by the CJEU in [Donner](#) (2012) and [Sportradar](#) (2012) would require a licence from those countries in which specific customers are specifically 'targeted' (e.g. via advertisement or the use of a language) by the online service provider.

Against this background, the Commission has [announced](#) that it will review the Satellite and Cable Directive to assess the need to enlarge its scope to broadcasters' online transmissions (e.g. to IPTV) and the need to tackle further measures to ensure enhanced cross-border access to broadcasters' services in Europe.

Such an approach, which would greatly simplify copyright protection in an online environment, is more appropriate than extending the exhaustion principle to all online communications, according to some [scholars](#). However, it could also lead some Member States to offer lower levels of copyright protection or enforcement for pan-European services, and even to a '[race to the bottom](#)' between Member States seeking to attract service providers by offering the most lenient level of copyright protection at the expense of rights-holders. Furthermore, the difficulties of locating the relevant act of transmission in the digital environment and the economic impact of such a solution on the rights-holders – given the risk of devaluation of copyright if a single tariff and licence were to be applied to the whole internal market – has been [stressed](#).

### **Stakeholders' views**

The [2014 public consultation](#) has shown that stakeholders are divided on the extension of the satellite broadcasting model to the online environment, and on the need to clarify the scope of the 'making available' right. While consumer associations, public service broadcasters and institutional users generally call for clarification of this principle, authors and performers, as well as collective management organisations generally do not see the need for any change in this area. The same goes for most publishers, producers and private broadcasters, which have indicated that any potential issues regarding the making available right can be dealt with through commercial negotiations or industry-led initiatives (e.g. multi-territory licensing hubs). In the same way, authors and performers are opposed in principle to the country-of-origin approach, and highlight potential problems with forum shopping. Many stakeholders warn that, in any case, such a solution would require a much higher level of harmonisation of copyright law at EU level than exists at present.

### **Parliament's position**

The EP has addressed the need to adapt copyright rules to the online environment on several occasions. In its 2012 resolution on [Online distribution of audiovisual works in the EU](#), the EP called on the Commission to analyse the application of the Cable and Satellite Directive to digital distribution. Furthermore, in its 2014 resolution on [Preparing for a fully converged audiovisual world](#) the EP emphasised that EU law needed to be adapted to the realities of the internet and the digital environment.

### **Further harmonising exceptions and limitations**

An approach which has long been discussed is to limit the effects of copyright territoriality by further harmonising throughout the EU the exceptions and limitations which allow the limited use of copyrighted works for certain purposes without the authorisation of the author or of other rights-holders.

### **Rationale and Commission approach**

The negative effects of having dissimilar exceptions to copyright protection throughout the EU have been particularly documented with regard to research and education. For instance differences in addressing materials for [e-learning](#) create legal uncertainty for educational institutions wishing to offer e-learning programmes throughout the EU. Similarly, [text and data mining](#) (TDM), i.e. techniques for the exploration and processing



of large amounts of text and data, enabling researchers to discover patterns, trends and other information valuable for research, may infringe copyright in some Member States while being subject to an exception in others (such as the UK). This is particularly problematic for [big data industries](#), for instance in the health and internet sectors, where the analysis and treatment of large data sets are key for innovation and competition. Concerns have also been expressed with regard to the lack of harmonisation throughout the EU of the copyright protection applicable to [browsing and hyperlinking](#) and [private copies](#).

The CJEU has ruled on a number of cases involving the interpretation of copyright exceptions and laid down several **principles** to be applied to the interpretation of, inter alia, **private copying** ([Padawan](#), 2010 and [ACI Adam](#), 2014), **quotation** ([Painer](#), 2011), and **parody** ([Deckmyn](#), 2013). While in its [case law](#) the Court has attempted to ensure consistency of the copyright rules with the functioning of the internal market and compatibility with the [Charter of Fundamental Rights of the EU](#) (for instance with the right of freedom of expression and the right to property) it has repeatedly acknowledged the **discretion** left to the Member States with regard to the implementation of the Copyright Directive. The autonomy of national legislators in implementing the optional list of exceptions is limited by some general principles of law such as the **proportionality principle**, the need to ensure **legal certainty**, a **high level of protection** of copyright, and a **strict interpretation** of the exceptions. As a result, while [scholars](#) have identified a general tendency of the CJEU towards expanding its own role and **deepening harmonisation** of copyright law in the EU, thereby filling in gaps in the legislation, the goal of creating a harmonised copyright law in the EU has not yet been [achieved](#).

The [Commission](#) has expressed its initial view that harmonising some exceptions for specific activities such as research and education may be necessary in order to ensure greater legal certainty for the cross-border use of digital content.

Further harmonisation in this matter would require first to identify those exceptions and limitations which need to be implemented in a more coherent way in order to avoid detrimental national discrepancies. In this respect, it has been claimed that there is a need to seek uniform solutions at EU level in order to foster [e-education](#) and [e-lending](#) in the internal market. The introduction of a [new data analysis exception](#) has been suggested as well, so as to ensure a level playing field for researchers throughout the EU. Moreover, it has been stressed that the absence in European copyright laws of an exemption permitting [user-generated content](#) (for example, photos or video posted on social media) can create a barrier to innovation which impedes new and potentially valuable works from being disseminated across the EU.

This approach also requires assessing whether some or all of the currently optional exceptions must be made mandatory, and whether more flexibility should be left to the Member States to add exceptions that are not included in the list in the Copyright Directive. Some scholars submit that the limitations and exceptions should in principal no longer be optional but compulsory for Member States to implement, in order to remove discrepancies between national systems.<sup>6</sup> In this regard, granting a mandatory nature to some exceptions could be justified on [three grounds](#): when inconsistent implementation would distort and create discrepancies in the Internal Market, when the exception is grounded on the need to enable the exercise of a fundamental freedom (e.g. the freedom of expression) and to achieve some key EU policy objectives such as the development of digital libraries. Alternatively it has been argued that a ['flexibility clause'](#) could be introduced under EU law on the US model of 'fair use', in order for national courts to estimate fairness of a given use when such use is not indicated in the

existing closed list of copyright exceptions. However, such a methodology would introduce a great deal of uncertainty and impracticality in the EU copyright regime, and is [not desirable](#) for some authors. The former approach would entail a shift from minimum harmonisation towards maximum harmonisation. The latter would enable some Member States to close the regulatory gap in their respective territories in introducing new exceptions for specific matters but would not result in more harmonisation. Whatever the chosen path, the [economic consequences](#) on rights-holders and other stakeholders of further harmonising exceptions and limitations need to be carefully assessed, especially with regard to their level of remuneration.

### Stakeholders' views

The [2014 public consultation](#) has shown there are opposing views, between those promoting more harmonisation and calling for mandatory exceptions and those mostly happy with the current situation. End-users, consumer associations and institutional users such as libraries generally support copyright harmonisation and making some exceptions mandatory. On the same side, intermediaries, distributors and other service providers argue for more harmonisation and legal certainty in the area of exceptions, and consider the current system needs to be recast for content-based cross-border activities (e.g. cloud services). Furthermore some of those stakeholders call for increasing the flexibility offered to Member States with regard to exceptions in the EU through the introduction of a [fair-use](#) type methodology. Conversely, authors, performers, publishers, producers, broadcasters and collective management organisations are generally against any further harmonisation, and especially the introduction of mandatory exceptions. They consider the current list of exceptions to be fit for purpose and hold the view that exceptions have a damaging effect on cultural production. Some are also reluctant to see the introduction of more flexibility, and believe that national courts and the CJEU can clarify the scope of the exceptions through the three-step test, without the need to implement a fair use system in EU law.

### Parliament's position

In the recently adopted 2015 resolution on [the harmonisation of certain aspects of copyright and related rights](#), the EP stressed that differences among Member States in the implementation of exceptions is challenging for the functioning of the internal market in view of the development of cross-border activities. In this regard, it considers it necessary to strengthen exceptions for institutions of public interest, such as libraries, museums, archives, and for persons with disabilities. Furthermore the EP emphasised that, new technology-based uses similar to existing one should be, as far as possible, construed in line with the existing exception or limitation. While the EP is refraining from calling to make some exceptions mandatory, it nevertheless called on the Commission to 'examine the application of minimum standards' across the exceptions and limitations in the EU, in order to better adapt to the digital environment.

## Towards a unified European copyright legal framework?

Given the identified drawbacks of the current harmonisation by directive, the introduction of a unified legal framework for EU copyright law has also been discussed.

### Rationale and Commission approach

This far-reaching solution has received lots of attention since [Article 118 TFEU](#) creates a specific [competence](#) for the EU in the IPR field. Several approaches have been evoked. The codification of the existing rules and CJEU case law could result in the creation of an optional unitary copyright title which would co-exist with national copyrights.<sup>7</sup>

Alternatively, the enactment of a [Community Copyright Regulation](#) that would [pre-empt](#) the rights, limitations and exceptions protected at national level and require the simultaneous abolishment of national titles has also been proposed. Finally, the creation of a [registration system](#) that would run in parallel to national copyright systems and could facilitate rights clearance and licensing of works on a pan-European basis has also been discussed.

The **European Copyright Society**, a group of copyright scholars across the European Union published [the European Copyright Code](#) in 2002, to serve as a model or reference tool for future harmonisation or unification of copyright at European level. According to some [scholars](#), the code demonstrates that a European copyright law that assimilates both the **continental European authors' rights tradition** and the **British copyright tradition** is feasible.

While the Commission has in the past [addressed](#) the possible codification of EU copyright rules and the need to examine the feasibility of creating an optional unitary copyright title, it has not yet made a legislative proposal to that end. Given the structural changes implied (for substantive law as well as for procedural rules) any action would require to carefully assess the pros and cons of introducing a single European copyright framework.

In this respect, adopting a unified law would [replace](#) the multitude of sometimes conflicting national rules, and therefore remove the territorial barriers that still persist in the current European framework of (harmonised) national copyright laws. Substituting national copyright law with a unified title would also [permit](#) a review of the *acquis* in the copyright field, enhance legal security and transparency for rights-holders and users, and could reduce licensing and transaction costs. De facto this solution would immediately [remove](#) all copyright-related territorial obstacles thereby creating a single market for copyright and related rights, both online and offline. But a number of drawbacks have also been pointed out. The legal complexity of setting common legal standards in jurisdictions governed by very different legal traditions is seen by many commentators as an impediment to achieve such a far-reaching solution in the short term. This is therefore a long-term project, which however could be dealt with [in parallel](#) to further harmonisation. Also, following the principles of subsidiarity and proportionality, a regulation should only regulate those aspects of the law that cannot be better dealt with at Member State level. Therefore, one [challenge](#) in this approach would be to identify what rules in the copyright framework should be dealt with at EU level and which rules should still reflect national interests and traditions.

The proposals for an optional unitary copyright title and the setting up of an EU registration system have not yet attracted a lot of attention from commentators, and would deserve more in-depth analysis of the expected benefits. However the ability of such solutions to foster a truly unified EU legal framework is debatable since the creation of an optional unitary title leaves room for national discrepancies. Moreover, a European registration system would need to be [optional](#) in order to remain in line with the requirements of the Berne Convention which, as matter of principle, does not require any formalities for the granting of copyright protection.

### Stakeholders' views

Such far-reaching proposals for reforming the EU copyright framework profoundly divide stakeholders as shown by the replies to the [2014 public consultation](#). While the creation of a non-mandatory registration system at EU level has been supported by some stakeholders (e.g. service providers), others (e.g. collective management

organisations) consider that such a system would be costly and complex, and doubt its effectiveness. With regard to the creation of a unitary copyright title, some stakeholders such as authors and performers believe this would enhance legal certainty, reduce transaction and licensing costs related to the clearance of rights in the EU, and prevent rights-holders from pursuing a strategy to grant licences territory per territory in order to seek extra revenue. On the other hand, other stakeholders including the vast majority of publishers, producers and broadcasters do not support the idea of a single EU copyright title as they fear in particular this may result in less protection for rights-holders and may impact on established business models and cultural diversity in the EU.

### Parliament's position

In its 2015 resolution on [the harmonisation of certain aspects of copyright and related rights](#), the EP called on the Commission to 'study the impact of a single European Copyright Title on jobs and innovation, on the interests of authors, performers and other rightholders, and on the promotion of consumers' access to regional cultural diversity'. The EP therefore expects the upcoming proposal to be based on a comprehensive evidence-based assessment, including the costs and benefits of having a single European copyright title.

### Endnotes

- <sup>1</sup> DLA Piper, [Legal analysis of a Single Market for the Information Society](#). Study for the European Commission, 2009, p. 21.
- <sup>2</sup> See I. Stamatoudi and P. Torremans, *EU Copyright Law* (Edward Elgar, 2014), p. 46-47.
- <sup>3</sup> See A. Wood, The CJEU's ruling in the Premier League pub TV cases - the final whistle beckons: joined cases *Football Association Premier League Ltd v QC Leisure (C-403/08)* and *Murphy v Media Protection Services Ltd (C-429/08)*, *European Intellectual Property Review*, 2012, 34(3), p. 203-207.
- <sup>4</sup> See Stamatoudi and Torremans, above at p 1134.
- <sup>5</sup> See Dimitrios Doukas, The Sky is not the (only) limit: sports broadcasting without frontiers and the Court of Justice: comment on Murphy, *European Law Review*, 2012, 37(5), p. 605-626.
- <sup>6</sup> M. Van Eechoud, P. Bert Hugenholtz, S. Van Gompel, L. Guibault, N. Helberger, *Harmonizing European Copyright Law* (Wolters Kluwer, 2009), p 304-305.
- <sup>7</sup> See Stamatoudi and Torremans, above at p 1136.

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