



## **Rethinking digital copyright law for a culturally diverse, accessible, creative Europe**

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## Executive Summary

As part of the *reCreating Europe* project, one strand of work focuses on how the territorial nature of copyright and related rights can hinder the realisation of the digital single market.

The EU's primary interest in regulating intellectual property lies in furthering the establishment and functioning of the internal market. The international framework of treaties to a large degree shapes the actual space the EU and its Member States have to legislate copyright and neighbouring rights. Viewed from a strictly formal standpoint, the EU could have two sets of norms: one for 'domestic' authors, works, performers, etc. geared at optimizing the internal market; and one guaranteeing that non-EU right holders are protected as is required under the international norms that bind the EU. Of course, such a dual system would be unfeasible politically and from the perspective of good law making. The EU, in short, in pursuing its harmonization (and perhaps future unification) efforts must ensure that EU copyright and neighbouring rights law complies with international law.

Copyright and related rights remain national at heart, although various "anti-territoriality" mechanisms have been introduced in the EU copyright *acquis*, especially over the past decade. These can be grouped as limitations to the exercise of distribution rights (exhaustion doctrine); Fictive localisation of acts in one particular place ('country of origin principle'); and Mutual recognition and pan-European licensing. Furthermore, some harmonization of private international law rules relevant to copyright and neighbouring rights has taken place. It is likely that such piece-meal interventions will continue, as harmonization advances ever further and new rights are introduced. Ultimately, the EU may even choose to introduce a EU-wide copyright title, akin to what already has been done for industrial property rights (e.g. EU trademark, Community design rights). This raises the question what limits result from the international intellectual property system, which also recognizes territoriality as an essential feature of copyright and neighbouring (related) rights.

The objective of this paper is to analyze the space that the international system allows the EU to take measures overcoming territoriality problems. In order to do that, we first recapitulate what those current mechanisms are. In chapter 2 we describe the position of the EU and its Member States in the field of international intellectual property, and the key features of the main treaties. For a better understanding of the landscape, in chapter 3 we map the most important grounds of competence of the EU relevant to copyright and neighbouring rights. Chapter 4 analyzes the current 'anti-territoriality' mechanisms identified in Deliverable 4.1 against the background of the international treaties. The concluding Chapter 5 summarizes the findings and elaborates issues to consider should the EU proceed with more far-reaching measures. This work ultimately feeds into the third stage of *Recreating Europe's* work package 4 on territoriality.



# 1 Introduction

As part of the *reCreating Europe* project, one strand of work focuses on how the territorial nature of copyright and related rights can hinder the realisation of the digital single market. The project considers what policies and legal mechanisms are in place —or could be developed— to overcome barriers caused by territoriality. Authors, performers, phonogram producers, database producers, broadcasters, press publishers and film producers all acquire bundles of national rights in their respective (intellectual) productions. Despite far-reaching harmonization of especially the scope, duration and the subject-matter of national laws, rights remain restricted in their existence and exploitation to the geographic boundaries of each individual Member State. Ideas for the introduction of a EU wide copyright title, akin to what has been done for industrial property rights (e.g. trademark, design) have been advanced in academia, but so far have not been considered in depth by policy makers. Copyright and related rights remain national at heart, although various “anti-territoriality” mechanisms have been introduced in the EU copyright *acquis*, especially over the past decade. It is likely that such piece-meal interventions will continue, as harmonization advances ever further and new rights are introduced. This raises the question what limits result from the international intellectual property system, which also recognizes territoriality as an essential feature of copyright and neighbouring (related) rights.

As in the prior paper, the methods used are desk research of legal sources (treaties, laws, cases, legislative record), (academic) literature and policy documents.

## 1.1 International copyright and neighbouring rights treaties

The EU’s primary interest in regulating intellectual property lies in furthering the establishment and functioning of the internal market. The international framework of treaties to a large degree shapes the actual space the EU and its Member States must legislate copyright and neighbouring rights. Viewed from a strictly formal standpoint, the EU could have two sets of norms: one for ‘domestic’ authors, works, performers, etc. geared at optimizing the internal market; and one guaranteeing that non-EU right holders are protected as is required under the international norms that bind the EU and its Member States. Of course, such a dual system would be unfeasible politically and from the perspective of good law making. The EU, in short, in pursuing its harmonization (and unification) efforts must ensure that EU copyright and neighbouring rights law complies with international law.

That international system is contained in a network of intellectual property treaties. These are all based on the idea, first, that intellectual property rights are territorial in nature, and second, that a combination of national treatment with substantive (minimum) norms of protection is the best (or at least best possible) way to ensure global protection of intellectual property. Within the EU, the principle of non-discrimination (art. 18 TFEU) can be said to operate as a generic national treatment provision.

As we summarize below, the territorial nature of copyright and related rights can produce challenges for the realization of the internal market. During the past quarter century, several mechanisms have surfaced in EU intellectual property law to overcome these challenges. A more far-reaching mechanism would be the introduction of a unitary titles for copyright works and other protected subject-matter, i.e. rights that would cover the entire EU territory, instead of the territories of individual Member States. Both the existing mechanisms, the potential to widen their scope, and a unitary title would need to respect the obligations that the EU and its Member States have under international intellectual property treaties. The objective of this paper is to analyse the space that the international system allows the EU to take measures overcoming territoriality problems. In order to do that, we first recapitulate what those current mechanisms are. In



chapter 2 we describe the position of the EU and its Member States in the field of international intellectual property, and the key features of the main treaties. For a better understanding of the landscape, in chapter 3 we map the most important grounds of competence of the EU relevant to copyright and neighbouring rights. Chapter 4 analyses the current ‘anti-territoriality’ mechanisms against the background of the international treaties. The concluding Chapter 5 summarizes the findings and elaborates issues to consider should the EU proceed with more far-reaching measures. This work ultimately feeds into the third stage of *reCreating Europe*’s work package on territoriality.

Of note, the multilateral intellectual property treaties are not the only instruments that can limit the EU’s possibilities to address problems caused by the territorial nature of rights. Trade agreements typically contain chapters on intellectual property,<sup>1</sup> that build upon existing multilateral treaties in intellectual property and expand protection. Apart from the 1994 ‘TRIPs’ Agreement on Trade-Related Aspects of Intellectual Property Rights, trade agreements are not discussed here.

## 1.2 Mechanisms addressing territoriality in the EU acquis

In an earlier scoping paper, we sketched ‘the problem with territoriality’ in the context of the EU’s digital single market and analysed the various techniques employed by the EU legislature and courts to curb the adverse effects of territorial copyright and neighbouring rights on the internal market, especially as regards the free flow of goods and services. The territorial nature of rights may hamper international trade in goods and services and global cultural exchange as well. Interesting (and important) as that may be, the objective of this paper is to ascertain what (if any) challenges flow from the international copyright system of which the EU and its Member States are part. The challenges we are interested in are those that limit the EU’s ability to overcome adverse effects of the territorial nature of rights in its digital single market.

The mechanisms identified and analysed in the preceding paper were as follows.

**Limitations to the exercise of distribution rights (exhaustion or ‘first sale’ doctrine):** this a commonly used mechanism across the world, aimed at ensuring the tangible copies of works and other protected subject-matter can circulate freely once they have been legitimately put on the market.

**Fictive localisation of acts in one particular place (‘country of origin principle’):** a non-rebuttable presumption that a particular act which because of the territorial nature of rights might be construed as taking place across borders, is in effect by law situated in one particular country. This means that a party engaging with protected subject matter will only have to seek clearance of the right holders, or pay (statutory) remuneration, for the place where he or she is presumed to perform the act. Examples in the EU acquis are satellite broadcasting and the use of educational materials. The broadcasting to the public by (unencrypted signals via) satellite is deemed to occur only in the state where the act is initiated, or in the case of encrypted signals, where the means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent.<sup>2</sup> The use of educational materials in closed (cross-border) digital networks is deemed to take place in the Member State where the educational institution that is a beneficiary of the rule is established.

**Mutual recognition:** a solution which obliges states to recognize a certain status (or permitted act) that is in conformity with the law in a certain country (sometimes dubbed ‘country of origin’, or ‘home country’). An

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<sup>1</sup> E.g. Chapter 10 of the EU-Singapore Free trade investment agreements 2019 also contains articles on copyright and related rights.

<sup>2</sup> Art. 1(1) sub c, Satellite and Cable directive.



example in the *acquis* are orphan works: once a work or phonogram has obtained orphan work status under a national Member State's regime, this status must be recognized in other Member States.

**Pan-European licensing and access rights:** in the scoping paper these were treated together with the mutual recognition mechanism, because instances where EU law obliges Member States to ensure licenses are pan-European, or certain user rights can be exercised across borders, are typically part of a broader solution that also includes mutual recognition. For example, to ensure wider availability of works for the visually impaired, a system of mutual recognition ensures that entities that have the proper status to produce and disseminate formats accessible for the visually impaired in one country, are recognized in all Member States. They must be authorized to produce and disseminate formats for eligible persons or organizations from other Member States, without having to secure authorizations under the IP laws of those Member States. Another example of pan-European licensing concerns out-of-commerce works. If these are collectively licensed, Member States must ensure that such a license covers the entire EU. With respect to collective management of music for online use, the EU "licensing passport" system facilitates the multi-territorial licensing by collective management organizations.

In the scoping paper, particular focus was laid on music and film industries. Historically, collective rights management systems (music) and financing models (film) put a premium on maintaining geographical markets. EU policy makers have shown special interest in regulating collective management in the music sector and support the production and distribution of European film. This led us to pay special attention to territoriality in the music and film sectors. For the purposes of this paper, collective management is of less relevance because the international treaties do not address collective management.<sup>3</sup> At most there can be some discussion about the extent to which international treaties allow states to impose *mandatory* or extended collective management on right holders (see the discussion of the prohibition of formalities, below).<sup>4</sup> The "European licensing passport",<sup>5</sup> is of particular importance to multi-territorial licensing of online rights in musical works by collective management organizations (CMOs). The system laid down in Collective rights management directive<sup>6</sup> is however based on a *voluntary* (re-)aggregation of repertoire for multi-territory licensing. CMOs that do not offer multi-territorial licences themselves have the right to "tag-on" to a CMO that does, meaning that CMO can be obliged to license their rights for multi-territorial purposes on their behalf.<sup>7</sup>

The territorial nature of rights combined with the national treatment principle that is a key element of the international intellectual property framework, has implications for **private international law** rules. Such rules address three issues: which (national) courts have jurisdiction to adjudicate a dispute involving copyright or neighbouring rights, what law to apply (choice of law, conflicts law), and when and how foreign judgments may be enforced. States set their own rules of private international law, but in this area too specialized

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<sup>3</sup> Ficsor, M. (2016), 'Collective rights management from the viewpoint of international treaties with special attention to the EU 'Acquis''. In Gervais, D. (eds), *Collective management of Copyright and Related Rights*, Alphen aan den Rijn: Kluwer Law International, p. 31 ff.

<sup>4</sup> For an in depth discussion of the extent to which mandatory collective management is limited by articles 11bis Berne Convention (which allows states to set the conditions for the exercise of the author's right to authorize broadcasting of her work) and 11(3) Berne Convention (which allows states to enact reservations and conditions on the exclusive right of the author to authorize sound recordings of work that has already been recorded with the author's permission); see Ficsor 2016, pp. 57-68.

<sup>5</sup> The notion of EU licensing passport model does not appear in the final Directive 2014/26/EU. It was only used in the EC's working documents and the Explanatory Memorandum of the proposal for the Directive.

<sup>6</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84/72, 20.03.2014, pp. 72-98).

<sup>7</sup> Schwemer, S.F. (2019), *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge: Cambridge University Press, p. 152.



international treaties exist, and the EU has embarked on harmonization and increasingly unification. However, for issues involving copyright and neighbouring rights there is no international instrument that directly addresses the law applicable to the existence, ownership, transfer, scope and duration. There is however wide acceptance of application of the law of the country for which protection is claimed as the premier conflict rule.<sup>8</sup> This so-called *lex protectionis* is regarded as consistent with the territorial nature of rights and the national treatment principles enshrined in the conventions. For the applicable law to infringement, the *lex protectionis* is set down in article 8 Rome II Regulation. All courts in EU Member States must apply this Regulation in (civil) disputes over infringement of copyright and neighbouring rights. It is important to note that there are no conflicts rules laid down in EU law that concern issues around existence, ownership, duration, transfer etc.

In 2020 the International Law Association has adopted Guidelines on Intellectual Property and Private International Law.<sup>9</sup> These take inspiration from earlier initiatives, notably the principles developed by Ginsburg and Dreyfuss under the aegis of the American Law Institute and the principles developed by the European Max Planck Group on Conflict of Laws in Intellectual Property.<sup>10</sup> These principles too, take the *lex protectionis* as starting point for issues of applicable law. They also formulate various (and different) exceptions to the primacy of the *lex protectionis*, especially regarding (global) infringement and allocation of rights. Considering that private international law is a distinct area of regulation —although there is obviously some connection with international copyright treaties— we do not consider it further in this paper.

As indicated above, one additional mechanism that we do consider in this paper is a ‘**EU copyright title**’, i.e. a copyright whose territorial scope is the EU, akin to the EU trademark and the Community design right. The (dis)advantages of such a title have been tentatively discussed in policy circles (and elaborated in legal scholarship). Although it does not (yet) exist, its introduction would be a radical way to address internal market issues, compared to the piecemeal ‘anti-territoriality’ measures that are the EU legislator’s preferred approach so far. Likely, it would pose significant challenges to shape it in such a way that it respects the Berne Convention’s (and other treaties’) prohibition on formalities.

## 2 The international treaties

This chapter sets out the key principles in the most important multilateral treaties in the area of copyright and neighbouring rights. This will allow us to analyse the mechanisms used to overcome territoriality in the EU *acquis* from the perspective of international law.

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<sup>8</sup> With respect to film copyright, the special provision of art. 14bis (2) leaves it expressly to the law of the protecting country to decide on ownership of rights, but also protects the interests of film producers. Disagreement over how to deal with ownership in audiovisual works (considering the potentially large number of authors and performers involved and the producer’s interest in controlling exploitation rights) was a key reason why negotiations to include the rights of audiovisual performers in WPPT failed, and why the conclusion of what became the Beijing Treaty took many years. See Reinbothe, J., Lewinski, S. von (2015), *The WIPO Treaties on Copyright – A Commentary on the WCT, the WPPT, and the BTAP*, Oxford: Oxford University Press, chapter 9.

<sup>9</sup> ILA Committee on Intellectual Property and Private International Law (2021), ‘Annex Guidelines on Intellectual Property and Private International Law (“Kyoto Guidelines”)', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol.12, No.1, pp. 86-93.

<sup>10</sup> European Max Planck Group on Conflict of Laws in Intellectual Property (2013), Basedow, J., de Miquel Asensio, P., Dinwoodie, G., Drexler, J., Heinze, C., Kur, A., Metzger, A., Peukert, A., Torremans, P., Eechoud, M. van, *Conflict of Laws in Intellectual Property, Principles and Commentary*, Oxford: Oxford University Press; American Law Institute (2008), *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, St. Paul, MN: American Law Institute.





## 2.1 Key treaties

The pre-eminent intellectual property treaty remains the Berne Convention (of 1886, latest revision 1971 Paris Act).<sup>11</sup> Its key role has been further cemented through the 1996 WIPO Copyright Treaty (WCT),<sup>12</sup> and before that through the incorporation of its standards in the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).<sup>13</sup> In the field of neighbouring rights, key principles of international law mirror those of the Berne Convention. The Rome,<sup>14</sup> Geneva,<sup>15</sup> and Brussels Conventions,<sup>16</sup> which deal with the protection of performers, phonogram producers and broadcasters, traditionally have a much smaller number of signatories. This has changed since the conclusion of the TRIPs Agreement, and especially since the adoption of the WIPO Performances and Phonograms Treaty (WPPT)<sup>17</sup> of 1996. Of the current contracting states of the 1961 Rome Convention, the majority have joined since 1994. Further treaties have been concluded in the past decade, notably the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ('Marrakesh Treaty'), and the Beijing Treaty on Audio-visual Performances ('Beijing Treaty', or 'BAPT') of 2012, which entered into force in 2020. Negotiations on a Broadcasting treaty have been ongoing with varied intensity since the mid 1990's.

International trade law and intellectual property law have become much more entwined since the establishment of the WTO, and particularly with the conclusion of the 1994 TRIPs agreement. Its substantive and procedural norms affect both copyright and neighbouring rights.<sup>18</sup> Since 1 January 1995 the EU has been a WTO member.<sup>19</sup> In addition, all EU Member States are WTO members. As the conclusion of trade agreements is a competence of the EU, the European Commission represents the EU as well as its Member States in i.e. the WTO meetings, and negotiations.<sup>20</sup> Moreover, the EU also exercise the rights to vote for its members.<sup>21</sup>

Under the terms of EU accession, new EU Member States must become a party to the intellectual property treaties by which the EU is (indirectly) bound.<sup>22</sup> The BC has 179 signatories and is in force in all EU Member States. The Rome Convention has 96 signatories and is in force in all EU Member States, except Malta. WTO membership makes TRIPs binding on more than 150 parties, including the EU and its Member States. Moreover, both the EU itself and its individual Member States are contracting parties to the WPPT, WCT, Marrakesh and Beijing treaties.

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<sup>11</sup> Berne Convention for the Protection of Literary and Artistic Works, 1971 Paris Text, 1161 U.N.T.S. 3. For the purposes of this study we leave aside the Universal Copyright Convention because of its limited significance today.

<sup>12</sup> WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002), 2186 U.N.T.S. 121 (WCT).

<sup>13</sup> Reinbothe & Von Lewinski 2015, p. 3.

<sup>14</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961.

<sup>15</sup> Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Geneva, 1971.

<sup>16</sup> Convention Relating to the Distribution of Phonogramme-Carrying Signals Transmitted by Satellite, Brussels, 1974.

<sup>17</sup> WIPO Performances and Phonograms Treaty, Geneva, 1996. The WPPT has 109 contracting states (as of 2020), the other neighbouring rights conventions have smaller numbers: Brussels 38, Geneva 80 and Rome 96.

<sup>18</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1996) 1869 U.N.T.S. 299 (TRIPs Agreement). Goldstein, P., and Hugenholtz, P.B. (2019), *International Copyright – Principles, Law and Practice*, Oxford: Oxford University Press.

<sup>19</sup> Article XI.1. of the WTO Marrakesh Agreement. Until 30 November 2009, the European Communities were members.

<sup>20</sup> Article 133 of the EC Treaty.

<sup>21</sup> Article IX.1. of the WTO Marrakesh Agreement.

<sup>22</sup> Article 49 TFEU. See on the EU in international copyright also Goldstein & Hugenholtz 2019.





Although the EU Member States are contracting parties to the Berne Convention, the EU itself is not, because the Berne Convention is not open to intergovernmental organizations. The pre-eminent role of the BC is confirmed by the fact that TRIPs is what is termed a Berne-plus treaty. Its Article 9 obliges contracting parties to comply with the (substantive) provisions of the Berne Convention (except for those on moral rights). The TRIPs Agreement creates some additional obligations, e.g. to protect databases and software as works.

The EU is a contracting party to the WIPO Copyright Treaty. This treaty is exceptional in that it has formal legal ties to the Berne Convention. Article 1 of the WCT states that it is a “special agreement” within the meaning of Article 20 of the Paris Act of the Berne Convention.<sup>23</sup> This means it is an agreement that grants authors more protection than the BC does, and that its provisions cannot run contrary to any obligations parties have under the Berne Convention. Nothing in the WCT is to derogate from existing obligations that Contracting Parties may have between themselves as Berne members.<sup>24</sup> Although membership of the Berne Convention is not a condition for membership of the WCT, compliance “with Articles 1 to 21 and the Appendix of the Berne Convention” is required.<sup>25</sup> The compliance clause and non-derogation clause of Article 1(4) and Article 1(2) respectively, have the effect that the rights states have under the Berne Convention (e.g. to make certain reservations) can be limited by the WCT, but not the obligations to protect foreign authors.<sup>26</sup>

The WIPO Copyright Treaty obliges the contracting parties to apply articles 2 through 6 of the Berne Paris Act *mutatis mutandis* “in respect of the protection provided for in this Treaty”.<sup>27</sup> As result, the provisions of the Paris Act concerning points of attachment, national treatment, and the scope of protectible subject matter apply under the WCT. As the EU is a contracting party to the WCT, the EU is also indirectly bound by Articles 1 to 21 of the Berne Convention.

With respect to neighbouring rights treaties, like the WIPO Copyright treaty these explicitly recognize that intergovernmental organizations such as the EU can become contracting parties.<sup>28</sup> In contrast to the WCT, the neighbouring rights treaties are stand-alone treaties with no formal relationship to e.g. the Rome Convention or copyright treaties. The WPPT does not derogate from the obligations contracting states have under the Rome Convention. That being said, as we shall see in the short description of key principles, there is a strong material connection with respect to terms and concepts used, and the WPPT also refers to the Rome Convention where it concerns the definition of beneficiaries.

## 2.2 Key principles in international treaties

The notion that copyright and neighbouring rights are territorial is deeply ingrained in the international treaties, but not expressed in the texts in a straightforward manner. Rather, it is implied in the principle of national treatment and especially in the wording of this principle in the Berne Convention. The effects of territorial rights on the cross-border production, distribution and use of cultural productions have long been

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<sup>23</sup> Article 1(1) WIPO Copyright Treaty; Reinbothe & Von Lewinski 2015, p. 59.

<sup>24</sup> Article 1(2) WIPO Copyright Treaty.

<sup>25</sup> Article 1(4) WIPO Copyright Treaty; Ricketson, S, and Ginsburg, J. (2005), *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, Oxford: Oxford University Press, p. 150.

<sup>26</sup> Note however that the Agreed Statement to art. 10 WCT provides: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

<sup>27</sup> Article 3 of the WIPO Copyright Treaty; Goldstein & Hugenholtz 2019, p. 41.

<sup>28</sup> See Articles 30 (WPPT) and 21 (WCT).



problematized. As we shall see, at the international level this has not led to changes in the basic approach to regulation. The one exception perhaps is the Marrakesh treaty which specifically obliges states to allow the cross-border exchange and importation of copies in formats accessible to visually impaired persons.

### 2.2.1 National treatment

The principle of national treatment has been a corner stone of the international copyright system. It means that states must accord beneficiaries of a particular treaty the same rights and means to enforce them as they accord their own nationals (or habitual residents) under domestic law. It was a common feature of 19<sup>th</sup> century bilateral agreements that preceded the multilateral conventions. It has the advantage that it leaves states optimal freedom to shape their intellectual property laws as suits them, for all issues on which no common standards exist. To 'operationalize' who must be accorded national treatment, the treaties contain rules on beneficiaries. In the case of the Berne Convention this revolves around the notion of 'country of origin' of authors and works. See further 2.2.3 below.

In the Berne Convention article 5 sets out national treatment thus (essential elements underlined):

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

Literal 2 contains the 'formalities prohibition' (discussed below at 2.2.5) but is also regarded as confirming the territorial nature of copyright.

The WCT (art. 1) and TRIPs (art. 9) impose national treatment by reference to the national treatment clause in the Berne Convention. The Rome Convention (1961) in article 2 sets out national treatment, with different connecting factors for the rights of performers, producers of phonograms and broadcasting organisations. National treatment is defined as "the treatment accorded by the domestic law of the Contracting State in which protection is claimed" (art. 2(1) Rome Convention). The younger treaties have a more straightforward wording (Article 4 BPAT<sup>29</sup>, article 4 WPPT). Except for the Bern Convention, the obligations to accord national treatment only concern the subject-matter and rights addressed in the specific treaties.<sup>30</sup>

### 2.2.2 Substantive minimum norms and limitations

The principle of national treatment goes hand in hand with obligations for contracting states to ensure a minimum level of protection for foreign right holders. These norms typically spell out exclusive rights, of

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<sup>29</sup> Art 4(1) BAPT reads: "Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty".

<sup>30</sup> For neighbouring rights this effectively means that the TRIPs principle of most-favoured-nation does not apply to neighbouring rights that are not specifically recognized in TRIPs. See Reinbothe & Von Lewinski 2015 at 8.4.18-8.4.21.



which key ones are the right to authorize reproductions (e.g., art. 9 Berne Convention, art. 10 Rome Convention, art. 7 and 11 WPPT), the distribution right (art. 6 WCT), and rights to control and/or be remunerated for acts of communication to the public (e.g. variations in art. 11, 11ter BC, art. 8 WCT, art. 6 and 15 WPPT, art. 10-11 Beijing Treaty). The Berne Convention itself does not really address issues of ownership and exploitation of rights (transfers, etc.) nor is it much concerned with enforcement.<sup>31</sup> The latter is since the TRIPs agreement an issue that is addressed in all treaties. TRIPs itself sets out provisions aimed at ensuring states effectively enforce intellectual property rights.<sup>32</sup> The WCT, WPPT and Beijing Treaty (BAPT) all oblige states to ensure effective action against any act of infringement of rights covered by the specific treaty. More specifically, foreign right holders must have recourse to expeditious remedies to prevent infringements, and remedies must be such that they constitute a deterrent to further infringements.<sup>33</sup>

To be sure, from a system oriented primarily at protecting right holders and ensuring that rights remain adequately protected in the face of technological developments, the adaptation of intellectual property to modern digitized society has also led to a better understanding of the importance of protecting the interests of users and public interest uses. Users is an umbrella term here, it can cover various roles and interests, e.g. users as citizens, as consumers and prosumers of media and other content, or because they have a particular interest worthy of special consideration (e.g. visually impaired, students, researchers, the press). Debate around enforceable user rights (rather than just permissions) testifies to this development.<sup>34</sup> Generally however, limitations and exceptions in international instruments are not drafted as mandatory, nor as proper user rights.<sup>35</sup> One exception seems to be the right to quote (art. 10(1) Berne Convention), which provides that making quotations “shall be permissible”.<sup>36</sup> Other enumerated exceptions are typically phrased as “It shall be a matter for legislation in the countries of the Union to permit...” (or “determine”).

A key provision is the three-step-test first set out in the Berne Convention (in art. 9 on the reproduction right), but subsequently reenforced through the WCT (art. 10) and WPPT (art. 16). Its three well-known cumulative criteria are that limitations of or exceptions to rights granted to authors of literary and artistic works 1) can only be for certain special cases, 2) must not conflict with a normal exploitation of the work or protected subject-matter and 3) do not unreasonably prejudice the legitimate interests of the right holder (author, performer, etc.). Contracting parties to the WCT have committed to honouring the three-step-test for all limitations and exceptions that are allowed under the Berne Convention.<sup>37</sup> This means the three-step-test must be applied regardless of whether the permitted use concerns reproduction, distribution or communication to the public. It must also be respected for all the specific limitations that the BC enumerates, e.g. use for press purposes, in judicial proceedings.

In practice, for practical and political reasons contracting states usually make no distinction between rights guaranteed to foreign and domestic right holders. States treat them on equal footing with respect to convention rights (taking account of reciprocity clauses, see below). The substantive minimum norms and permitted exceptions and limitations under the conventions therefore have a de facto harmonizing effect.

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<sup>31</sup> Ricketson & Ginsburg 2005, at 4.05 ff.

<sup>32</sup> For a detailed analysis, see Gervais, D. J. (2012), *The TRIPS Agreement: drafting history and analysis*, London: Sweet & Maxwell/Thomson Reuters.

<sup>33</sup> Article 14 WCT, article 23 WPPT, article 20 BTAP.

<sup>34</sup> See e.g. Greenleaf, G.W., and Lindsay, D. (2018), *Public Rights: Copyright's Public Domains*, Cambridge: Cambridge University Press; Chapdelaine, P. (2016), *Copyright User Rights: Contracts and the Erosion of Property*, Oxford: Oxford University Press.

<sup>35</sup> Reinbothe & Von Lewinski 2015, argue limitations and exceptions under the treaties must be viewed as defenses, not user rights (at 18.0.29).

<sup>36</sup> See for an in-depth analysis: Aplin, T., and Bently, L. (2020), *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works*, Cambridge: Cambridge University Press.

<sup>37</sup> Reinbothe & Von Lewinski 2015, at 7.10.



### 2.2.3 Beneficiaries

To determine exactly who can claim national treatment, the Berne Convention and Rome Convention set out quite elaborate criteria for distinguishing domestic from foreign situations. This distinction is important in theory for the above-mentioned reason that States are generally not under an obligation to offer domestic productions the minimum convention rights. The country of origin or 'home country' is more important to establish where the treaties allow states to limit protection on the basis of reciprocity clauses (on these see section 2.2.4 below). Note that the term 'country of origin' as used in the context of the Berne Convention is not the same concept as that used in EU law, where it relates mainly to the freedom to provide cross-border services. Depending on the context, in EU law country of origin is sometimes used as a shorthand for rules imposing mutual recognition (e.g. a business that offers services in compliance with the law of its place of establishment must be allowed to offer these services in another member state). At other times it is also used to mean the country designated by fictive localization. See sections 4.2 and 4.3 below.

For our current purposes an in-depth analysis of the definitions is not needed. What is relevant is that the Berne Convention gives precedence to the place of first publication above the nationality or habitual residence of the author. For cinematographic works not nationality but headquarters or habitual residence of the maker is leading, for built works and artistic works that are incorporated in a built structure, the location is the country of origin. By referencing the Berne Convention, the WCT and TRIPs use the same points of attachment.

Article 2 Rome Convention sets out who can claim protection for what. To establish who is a beneficiary one must look to the feature of the (legal) person (the performer, producer, broadcasting organization) as well as to features of the subject-matter (place where performance takes place, is broadcast or first fixed). In this sense it is like the Berne Convention, where the notion of country of origin captures both author and work. For each group of beneficiaries, further points of attachment are specified. Thus, a performer who is national of contracting state A must in state B be able to claim protection that state B accords to its national performers with respect to performances taking place in B, being broadcast in B or first fixed (on e.g. a phonogram) in B.

The criteria used in the Rome Convention also apply to TRIPs and WPPT, which both refer to them. The Beijing Treaty has a much simpler definition, which focuses on the nationality or habitual residence of the audio-visual performer (Article 3 BTAP).

### 2.2.4 Reciprocity

The original Berne Convention of 1886 contained a number of reciprocity provisions which effectively allowed states to limit national treatment, but these have gradually been reduced in number.<sup>38</sup> One remnant is the freedom of states to apply reciprocity where the protection of industrial design is concerned (not protected under copyright in all states).<sup>39</sup> Another is the freedom of states to limit the duration of rights to 50 years post mortem auctoris if that is the term in the country of origin.<sup>40</sup>

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<sup>38</sup> Echoud, M.M.M. van (2003), *Choice of Law in Copyright and Related Rights*, Deventer: Kluwer Law International, see s. 3.3.2. for an overview of historic development.

<sup>39</sup> Art. 2(7) Berne Convention, which art. 3 WCT

<sup>40</sup> Art. 7(8) Berne Convention.



In the field of neighbouring rights, article 4(2) WPPT contains a material reciprocity clause, which allows states to limit national treatment of beneficiaries when their home state has made reservations. For example, states may decide that certain uses for broadcasting are free and make a reservation to that effect.<sup>41</sup> Other states do then not have to accord a right to equitable remuneration (art. 15 WPPT) for those uses to right holders from the state that has made such a reservation. Intellectual property treaties typically contain a prohibition to make reservations, except for reservations expressly allowed (e.g. art. 21 WPPT, art. 18 BTAP).

The fact that treaties allow for reciprocity, does not mean EU Member States are free to require it. This has to do with mainly with the division of competences between the EU and its members, and with the relationship between international and EU law. To what extent the intellectual property treaties have direct effect in EU Member States is a matter complicated by the two-tier legislative structure of the EU.<sup>42</sup> According to the CJEU, the norms of international treaties to which the EU is a party form part of the EU legal order and are therefore (also) binding upon EU Member States. When enacting intellectual property laws, the EU legislator must take into account its own obligations under international law but also those of its Member States.<sup>43</sup> The harmonized rules on copyright and neighbouring rights of the EU typically require Member States to provide more, but never less protection than is required by the relevant international treaties.<sup>44</sup> Moreover, Article 18 TFEU on the prohibition of discrimination within the EU on grounds of nationality, requires EU Member States to provide the same level of protection to all EU citizens and residents. This obligation also applies in situations where 'discrimination' through reciprocity requirements would not be in breach of international copyright and neighbouring rights standards.<sup>45</sup> A further restriction on the application of material (or formal) reciprocity stems from the fact the protection of intellectual property is recognized as a fundamental right under the Charter of Fundamental Rights of the EU. On this, see section 3 below and specifically the discussion of the CJEU's judgment in *RAAP*.

### 2.2.5 Prohibition of formalities

Arguably the most influential prohibition of formalities is laid down in article 5(2) Berne Convention. It has stood as an example to prohibitions in subsequent treaties. By 1886, most national copyright laws required an author to comply with certain formalities in order to obtain protection. There were however considerable differences these requirements. Some national laws required the depositing of copies of the work, while others required registration of the work or the making of a declaration (often together with some form of deposit).<sup>46</sup> Non-compliance with formalities within the prescribed time limits also had enforcement consequences; e.g. an author would not be able to enforce copyright before the courts.<sup>47</sup> The existence of such formalities was generally regarded as a major stumbling block to securing effective protection of foreign authors. The eventual wording of the formalities prohibition was strongly influenced by the tendency of courts to continue to impose reciprocity requirements (as they had done under bilateral treaties) and more generally by subjecting foreigners to additional measures, like having to pay a caution to be able to enforce copyright through courts.<sup>48</sup>

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<sup>41</sup> Generally, the intellectual property treaties explicitly exclude

<sup>42</sup> Goldstein & Hugenholtz 2019, p. 27.

<sup>43</sup> Ramalho, A. (2014), 'Conceptualising the European Union's Competence in Copyright – What can the EU do?', *International Review of Intellectual Property and Competition Law*, Vol.45, No.2, p. 186.

<sup>44</sup> Goldstein & Hugenholtz 2019, p. 60.

<sup>45</sup> Goldstein & Hugenholtz 2019, p. 60.

<sup>46</sup> Ricketson & Ginsburg 2005, p. 18.

<sup>47</sup> Dusollier, S. (2013), '(Re)introducing Formalities in Copyright as a Strategy for the Public Domain'. In Guibault, L., and Angelopoulos, C., *Open Content Licensing: From Theory to Practice*, Amsterdam: Amsterdam University Press, p. 79.

<sup>48</sup> Van Eechoud 2003.



The prohibition of formalities was introduced in 1908 with the Berlin Act. The current article 5(2) BC provides that the “[t]he enjoyment and the exercise” of rights guaranteed by the Convention in the works protected under the Convention “shall not be subject to any formality”.<sup>49</sup> Although there is some discussion about what exactly constitutes a formality, it is clear that the existence and enforcement cannot be made dependent on the making of a copyright notice, registration of the work, the deposit of copies, the payment of registration fees, or for example a requirement of domestic manufacture.<sup>50</sup> Of note, the prohibition on formalities does not apply to domestic works.<sup>51</sup> Strictly speaking, a country may impose formalities for works of which it is the country of origin (the country of first publication, or for unpublished works the country of which authors are nationals or habitual residents, etc.).<sup>52</sup>

The BC’s prohibition on formalities was incorporated into the TRIPS Agreement and the WCT, as these treaties oblige states to respect (inter alia) article 5 BC.<sup>53</sup> It has become the norm in international copyright law and resulted in a reduction of domestic formalities.<sup>54</sup> Although the BC’s prohibition of formalities applies only to international situations, most countries that are signatories to the BC, TRIPS Agreement and WCT have decided to ‘abolish formalities and grant unconditional protection for all works, regardless of their origin.’<sup>55</sup> However, some countries still require some form of deposit or registration, although not as a precondition for copyright protection.<sup>56</sup> After the US joined the BC in 1989, the US legislator made existing formalities voluntary, while providing some incentives for compliance.<sup>57</sup>

For neighbouring rights, the 1961 Rome Convention does allow the imposition of formalities. However, for rights of performers and phonogram producers the norm is now also that these cannot be made subject to formalities (art. 20 WPPT). The same goes for the rights of audio-visual performers (art. 17 BTAP). This abolition of formalities for neighbouring rights does not directly affect the Rome Convention, but because of the substantial overlap in contracting states between Rome and the later treaties, and because the WPPT and BTAP extend the rights beyond those guaranteed by the Rome Convention, the net effect is likely to be that formalities will be pushed back further. Should a Broadcast treaty come to fruition, this may perhaps also contain an explicit prohibition on formalities, although much will depend on the form protection takes.<sup>58</sup>

None of the treaties define what constitutes a “formality”. Formalities in intellectual property law can take different forms, such as registration, renewal, recordation of transfers or assignment of rights, deposit, and notice requirements.<sup>59</sup> WIPO, in its Guide to the Berne Convention, states that formalities means an administrative obligation laid down in national legislation which is a precondition for the existence of a

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<sup>49</sup> Article 4(2) Berne Convention Berlin Text 1908; Article 4(2) Berne Convention, Rome Text 1928; Article 4(2) Berne Convention, Brussels Text 1948; Article 5(2) Berne Convention, Stockholm Text 1967; Article 5(2) Berne Convention, Paris Text 1971.

<sup>50</sup> Goldstein & Hugenholtz 2019, p. 207.

<sup>51</sup> Article 5(3) BC states that “[p]rotection in the country of origin is governed by domestic law”.

<sup>52</sup> Springman, C. (2004), ‘Reform(aliz)ing Copyright’, *Stanford Law Review*, Vol.57, No.2, p. 542.

<sup>53</sup> Article 9(1) TRIPS Agreement and article 1(4) WCT.

<sup>54</sup> Van Gompel, S. (2011), *Formalities in Copyright Law – An Analysis of their History, Rationales and Possible Future*, Alphen aan den Rijn: Kluwer Law International, p. 1.

<sup>55</sup> Van Gompel 2011, p. 2.

<sup>56</sup> WIPO Standing Committee on Copyright and Related Rights (2005), ‘Survey of national legislation on voluntary registration systems for copyright and related rights’, Thirteenth Session, Geneva, 09.11.2005, SCCR/13/2.

<sup>57</sup> Dusollier 2013, p. 79; Springman 2004, p. 542.

<sup>58</sup> See article 15 of Working Document for a Treaty on the Protection of Broadcasting Organizations, SCCR/27/2 rev. (March 2014) which still sets out a prohibition, whereas in the revised text contained in document SCCR/39/7 (Oct. 2019) formalities are not mentioned.

<sup>59</sup> Van Gompel 2011, p. 17.





copyright, or for the continued existence of the right in practice.<sup>60</sup> Van Gompel defines the term copyright formalities as “formal requirements that the law imposes on authors and copyright owners for the purpose of securing or maintaining copyright protection or enforcing this right before the courts.”<sup>61</sup>

A distinction can be made between formalities with constitutive, maintenance, or declaratory effects. The latter help to establish that rights are legal and protected by law, but do not affect the existence or possibility to enforce rights as such.<sup>62</sup> There seems to be general agreement that the obligation to deposit a copy, register a work or attach a notice to a work constitutes a forbidden formality, if non-compliance is sanctioned by either a (copy)right not being recognized, or not being legally enforceable. The formalities prohibition is however not seen to cover formal requirements which determine the manner in which a transfer of copyright must take place, or which confirm the existence or extent of the transaction in question.<sup>63</sup> Also, formalities with mere declaratory effect, e.g. a deposit of a copy that produces evidentiary effect like a (rebuttable) presumption of a valid right, are not regarded as prohibited under the Berne Convention.<sup>64</sup> Collective management systems are likewise not generally affected; specific forms of mandatory collective licensing are considered to be in line with the prohibition on formalities.<sup>65</sup>

In sum, it is important to distinguish formalities based on their effects, in order to be able to assess the scope of the prohibitions. Also, although the prohibition of formalities has been a longstanding obligation that has been extended in the past thirty odd years across neighbouring rights, it has by no means become an uncontested phenomenon. Today, registration and notice systems are no longer viewed as necessarily unjustified barriers to cross-border protection.<sup>66</sup> Digital technologies make possible the development of accessible and scalable identification systems. In several sectors, unique digital identification systems have become an important tool for managing rights in works and other protected material. These are mostly private sector initiatives, which could effectively morph into de facto standards on which right holders must rely to be able to effectively monetize their rights. For the EU, any intervention in the internal market that involves the use of formalities to facilitate cross-border exploitation and enforcement of rights must respect the boundaries imposed by the intellectual property treaties. This is also the case should the EU consider the introduction of EU wide copyright and neighbouring rights titles at some point in the future.

### 3 The EU in international copyright

For a proper understanding of the way in which the international copyright and neighbouring rights treaties impact EU law, it is helpful to understand how the division of legislative competence works between the EU and its Member States. This is also relevant where it concerns the possibility that in the future, national copyrights may be either pre-empted or co-exist with an EU copyright title (and neighbouring rights titles of course). Another reason why it is worth setting out how competences are distributed, is because of its effect

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<sup>60</sup> World Intellectual Property Organization (1978), *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, Geneva: WIPO, p. 33.

<sup>61</sup> Van Gompel 2011, p. 10.

<sup>62</sup> Gompel, S. van (2014), ‘Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing’, *Berkley Technology Law Journal*, Vol.28, No.3.

<sup>63</sup> Ricketson & Ginsburg 2005, pp. 326-327; Ginsburg, J. (2010), ‘The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship’, *Colombia Journal of Law & the Arts*, Vol.33, No.3, pp. 316-317.

<sup>64</sup> Van Gompel 2014.

<sup>65</sup> Gervais, D., (2010), ‘Collective Management of Copyright: Theory and Practice in the Digital Age’. In Gervais, D., *Collective Management of copyright and related rights*, Den Haag: Kluwer Law International, p. 26.

<sup>66</sup> On different aspects of the purposes formalities can serve, see: Landes, W., and Poser, R. (2003), ‘Indefinitely Renewable Copyright’, *The University of Chicago law review*, Vol.70, No.2; Dusollier 2013; Springman 2004; Van Gompel 2011.





on the rights of third country nationals. This has to do with the fact that intellectual property rights are recognized as fundamental rights (human rights) under the EU Charter of fundamental rights.<sup>67</sup> Article 17(2) of the Charter provides that intellectual property shall be protected.

In its 2020 *RAAP*<sup>68</sup> judgment the CJEU held that the right of performers and producers of phonograms to a single equitable remuneration for (in short) broadcasting or other communication to the public, is protected under Article 17(2) Charter. The remuneration right at issue is legislated in article 8 Rental and Lending Right Directive and implemented in the laws of Member States. The Rental and Lending Right Directive is silent on its application to non-EU residents, unlike for example the Database Directive which largely limits sui generis rights to EU citizens and businesses established there. Because of the Rental and Lending Right Directive not limiting protection for non-EU persons, beneficiaries of protection under the WPPT (which in its article 15 provides for a right to remuneration) can invoke the remuneration right in EU Member States. Member states do not have the liberty to (continue to) invoke reciprocity clauses of treaties because of the distribution of competences regarding international treaties (external competence) and the effect this has on 'domestic' EU intellectual property law (internal competence). It was argued in this case that Ireland could set a requirement of reciprocity, but the CJEU said no.

How does the CJEU arrive at this result? As we have seen, Article 4(2) WPPT allows parties to restrict national treatment in response to a reservation made by another contracting party. Article 15(3) WPPT permits reservations to be made with respect to the grant of the right to equitable remuneration. The U.S. has made such a reservation: the right to remuneration exists only with respect to digital communication to the public, not for traditional radio and TV broadcasts, nor for public performance in physical venues such as bars and discos. The EU has not indicated that, in response to reservations made by the U.S. (and other countries) within the meaning of Article 15 WPPT, it is limiting the operation of the remuneration right with respect to nationals of those countries. Because the right to remuneration comes within the scope of the fundamental right to protection of intellectual property under the EU Charter, the Court held that such a limitation must be made explicit. Therefore, the principle of national treatment to which the EU and Member States have committed themselves is leading. The EU has taken sufficient regulatory action in the area of the related rights of performers and record producers (inter alia by being a contracting state of the WPPT) and has therefore acquired exclusive competence with respect to international agreements.

The RAAP judgment shows how the combination of the status of copyright and neighbouring rights as fundamental rights in the EU legal order, and the distribution of legislative competences between the EU and its Member States (both internally and externally), are directly relevant to the question how Member States must give effect to international treaties. It is to this topic we now turn.

### 3.1 Internal competences of the EU in its relation to Member States

The EU must have the necessary legislative competence, in order to legislate in a given area. The EU acquires legislative competence when the Treaties (TEU and TFEU)<sup>69</sup> confer it, in order "to attain the objectives set therein" ('the principle of conferral').<sup>70</sup> Thus, the EU can only act within the limits of the powers granted to

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<sup>67</sup> On the relationship between art. 17(2) Charter and the protection of intellectual property as property under the First protocol of the European Convention on Human Rights, see Husovec, M. (2019), 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter', *German Law Journal*, Vol. 20, No.6, pp. 840-863.

<sup>68</sup> CJEU 8 September 2020, C-265/19, ECLI:EU:C:2020:677 (*RAAP/PPI*).

<sup>69</sup> Treaty on the Functioning of the European Union (consolidated version) (*OJ* C 326/01, 26.10.2012, pp. 47-390); Treaty on European Union (consolidated version) (*OJ* C 326, 26.10.2012, pp. 13-390).

<sup>70</sup> Article 5(2) TEU.



it.<sup>71</sup> The requisite legal basis that is typically used for copyright and neighbouring rights is Article 114 TFEU (functioning of the internal market). The one provision that specifically addresses legislative competence in the field of intellectual property is the relatively new Article 118 TFEU.

Article 114 TFEU (ex Article 95 EC Treaty) grants the EU the competence to approximate national laws for the establishment and functioning of the internal market.<sup>72</sup> Legislative activity in this area is thus linked to the creation and functioning of “an area without internal frontiers in which free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties”.<sup>73</sup> This Article enables the EU to harmonize in a large number of subjects, such as cross-border trade in copyright protected goods and services, as long as there is link to the construction of the internal market.<sup>74</sup>

Subsidiary grounds on which harmonization measures in the field of copyright are based are Articles 53 and 56 TFEU, which aim to ensure the proper functioning of the internal market, in particular as regards to the facilitation of the taking-up and pursuit of activities of self-employed persons within the context of the freedom of establishment (Article 53 TFEU) and freedom to provide services (Article 56 TFEU). These two legal bases have only been used as a secondary basis, as they have usually been considered together with the establishment and functioning of the internal market (Article 114 TFEU). The EU is also tasked with the promotion of culture and cultural diversity (Article 167 TFEU, ex Article 151 TEC) but has no explicit legislative powers in this field.

In 2009, the Lisbon Reform Treaty has in Article 118 TFEU introduced a specific competence for EU-wide intellectual property rights. Article 118 TFEU states:

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 authorization, coordination and supervision arrangements.

Article 118 TFEU thus sets the stage for the creation of a unitary EU copyright title, valid in all EU Member States. Article 118 TFEU has not yet been used as a legal basis, as the current intellectual property unitary rights for Community trademark<sup>75</sup> and Community Design<sup>76</sup> were created based on Article 308 TEC. The flexibility clause continues to exist via Article 352 TFEU. It is however doubtful whether any unitary intellectual property right could be created in the future based on this clause provision, as there is now a specific provision to do so, namely Article 118 TFEU.<sup>77</sup>

It has been argued that the process and outcome of this ‘unification’ is different from the harmonization of already existing national laws, as the creation of a new EU copyright title adds ‘a new form of right to the

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<sup>71</sup> Graig, P., and De Burca, G. (2015), *EU law – Text, cases, and materials*, Oxford: Oxford University Press, p. 74.

<sup>72</sup> Ramalho 2014 a, p. 13.

<sup>73</sup> Article 26(2) TFEU.

<sup>74</sup> CJEU 5 October 2000, case C-376/98, ECLI:EU:C:2000:544 (*Tobacco Advertising I*), para. 84.

<sup>75</sup> Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark (*OJ L 349*, 31.12.1994, pp. 1-36); amended by Council Regulation (EC) No.422/2004 of 19 February 2004 (*OJ L 70*, 09.03.2004, pp. 1-7); Council Regulation (EC) no.207/2009 of 26 February 2009 (*OJ L 78*, 24.03.2009, pp. 1-42); Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European trade mark (*OJ L 154*, 16.06.2017, pp. 1-99).

<sup>76</sup> Council Regulation (EC) No.6/2002 of 12 December 2001 on Community designs (*OJ L 3*, 05.01.2002, pp.1-24); amended by Council Regulation (EC) No.1891/2006 of 18 December 2006 (*OJ L 386*, 29.12.2006, pp. 14-16).

<sup>77</sup> Ramalho 2014 b, p. 185.



legal order’ (whether or not it supersedes national copyrights). Harmonization of national copyright laws modifies existing national laws to make them more compatible.<sup>78</sup> The use of Article 118 TFEU as a legal basis is also subject to internal market considerations, as the creation of an EU-wide copyright title must serve the establishment and functioning of the internal market.<sup>79</sup> Although Article 118 TFEU does not specify the type of measures which the EU may adopt, it is generally considered that Article 118 TFEU enables the adoption of a regulation.<sup>80</sup> A regulation would be more appropriate than a directive to achieve the result that article 118 TFEU, as this legal basis is specifically tailored to “provide uniform protection of intellectual property rights throughout the Union.”<sup>81</sup>

## 3.2 External competences of the EU

The distribution of internal competences affects the external competence of the EU i.e. its power to conclude international agreements.<sup>82</sup> However, EU Member States may also have pre-existing international obligations towards third countries, some of which may be or come in conflict with EU law.<sup>83</sup> Article 351 TFEU allows EU Member States to honour previous obligations, but also mandates them to take all appropriate measures to eliminate any incompatibilities with EU law. In its legislative actions, the EU itself also seeks to respect international obligations of EU Member States under existing intellectual property treaties.

The distribution of competences in the field of intellectual property has been subject of conflict between Member States and the EU institutions. The debate on the scope of EC’s competence peaked during the negotiations on the WTO TRIPs Agreement. It must be borne in mind that at the time, EU law had not been reformed to its current state, and the level of harmonization was much more modest also in the field of copyright and neighbouring rights.<sup>84</sup>

The EU itself plays an increasingly dominant role in shaping the international intellectual property law. Article 47 TEU explicitly confirms the legal personality of the EU. The European Commission’s competence in external relations can be explicit or implicit (deriving from internal competences such as Article 114 TFEU), and it can be exclusive or shared.<sup>85</sup>

Since the Lisbon Treaty (2009), **explicit competence** in intellectual property matters can be based on Article 207 TFEU concerning the common commercial policy, i.e. the EC’s external trade policy in the broad sense. Article 3(1) TFEU expressly provides for the **exclusive competence** of the EU with regard to its common commercial policy.<sup>86</sup> These articles combined therefore, give the EU the exclusive competence to conclude

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<sup>78</sup> Ramalho, A. (2014), *The competence of the European Union in copyright lawmaking: a normative perspective of EU powers for copyright harmonization*, PHD thesis, p. 12.

<sup>79</sup> CJEU 16 April 2013, joined cases C-274/11 and 295/111, ECLI:EU:C:2013:240 (*Spain v. Council*), para. 21.

<sup>80</sup> Hugenholtz, P.B. (2013), ‘The dynamics of harmonization at the European level’. In Geiger, C. (eds), *Constructing European Intellectual Property- Achievements and New Perspectives*, Cheltenham: Edward Elgar Publishing, pp. 273-291; Kur, A., Dreier, T. (2013), *European Intellectual Property Law. Text, Cases and Materials*, Cheltenham: Edward Elgar Publishing, p. 319.

<sup>81</sup> Article 118 TFEU; Ramalho 2014 b, p. 185.

<sup>82</sup> Van Eechoud et al. 2009, p. 15.

<sup>83</sup> Van Eechoud et al. 2009, p. 16.

<sup>84</sup> The EC claimed exclusive competence to conclude TRIPs under the common commercial policy or alternatively implicit exclusive competence, some Member States disagreed. At the time little harmonization had taken place. The ECJ reasoned, that the objective of TRIPs is primarily to harmonize and strengthen the protection of intellectual property at international level and this does not relate specifically to international trade: this affects internal trade as much, if not more than, international trade. Competence was shared. See Van Eechoud et al 2009, p. 17.

<sup>85</sup> Article 3(2) and Article 4 TFEU.

<sup>86</sup> Article 3(1)(e) TFEU.



international agreements on the commercial aspects of intellectual property.<sup>87</sup> In that case, the involvement of EU Member States in the negotiation and conclusion of international agreements in the fields of common commercial policy is not required. The EC has argued for an extensive interpretation of the provisions on the common commercial policy. Originally, these were limited to a common policy for international trade in goods (e.g. import tariffs, quotas, and customs).<sup>88</sup> As the relative importance of services and intellectual property in the EU grew, so did the interest in including them in international trade negotiations.

Although the concept of commercial aspects of intellectual property has already been introduced in the Nice Treaty (2001), the legislator left its exact meaning unclear.<sup>89</sup> The CJEU in *Daiichi* held that for a rule to come within the concept, it must have a “specific link to international trade”.<sup>90</sup> Applied to copyright, it seems to be sufficient that a certain aspect of copyright is relevant for cross-border international trade, including matters where the EU has only limited internal competence (such as in the field of culture).<sup>91</sup>

A complication that can arise as result of the (exclusive) external competence, is that it does not necessarily run in parallel with the EU’s internal competence. It is possible for the EU to have external competence in a certain area where it does not have exclusive internal competence.<sup>92</sup> However, the EU’s external competence cannot affect the delimitation of competences between the EU and the Member States.<sup>93</sup> The exercise of external competence cannot be a means used to ‘circumvent’ the internal limitation of the EU competence. The implementation of obligations under international agreements often becomes a matter necessitating mutual cooperation between the EU and its Member States, if it calls for harmonization of national laws.<sup>94</sup> Consequently, international agreements concluded under the exclusive EU competence will not necessarily lead to an internal exclusive competence, i.e. to harmonize national laws. Internal competence must be assessed separately.<sup>95</sup>

Article 3(2) TFEU provides for **implicit exclusive competence** for the EU. This exists “when its [the international agreement] conclusion is provided for in a legislative act of the Union, when this is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.” Article 3(2) TFEU codifies CJEU case law. In Opinion 1/94 GATS and TRIPS, the CJEU held that:

Whenever the [EU] has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts.<sup>96</sup>

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<sup>87</sup> Müller-Graff, P.-C. (2008), ‘The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?’. In Maresceau, M., and Dashwood, A., *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, p. 190.

<sup>88</sup> Van Echoud et al. 2009, p. 17.

<sup>89</sup> Tanghe, Y. (2016), ‘The Borders of EU Competences with regard to the International Regulation of Intellectual Property Rights: Constructing a Dam to resist a River Bursting its Banks’, *Utrecht Journal of International and European Law*, Vol.32, No.82, p. 28.

<sup>90</sup> CJEU 18 July 2013, case C-414/11, ECLI:EU:C:2013:520 (*Daiichi*), para. 52.

<sup>91</sup> Ramalho 2014 b, p. 186.

<sup>92</sup> Ramalho 2014 b, p. 186.

<sup>93</sup> Article 207(6) TFEU.

<sup>94</sup> Ramalho 2014 b, p. 186.

<sup>95</sup> Ramalho 2014 b, p. 186.

<sup>96</sup> Opinion 1/94 of the CJEU of 15 November 1994, ECLI:EU:C:1994:384 (*Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*), para. 95.



Article 3(2) TFEU should be read in conjunction with Article 216 TFEU. Article 216(1) TFEU confirms the general competence of the EU to conclude international agreements. It stipulates that the EU may conclude an agreement with one or more third countries or international organizations, where the conclusion of an agreement is “provided for in a legally binding Union act”.<sup>97</sup> Article 218 TFEU provides for one single procedure for negotiations and the concluding of international agreements with third countries.<sup>98</sup> Article 3(2) specifies three instances in which the EU has **explicit exclusive external competence**.<sup>99</sup> Firstly, when the conclusion of an international agreement “is provided for in a legislative act of the Union”. The result is that Member States cannot independently conclude such an agreement and cannot adopt or approve legally binding legislation.<sup>100</sup> Secondly, the EU has the competence to conclude an international agreement when this is “necessary to enable the Union to exercise its internal competence”, regardless of the type of internal competence possessed by the EU. This means that exclusive competence to conclude an international agreement resides with the EU, where this is necessary for the exercise of internal competence, even if the international competence is only shared or even if the EU can only act in a supporting or coordinating capacity.<sup>101</sup> Thirdly, the EU shall have exclusive competence insofar as the conclusion of an international agreement “may effect common rules or alter their scope.” Furthermore, the EU will have to power to act alone when the envisaged international agreement covers an area ‘covered to a large extent’ by Union rules, because the agreement could ‘affect the Union rules’ or ‘alter their scope’ (the so-called *ERTA* principle). This requires parallelism between internal and external field because its application depends upon a degree of prior secondary legislation. As a result, in many cases where the EU has exercised its competence internally, it will be considered to have exclusive external competence.<sup>102</sup>

The combined effect of the provisions on exclusive implicit and explicit competence is that as the level of harmonization of copyright and neighbouring rights progresses, the EU attains more competence to conclude international agreements, and Member States increasingly lose their individual powers. Leaving aside problems that may arise when a EU Member States leave the EU, from the perspective of the international copyright framework it is not a particular (legal) problem that the EU takes precedence over its Member States where the conclusion of treaties is concerned. The EU and its Member States must of course respect the norms of such conventions when drafting and implementing internal law.

## 4 Analysis of EU mechanisms in context of international treaties

The primary objective of harmonization is removing barriers to the free flow of information goods and services. By approximating the laws of the Member States these laws are made more consistent and transparent to (foreign) providers of cross-border goods or services. This enhances legal certainty and creates a level playing field to a certain extent, in turn that promote the internal market. But removing disparities in national laws does not do away with the territorial effect that remains an obstacle to the establishment of a

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<sup>97</sup> Article 216(1) TFEU states that the EU can conclude international agreements “where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in legally binding Union act or is likely to affect common rules or alter their scope”.

<sup>98</sup> Barnard, C., and Peers, S. (2014), *European Union Law*, Oxford: Oxford University Press, p. 732.

<sup>99</sup> For criticism of this provision and its apparent conflation of implied and exclusive competences, see Cremona, M. (2008), ‘Defining Competence in EU External Relations: Lessons from the Treaty Reform Process’. In Dashwood, A. and Maresceau M. (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, p. 61; Graig & De Burca 2015, p. 82.

<sup>100</sup> Graig & De Burca 2015, p. 82.

<sup>101</sup> Graig & De Burca 2015, p. 82. See also CJEU 14 July 1976, case C- 3, 4, 6/76, ECLI:EU:C:1976:114 (*Kramer*), Opinion 2/94 of the CJEU 28 March 1996, ECLI:EU:C:1996:140, (*Accession of the Community to the European Human Right Convention*).

<sup>102</sup> CJEU 4 September 2014, case C-114/12, ECLI:EU:C:2014:2151 (*Convention on the Rights of Broadcasting Organizations*).



single market. In the end users will still need to clear authorization for different territories. This puts smaller parties (e.g. SME's, cultural heritage organisations and other local cultural organisations) at a disadvantage compared to multinationals.

Looking at the copyright and related rights acquis record, it is relatively rare for the European legislature to problematize the continued existence of territorial copyright and related rights as such. Rather, the main stay of legislative intervention has been to reduce divergences in national substantive norms. Over time however, a number of exceptions to territoriality have been legislated. These can be grouped based on shared characteristics.

In this section we map the different mechanisms that feature in the EU acquis against the relevant norms of the treaties. As set out in 1.2 above, we do not discuss conflicts of laws as a mechanism because firstly it is a quite separate field of law and second because there are no international instruments that specifically address conflicts of laws.

## 4.1 The exhaustion doctrine

The exhaustion or first sale doctrine is a common feature of national copyright laws. It can be very limited, i.e. only curbing the power of the owner of intellectual property rights to control distribution within one jurisdiction, or very broad, as is the case in so-called international exhaustion. Countries that recognize international exhaustion allow the subsequent distribution of copies via sale or other transfer of ownership in their country, regardless of where in the world these were first (by or with the right owner's consent) put on the market. In the EU, some states recognized this international exhaustion whereas others only recognized 'community' (EC) exhaustion because the ECJ had in a string of cases decided that the free flow of goods demands it.<sup>103</sup>

Currently, all EU member states adhere to community exhaustion because this is laid down in various directives. The exhaustion doctrine is constructed as a carve-out to distribution rights. With respect to neighbouring rights, Article 9 Rental and Lending directive sets out the distribution right for performers, phonogram producers, film producers and broadcasters. It grants the exclusive right to make available these objects, including copies thereof, to the public by sale or otherwise. For software and databases, distribution rights are laid down in the respective directives.<sup>104</sup> It was the 2001 Information Society Directive (also known as Copyright directive) that introduced a broad distribution right for authors in general. Article 4 sets out the exclusive right to authorize 'any distribution to the public by sale or otherwise' of the original or copies of a work. This right is limited by article 4(2) which provides that the "distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent."

The principle of exhaustion is also recognized in international treaties. TRIPS does not contain a general distribution right for copyright and neighbouring rights, but it does make clear that TRIPS does not affect states' powers to regulate exhaustion (art. 6 TRIPS).<sup>105</sup> Article 6(2) of the WIPO Copyright Treaty explicitly respects the freedom of contracting parties to have an exhaustion right that can apply after the first sale or other transfer of ownership of the original or a copy of the work. The author must have authorized that first

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<sup>103</sup> For a detailed discussion see Scoping paper.

<sup>104</sup> Article 4 sub c of the Computer Programs Directive and Article 5 sub c of the Database Directive ('any form of distribution to the public').

<sup>105</sup> Gervais, D., and Frankel, S. (2016), 'International Intellectual Property Rules and Parallel Importing'. In Calboli, I, and Lee, E. (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports*, Cheltenham: Edward Elgar, pp. 85-105.





sale. This freedom was the result of long and difficult negotiations, on the desirability and (territorial) scope of such a limitation, its consistency with the territorial nature of intellectual property, etc. An exhaustion rule does not qualify as a limitation that is subject to the three-step test expressed in e.g. art. 10 WCT.<sup>106</sup> It is for contracting states to decide what territorial scope they give the exhaustion doctrine: national, international, or regional as the EU has done.

One of the most challenging aspects of the exhaustion doctrine is how it is to be applied in the digital environment. In the EU there has been controversy over the question how to apply the distribution right in the digital environment. Does the distribution right only apply to protected subject matter marketed as physical copies (a print book, a CD with sound recordings), or should be interpreted broader to include at least digital copies? And if so, does this imply the exhaustion rule should equally apply? Arguably, as more and more protected subject-matter is disseminated electronically online, substituting traditional dissemination of digital copies on physical carriers (CD, DVD etc.), the significance of the exhaustion doctrine as a mechanism to promote the internal market shrinks.

In the first preliminary reference case before the CJEU on article 4 Copyright Directive, the Court looked to article 6 of the WIPO Copyright Treaty (WCT). The distribution right was after all designed to be in conformity with WCT. In this case, involving an interpretation of the distribution right with respect to the use in shops of chairs, the CJEU held<sup>107</sup> that the distribution right is limited to 'acts which entail, and only acts which entail, a transfer of the ownership of that object.' The implication is that the distribution right indeed applies only to physical copies embodying a work. And indeed, recital 29 of the Directive says that the 'question of exhaustion does not arise in the case of services and online services in particular'.

However, subsequent judgments have clouded the picture.<sup>108</sup> The *UsedSoft* and *Ranks* judgments seem to broaden the possibility of applying exhaustion to digital copies, but here the matter arose under the distribution right for software as laid down in the Computer Programmes Directive.<sup>109</sup> The Court did consider when an online delivery is essentially equivalent to the sale of a copy on a physical carrier. In the subsequent *TomKabinet* case on trade in second-hand eBooks, the CJEU again acknowledged that where an 'online transmission method is the functional equivalent of the supply of a material medium...in the light of the principle of equal treatment justifies the two methods of transmission being treated in a similar manner.' (para. 57). However, the Court considered an eBook to be not functionally and economically equivalent to a print book (because it does not deteriorate), so saw no place for applying the exhaustion rule.<sup>110</sup>

What happens when we take a closer look at the international treaties? According to the Agreed Statement to Article 6 WCT, the distribution right only applies to fixed copies that can be put into circulation as tangible objects. Here then there is a potential for conflict with EU law, if one takes the CJEU's judgment in *TomKabinet* (and its progeny) to mean that in case online transmission is indeed a functional equivalent of the supply of a material medium, exhaustion could apply in principle. The question then becomes whether

<sup>106</sup> Reinbothe & von Lewinski 2015, at 7.5.1.

<sup>107</sup> CJEU 17 April 2008, Case C-456/06, ECLI:EU:C:2008:232 (*Peek & Cloppenburg KG v Cassina SpA*).

<sup>108</sup> For a discussion see Geiregat, S. (2017), 'Digital exhaustion of copyright after CJEU judgment in *Ranks* and *Vasilevičs*', *Computer Law & Security Review*, Vol.33, No.4, pp. 521–540.

<sup>109</sup> CJEU 3 July 2012, Case C-128/11, ECLI:EU:C:2012:407 (*UsedSoft*) and CJEU 12 October 2016, Case C-166/15, ECLI:EU:C:2016:762 (*Ranks and Vasilevičs*). In the latter the Court held that: [t]he exhaustion of the distribution right... concerns the copy of the computer program itself and the accompanying user licence, and not the material medium on which that copy has, as the case may be, been first offered for sale in the European Union by the copyright holder or with his consent. It thus did not limit exhaustion to software distributed on material carriers (here: CD-ROM).

<sup>110</sup> CJEU 19 December 2019, Case C-263/18, ECLI:EU:C:2019:1111 (*TomKabinet*).





contracting states are free to apply exhaustion to what in the context of the treaties are properly construed as acts of communication to the public (making available), not acts of distribution.

This problem does not just arise with respect to copyright works. Article 12 of the WIPO Phonograms and Performances Treaty has a provision similar to the WCT, with an Agreed Statement to match. The same is true with respect to the fixations of audio-visual performances under Article 8 of the Beijing treaty. The question then becomes how to interpret these provisions and the accompanying Agreed Statements, also in light of the preparatory materials such as the records of the Diplomatic Conferences and preceding stages of negotiation. The wording of the Agreed Statements can be taken at face value. Alternatively, the Agreed statement to the WCT and WPPT can also be said to reflect the disagreement and uncertainty over just to what extent digital copies not fixed on a tangible ‘carrier’ should in the future be treated differently from those that are. In this context, it is important to note that in the mid-1990s when negotiations on TRIPS and later the WCT and WPPT took place, the (commercial) internet was young, and it was unclear to what extent digital distribution of copies would become a substitute for distribution of copies on physical carriers. For example, the availability of eBooks, software downloads and music downloads, etc. were limited compared to today, especially if one considers that these treaties have global reach.

Public international law offers a highly developed body of interpretative rules, codified in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT).<sup>111</sup> Article 31 VCLT provides a general rule of interpretation. Its first paragraph states that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. This is the cornerstone of Article 31 VCLT. Interpretations begins with the plain meaning of the text in its context, which may include reference to the presumed intention of the parties.<sup>7</sup> Based on such a view, the text of the treaty is simultaneously the starting point and the ultimate limit of interpretation.<sup>8</sup> Proper application of the principles of treaty interpretation further implies taking into account the object and purpose of the treaty.<sup>9</sup> What the relevant context is, is enumerated in Paragraphs 2 and 3 of article 31. Article 31(2) states that in addition to the text itself, including its preamble and annexes, sources of interpretation are agreements concluded by the same parties in connection with the treaty, or agreements accepted by parties. Furthermore, Article 31(3) lists additional sources of interpretation such as subsequent treaties regarding interpretation. A special meaning shall be given to a term if it is established that the parties so intended (Article 31(4) 4 VCLT). The WTO has confirmed that it is not necessary to apply other rules of international law if the application of Article 31(1) provides the answer.<sup>112</sup>

When correctly interpreted, supplementary material, including the preparatory work of the treaty, should only be considered in the circumstances described in Article 32 Vienna VCLT. That is: either to confirm the meaning resulting from the application of Article 31, or to determine the meaning when interpretation “leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable”. Supplementary material is only a second resort after the Article 31 route has been taken. The concept of limited recourse to the travaux préparatoires has been understood as a reflection of the rather textual, objective approach to interpretation in Article 31 and 32 VCLT. This does not prevent courts and other authorities from examining the travaux préparatoires. However, if the criteria of Article 31 (ordinary meaning, context and purpose) lead to a result that is neither “ambiguous or obscure” nor “manifestly absurd or unreasonable”, the preparatory works may not be used to modify this preliminary result of interpretation. Article 32 may therefore act as a barrier.

<sup>111</sup> Vienna Convention of the Law of Treaties, 23 May 1969, A/CONF.39/11/Add.2; 115 U.N.T.S. 331 (1980) (Vienna Convention).

<sup>112</sup> Frankel 2014, p. 15.



When applied to the distribution rights and connected exhaustion regime in the WCT, WPPT and BPAT, the interpretative provisions of the Vienna Convention point strongly towards a reading of these articles which precludes the possibility of “digital exhaustion”. Just the application of Article 31(1) VCLT suggests so.<sup>113</sup> This means that as a mechanism to overcome effects of territoriality and promote the free flow of services, the exhaustion doctrine is not suited because by expanding it the EU would run into the boundaries set by the treaties.

## 4.2 Fictive localisation of acts in one place ('country of origin principle')

The EU copyright *acquis* contains a number of ‘localization fictions’. These take the shape of (non-rebuttable) presumptions that a particular act which might be construed as taking place across borders, is in effect by law situated in one Member State. In the scoping paper we explained why we prefer the use of the term fictive localization instead of ‘country of origin’, a term used from time to time as shorthand in policy documents and legal literature. The term ‘country of origin’ is imprecise. It can refer to many places: to the place of use, to the place of establishment of a certain party (right holder, professional user, end consumer), to the Member State in which certain conditions have been met, etc. What is more, as we have seen above, the term country of origin has a particular meaning in international intellectual property law treaties. It serves to establish whether a person (author, performer) or subject matter (e.g. work, performance) is eligible for protection under a treaty. Sometimes it also serves to establish whether a reciprocity clause applies.

Localization fictions in EU law sometimes are stand-alone type but can also be closely tied to other rules. For example, the provisions aimed at facilitating the use of works and other subject-matter that is out of commerce combine rules on (extended) collective licensing with a localization fiction. If there is no representative collective management organisation to license with, cultural heritage institutions have the fall-back option to provide access to their collections online (for non-commercial uses only). The cultural heritage institution that relies on the fall-back option is presumed to only engage in copyright relevant acts at its place of establishment, thus enabling the multi-territorial non-commercial use of its collections (articles 8-11 Digital Single Market directive (‘DSM Directive’)).<sup>114</sup>

Undoubtedly the best-known example of a localization fiction is the ‘country of origin’ or ‘injection doctrine’ for satellite broadcasting contained in the Satellite and Cable Directive 83/93/EEC of 1993. To avoid the cumulative application of several national laws to one single act of broadcasting via (unencrypted) satellite signals which could be received in multiple countries, the fiction was introduced that an act of communication to the public by satellite occurs solely in the Member State where the broadcast signals are introduced in an uninterrupted chain of communication leading to the satellite and down towards the earth.<sup>115</sup> This localizes the copyright relevant acts for the purpose of licensing. For the broadcast of encrypted signals, there is only a ‘communication to the public’ in those territories where the “means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent” (Art. 1(1) sub c Satellite and Cable directive).

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<sup>113</sup> For an in-depth discussion of the preparatory works and also the relationship between the distribution right, exhaustion and the making available right, see Reinbothe & Von Lewinski 2015.

<sup>114</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, *OJ L 2019/130*. (‘DSM Directive’).

<sup>115</sup> Art. 1(2) sub b Satellite and Cable Directive: “The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.”



Recent is the fictive localization aimed at making it easier for broadcasters to provide so-called ancillary services for its own productions and news and current affairs programmes (e.g. catch-up tv, simultaneous webcasting). The Online broadcasting directive contains a presumption that with respect to such services, acts of communication to the public take place in the Member State where the broadcasting organisation has its principal place of establishment.<sup>116</sup>

Other more recent examples of localization fictions are those relating to the use of works for educational purposes in secure electronic networks, and access to online content services for consumers that are temporarily outside their home country. Article 5 of the DSM Directive provides that “The use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments [...] shall be deemed to occur solely in the Member State where the educational establishment is established.” (Art. 5(3)). The use must be in compliance with the provisions of national law that implement the exception. It only applies to educational institutions established in the EU and offering their education there.

The fictive localization of consumers on online content services (including audio-visual ones) is meant to ensure that service providers can meet their obligation to ensure that (paid) subscribers that are normally resident in a EU Member State, retain access to the service when they are temporarily in another Member State (Article 3 Online content portability Regulation).<sup>117</sup> The consumer who is temporarily present in another Member State, is presumed to access the content in her normal country of residence (Article 4).

None of the international treaties contain fictive localizations of the type employed in EU law. In the earlier stages of the negotiations on a Broadcast Treaty, the ‘injection’ doctrine has been discussed in various shapes and sizes. However, it does not feature in the more recent proposals that the WIPO secretariat has prepared.<sup>118</sup> The extent to which catch-up and other ancillary services will be protected under a new Broadcast treaty is a matter still debated at WIPO (as is the question what the nature of protection is).<sup>119</sup>

From the perspective of international treaties, the key question in situations where EU law uses the mechanism of fictive localization, is whether by doing so right holders —and in particular those of third countries— will still have the protection that the EU and its Member States are bound to provide under international law. Because the instances of fictive localization go hand in hand with harmonized norms, and because fictive localization always points to a place in the EU and not outside it, there seems to be no particular problem. That is, as long as the harmonized norms are in keeping with the obligations of the treaties.

### 4.3 Mutual recognition

Mutual recognition as used here covers situations where a person/entity or product acquires a certain status in one country, which must then be recognized in other states. In the EU *acquis* it is still a rarity for copyright

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<sup>116</sup> Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (OJ L 130, 17.05.2019, pp. 82-91).

<sup>117</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 2017168 (*‘Online content portability Regulation’*).

<sup>118</sup> See e.g. WIPO Standing Committee on Copyright and Related Rights (2019), ‘Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted and Other Issues’, Thirty-Ninth Session, Geneva, SCCR/39/7, and before that WIPO Standing Committee on Copyright and Related Rights (2014), ‘Working Document for a Treaty on the Protection of Broadcasting Organizations’, Twenty-seventh Session, Geneva, SCCR/27/2 rev.

<sup>119</sup> See WIPO Secretariat SCCR/39/7. The text uses “equivalent deferred transmissions” rather than “ancillary services”.



and neighbouring rights. Mutual recognition tends to be combined with either obligations for Member States to allow pan-European licensing, or cross border access rights.

Mutual recognition is a mechanism absent from the international instruments, with the exception of the recent Marrakesh treaty which could be characterized as mandating a form of mutual recognition. The Marrakesh treaty is different from its predecessor treaties in that it does not contain a principle of national treatment but obliges contracting states to adapt their internal legislation so that it contains limitations aimed at making available works for the visually impaired. To comply the EU have enacted a Regulation<sup>120</sup> and a Directive.<sup>121</sup> In conformity with the Marrakesh Treaty, the Directive creates a system of authorized institutions ('entities') that are allowed to reproduce and disseminate works in a format that is accessible for the blind and visually impaired. Member states must ensure that eligible institutions and persons from other EU Member States have access to accessible formats created by authorized entities. Local entities must also be allowed to produce and disseminate accessible formats for eligible persons or organizations from other Member States, without having to secure additional permissions (i.e. they may provide cross-border services).

The Regulation grants authorized entities the powers to import and export accessible format copies to and from third countries. These copies must originate from authorized entities in third states; hence this can be regarded as an (indirect) form of mutual recognition.

An example of mutual recognition that has no equivalent in international intellectual property concerns orphan works. These are works (and other subject-matter) that are still protected, but of which the right holders are unknown or very difficult to trace. The 2012 Directive<sup>122</sup> seeks to improve possibilities to access and use such works. The directive sets up a system whereby (public) libraries, public services broadcast archives and similar institutions parties wanting to use orphan works for their public interest missions, can go through a process that culminates in a work obtaining 'orphan work' status. The outcome —and details of the search— must be registered in a publicly accessible online database (hosted by the OHIM, the EU agency which also operates EU intellectual property registries for e.g. trademarks). Once a work or phonogram has obtained orphan work status under a national Member State's regime, this status must be recognized in other Member States. This system of mutual recognition means that the work or phonogram may be used and accessed in all Member States (Article 4 Orphan works directive).<sup>123</sup>

From the perspective of international treaties, what is true for fictive localization also applies to mutual recognition mechanisms. Right holders must be ensured of the level of protection required by the treaties. Because the principle of mutual recognition goes hand in hand with harmonized norms, and only applies to EU based persons (on the side of users), there seems to be no particular problem. It is conceivable that for

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<sup>120</sup> Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (*OJ* 2017 L 242, 20.09.2017, pp. 1-5).

<sup>121</sup> Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ* L 242, 20.09.2017, pp. 6-13); Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, WIPO 2014.

<sup>122</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan work (*OJ* L 299, 27.10.2012, pp. 5-12).

<sup>123</sup> Art. 4 "A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States."..'



special cases, the mutual recognition mechanism will in the future achieve wider application (e.g. for orphan works which is also a topic on the WIPO agenda).

## 5 Conclusions

In this paper we have set out the various ways in which EU copyright and neighbouring rights law seeks to overcome adverse effects of the territorial nature of rights, and put this in the perspective of the international treaties that bind the EU and its Member States. The territorial nature of intellectual property rights is a fundamental tenet on which these treaties are based. From the discussion of the key principles of the treaties (beneficiaries, national treatment, minimum rights, formalities prohibition, reciprocity) it surfaces however that there is ample room for “anti-territoriality” measures in the EU, as long as their territorial scope is limited to the EU geographically speaking. Furthermore, such measures must also respect the minimum protection guaranteed by the treaties. Effectively this means that if anti-territoriality measures are embedded in a system of harmonized norms, and the latter are in keeping with the obligations of the treaties, no particular problems need arise.

There is one area where we do identify potential conflict. With respect to the ‘anti-territoriality’ mechanisms found in the EU copyright and neighbouring rights acquis, by far the most controversial issue concerns the possibility that the online transmission of digital copies can in certain circumstances be treated as an act of distribution to which exhaustion applies. The distribution rights set out in the WCT, WPPT and BAPT cannot serve as a basis for the introduction of exhaustion type provisions for digital copies that are functionally equivalent but delivered digitally (notably as download). This is because clearly the distribution rights are restricted to tangible copies. Although there is some unclarity over the exact application of the exhaustion doctrine to digital content under current (internal) EU law, following the *TomKabinet* and earlier judgments of the court of justice, ‘digital exhaustion’ will only be accepted in exceptional circumstances. Going forward, it would seem unlikely that the Court of Justice can develop a full-fledged functional equivalence doctrine when interpreting the distribution right under the Information Society Directive. This would not be in conformity with exhaustion as defined in international treaties.

Another question is just how extensively digital copies (e.g. downloads) will push out tangible copies as the premier method of distribution of certain works and subject-matter. As was pointed out, downloads were not yet common when the WCT and WPPT were concluded but have subsequently increasingly become a substitute for tangible copies. On the other hand, there has been a strong development towards streaming content in several industries like music, video and gaming, as well as in various parts of the software industries (software as a service). This makes digital copies of less importance. So, to a degree the problem has fewer practical implications in those sectors.

The analysis of the relationship between the EU and its Member States where it concerns the external competence to conclude international agreements shows that as harmonization progresses and intellectual property treaties multiply, individual Member States can no longer make independent decisions. The exclusive competence of the EU has by now largely replaced shared competences. One particularly important consequence is that Member States are less able to maintain (or make) reciprocity requirements which the intellectual property treaties allow when other states make reservations. This is connected to the changing status of intellectual property rights in the EU legal order: as fundamental rights protected under the EU’s Charter of fundamental rights, nationals of third countries can in principle invoke protection. This is only different if the EU legislator explicitly activates reciprocity requirements under the intellectual property treaties.



Also, as part of this research, we have sketched the boundaries posed by the international treaties where it concerns the prohibition to make the existence and exercise of copyright and neighbouring rights subject to formalities. This will prove to be of particular relevance to the question of the shape that possible uniform community wide titles for copyrights and the various neighbouring rights might take. This is a topic that will be taken up in the next stage of the *reCreating Europe's* strand on territoriality.





## 6 References

- American Law Institute (2008), *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, St. Paul, MN: American Law Institute.
- Aplin, T., and Bently, L. (2020), *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works*, Cambridge: Cambridge University Press.
- Barnard, C., and Peers, S. (2014), *European Union Law*, Oxford: Oxford University Press.
- Chapdelaine, P. (2016), *Copyright User Rights: Contracts and the Erosion of Property*, Oxford: Oxford University Press.
- Cremona, M. (2008), 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process'. In Dashwood, A. and Maresceau M. (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press.
- Dusollier, S. (2013), '(Re)introducing Formalities in Copyright as a Strategy for the Public Domain'. In Guibault, L., and Angelopoulos, C., *Open Content Licensing: From Theory to Practice*, Amsterdam: Amsterdam University Press, pp. 75-105.
- Eechoud, M.M.M. van (2003), *Choice of Law in Copyright and Related Rights*, Deventer: Kluwer Law International.
- Eechoud, M. M. M. van, & Hugenholtz, P.B. (eds) (2009), *Harmonizing European copyright law: The challenges of better lawmaking*, Alphen aan den Rijn: Kluwer Law International.
- Eechoud, M.M.M. van, & Hugenholtz, P.B. (eds) (2009), 'The last frontier: Territoriality'. In Eechoud, M.M.M. van & Hugenholtz, P.B. (eds), *Harmonizing European Copyright Law: the challenges of better lawmaking*, Alphen aan den Rijn: Kluwer Law International.
- European Max Planck Group on Conflict of Laws in Intellectual Property (2013), Basedow, J., de Miquel Asensio, P., Dinwoodie, G., Drexler, J., Heinze, C., Kur, A., Metzger, A., Peukert, A., Torremans, P., Eechoud, M. van, *Conflict of Laws in Intellectual Property, Principles and Commentary*, Oxford: Oxford University Press.
- Ficsor, M (2016), 'Collective rights management from the viewpoint of international treaties with special attention to the EU 'Acquis''. In Gervais, D. (eds), *Collective management of Copyright and Related Rights*, Alphen aan den Rijn: Kluwer Law International, pp. 31-77.
- Geiregat, S. (2017), 'Digital exhaustion of copyright after CJEU judgment in Ranks and Vasiļevičs', *Computer Law & Security Review*, Vol.33, No.4, pp. 521–540.
- Gervais, D., (2010), 'Collective Management of Copyright: Theory and Practice in the Digital Age'. In Gervais, D., *Collective Management of copyright and related rights*, Den Haag: Kluwer Law International, pp. 1-28.
- Gervais, D. J. (2012), *The TRIPS Agreement: drafting history and analysis*, London: Sweet & Maxwell/Thomson Reuters.
- Gervais, D., and Frankel, S. (2016), 'International Intellectual Property Rules and Parallel Importing'. In Calboli, I., and Lee, E. (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports*, Cheltenham: Edward Elgar, pp. 85-105.
- Ginsburg, J. (2010), 'The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship', *Colombia Journal of Law & the Arts*, Vol.33, No.3, pp. 311-348.





- Graig, P., and De Burca, G. (2015), *EU law – Text, cases, and materials*, Oxford: Oxford University Press.
- Greenleaf, G.W., and Lindsay, D. (2018), *Public Rights: Copyright's Public Domains*, Cambridge: Cambridge University Press.
- Goldstein, P., and Hugenholtz, P.B. (2019), *International Copyright – Principles, Law and Practice*, Oxford: Oxford University Press.
- Gompel, S. van (2011), *Formalities in Copyright Law – An Analysis of their History, Rationales and Possible Future*, Alphen aan den Rijn: Kluwer Law International.
- Gompel, S. van (2014), 'Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing', *Berkley Technology Law Journal*, Vol.28, No.3, pp. 1425-1458.
- Hugenholtz, P.B. (2013), 'The dynamics of harmonization at the European level'. In Geiger, C. (eds), *Constructing European Intellectual Property- Achievements and New Perspectives*, Cheltenham: Edward Elgar Publishing, pp. 273-291.
- Husovec, M. (2019), 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter', *German Law Journal*, Vol. 20, No.6, pp. 840-863.
- ILA Committee on Intellectual Property and Private International Law (2021), 'Annex Guidelines on Intellectual Property and Private International Law ("Kyoto Guidelines")', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol.12, No.1, pp. 86-93.
- Kur, A., and Dreier, T. (2013), *European Intellectual Property Law. Text, Cases and Materials*, Cheltenham: Edward Elgar Publishing.
- Landes, W., and Poser, R. (2003), 'Indefinitely Renewable Copyright', *The University of Chicago law review*, Vol.70, No.2, pp. 471-518.
- Müller-Graff, P.-C. (2008), 'The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?'. In Maresceau, M., and Dashwood, A., *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press.
- Ramalho, A. (2014), *The competence of the European Union in copyright lawmaking: a normative perspective of EU powers for copyright harmonization*, PHD thesis (Ramalho 2014 a).
- Ramalho, A. (2014), 'Conceptualising the European Union's Competence in Copyright – What can the EU do?', *International Review of Intellectual Property and Competition Law*, Vol.45, No.2, pp. 178-200 (Ramalho 2014 b).
- Reinbothe, J., Lewinski, S. von (2015), *The WIPO Treaties on Copyright – A Commentary on the WCT, the WPPT, and the BTAP*, Oxford: Oxford University Press.
- Ricketson, S, and Ginsburg, J. (2005), *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, Oxford: Oxford University Press.
- Schwemer, S.F. (2019), *Licensing and access to content in the European Union: regulation between copyright and competition law*, Cambridge: Cambridge University Press, pp. 121-217.
- Springman, C. (2004), 'Reform(aliz)ing Copyright', *Stanford Law Review*, Vol.57, No.2, pp. 485-569.
- Tanghe, Y. (2016), 'The Borders of EU Competences with regard to the International Regulation of Intellectual Property Rights: Constructing a Dam to resist a River Bursting its Banks', *Utrecht Journal of International and European Law*, Vol.32, No.82, pp. 27-43.



- WIPO Standing Committee on Copyright and Related Rights (2005), 'Survey of national legislation on voluntary registration systems for copyright and related rights', Thirteenth Session, Geneva, 09.11.2005, SCCR/13/2.
- WIPO Standing Committee on Copyright and Related Rights (2014), 'Working Document for a Treaty on the Protection of Broadcasting Organizations', Twenty-seventh Session, Geneva, SCCR/27/2 rev.
- WIPO Standing Committee on Copyright and Related Rights (2019), 'Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted and Other Issues', Thirty-Ninth Session, Geneva, SCCR/39/7.
- World Intellectual Property Organization (1978), *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, Geneva: WIPO.

## Short references to (draft) legislation and cases

- CJEU 14 July 1976, case C- 3, 4, 6/76, ECLI:EU:C:1976:114 (*Kramer*).
- CJEU 5 October 2000, C-376/98, ECLI:EU:C:2000:544 (*Tobacco Advertising I*).
- CJEU 17 April 2008, C-456/06, ECLI:EU:C:2008:232 (*Peek & Cloppenburg KG V Cassina spA*).
- CJEU 3 July 2012, C-128/11, ECLI:EU:C:2012:407 (*UsedSoft*).
- CJEU 16 April 2013, joined cases C-274/11 and 295/111, ECLI:EU:C:2013:240 (*Spain v. Council*).
- CJEU 18 July 2013, C-414/11, ECLI:EU:C:2013:520 (*Daiichi*).
- CJEU 4 September 2014, C-114/12, ECLI:EU:C:2014:2151 (*Convention on the Rights of Broadcasting Organizations*).
- CJEU 12 October 2016, C-166/15, ECLI:EU:C:2016:762 (*Ranks and Vasilevičs*).
- CJEU 19 December 2019, C-263/18, ECLI:EU:C:2019:1111 (*TomKabinet*).
- CJEU 8 September 2020, C-265/19, ECLI:EU:C:2020:677 (*RAAP/PPI*).
- Opinion 1/94 of the CJEU of 15 November 1994, ECLI:EU:C:1994:384 (*Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*).
- Opinion 2/94 of the CJEU 28 March 1996, ECLI:EU:C:1996:140, (*Accession of the Community to the European Human Right Convention*).

## Legislation

### Berne Convention

Berne Convention for the Protection of Literary and Artistic Works, 1971 Paris Text, 1161 U.N.T.S. 3.

### Brussels Convention

Convention Relating to the Distribution of Phonogramme-Carrying Singals Transmitted by Satellite, Brussels, 1974.

### BTAP ('Beijing Treaty')

Beijing Treaty on Audiovisual Performances (adopted 24 June 2012, entered into force 28 April 2020).

### Collective management directive

Directive (EU) 2014/26 of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (*OJ L 84/72*, 20.03.2014, pp.72-98).



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**Community Designs regulation**

Council Regulation (EC) No.6/2002 of 12 December 2001 on Community designs (*OJ L 3*, 05.01.2002, pp.1-24).

Council Regulation (EC) No.1891/2006 of 18 December 2006 amending Regulation (EC) No. 6/2002 and (EC) No. 40/94 to give effect to the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs (*OJ L 386* 29.12.2006, pp. 14-16).

**Computer programs directive**

Directive (EC) 2009/24 of the European Parliament and of the Council of 23 April 2009 on the legal protection of computers programs (*OJ L 111*, 05.05.2009, pp. 16-22).

**Database directive**

Directive (EC) 96/9 of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (*OJ L 77*, 27.03.1996, pp. 20-28).

**DSM directive**

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (*OJ L 130*, 17.05.2019, pp. 92-125).

**Geneva Convention**

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Geneva, 1971.

**Information Society directive ('Copyright directive')**

Directive (EC) 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ 2001 L 167/10*, 22.06.2001, pp. 10-19).

**Online broadcasting directive**

Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (*OJ L 130*, 17.05.2019, pp. 82-91).

**Online content portability regulation**

Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (*OL 168*, 30.06.2017, pp. 1-11).

**Orphan works directive**

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan work (*OJ L 299*, 27.10.2012, pp. 5-12).

**Rental and Lending Rights directive**

Directive (EC) 2006/115 of 12 December 2006 on rental right and lending right and on certain rights related to to copyright in the field of intellectual property (*OJ L 376*, 27.12.2006, pp. 28-35).

**Marrakesh Visually Impaired directive**

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Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ L 242*, 20.09.2017, pp. 6-13).

### **Accessible format copies Regulation**

Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (*OJ L 242*, 20.09.2017, pp. 1-5).

### **Rome II regulation**

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (*OJ L 199*, 31.07.2007, pp. 40-49).

### **Rome Convention**

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961.

### **Satellite and Cable directive 1993**

Council Directive (EEC) 93/83 of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (*OJ L 248*, 06.10.1993, pp. 15-21).

### **Software directive**

Directive (EC) 2009/24 of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (*OJ L 111*, 05.05.2009, pp. 16-22).

### **TEU**

Treaty on European Union (consolidated version) (*OJ C 326*, 26.10.2012, pp. 13-390).

### **TFEU**

Treaty on the Functioning of the European Union (consolidated version) (*OJ C 326*, 26.10.2012, pp. 47-390).

### **Trade mark regulation**

Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark (*OJ L 349*, 31.12.1994, pp.1-36).

Council Regulation (EC) No.422/2004 of 19 February 2004 amending Regulation (EC) No. 40/94 on the Community trade mark (*OJ L 70*, 09.03.2004, pp.1-7).

Council Regulation (EC) no.207/2009 of 26 February 2009 on the Community trade mark (*OJ L 78*, 24.03.2009, pp.1-42).

Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European trade mark (*OJ L 154*, 16.06.2017, pp. 1-99).

### **TRIPS Agreement**



Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1996) 1869 U.N.T.S. 299.

### **Vienna Convention**

Vienna Convention of the Law of Treaties, 23 May 1969, A/CONF.39/11/Add.2; 115 U.N.T.S. 331 (1980).

### **WIPO Marrakesh Treaty**

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, WIPO 2014.

### **WPPT**

WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 2002)

### **WCT**

WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002), 2186 U.N.T.S. 121.

