



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

Grant Agreement No. 870626

Deliverable Title	D4.4 Territoriality Roundtables (combined report)
Deliverable Lead:	UvA
Partner(s) involved:	-
Related Work Package:	WP4 – Creative Industries
Related Task/Subtask:	Task 4.1 – Territorial rights in the DSM
Main Author(s):	Mireille van Eechoud (UvA)
Dissemination Level:	public
Due Delivery Date:	31.04.2022
Actual Delivery:	22.4.2022 (First roundtable) / 09.05.2022 (report 1st roundtable, not public) 26.8.2022 (Second roundtable) / 14.12.2022 (combined report)
Project ID	870626
Instrument:	H2020-SC6-GOVERNANCE-2019
Start Date of Project:	01.01.2020
Duration:	36 months

Version history table			
Version	Date	Modification reason	Modifier(s)
v.01	30/11/2022	First draft	Mireille van Eechoud
v.02	14/12/2022	Accommodated suggested actions from the QEs	Mireille van Eechoud

Legal Disclaimer

The information in this document is provided “as is”, and no guarantee or warranty is given that the information is fit for any particular purpose. The above referenced consortium members shall have no liability for damages of any kind including without limitation direct, special, indirect, or consequential damages that may result from the use of these materials subject to any liability which is mandatory due to applicable law. © 2022 by Authors.

Table of contents

1	Introduction First Roundtable	1
2	Approach of the first roundtable	2
3	Outcomes	2
3.1	Statement I: Uniform titles are good news for creators and performers	2
3.2	Statement II: Uniform titles will change business models in the creative industries and facilitate new ones	3
3.3	Statement III: New related rights should be legislated as unitary rights by default	3
3.4	Summing up	4
4	Approach of the Second Roundtable	5
5	Outcomes	5
5.1	Session I: Revisit & expand upon the findings of the first roundtable	5
5.2	2nd session: A unitary title – fundamental rights aspects	6
5.3	3rd session: Moving forward	8
6	Participants	11

1 Introduction First Roundtable

After a round of introductions, the roundtable started with a short explanation of the work done in the task on territoriality so far. This strand of the project queries how the territorial nature of copyright and related rights can hinder the realisation of the digital single market. While for e.g., trademarks and designs the EU has legislated community wide rights that extend across borders of individual Member States, copyright and related rights remain national at heart. Authors, performers, phonogram producers, database producers and other related rights owners all acquire bundles of national rights in their respective (intellectual) productions. Despite far-reaching harmonization of the subject-matter, scope and duration of national rights, these rights remain restricted in their existence and exploitation to the geographic boundaries of the individual Member States under whose laws they arise, i.e., they are territorial.

In the first stage of the project, a ‘scoping paper’ was produced (D.4.1) It sets out ‘the problem with territoriality’ in the context of the digital single market, analyses the friction with the idea of a single market, and categorizes the various techniques employed by the legislature and courts to curb its adverse effects. There are different mechanisms currently used to overcome certain drawbacks of territorial rights in a single European market. They are found in various instruments and 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')
- Mutual recognition coupled with pan-European licensing
- Harmonization of private international law rules, notably Rome II Regulation rules on applicable law to infringement of intellectual property (although this is a second order solution, and a separate field of law aimed at the resolution of conflicts of laws in international cases).

After the introduction of the exhaustion doctrine (already known in Member States’ laws) by the Court of Justice in the 1970s, it was not until harmonization started to gain momentum in the 1990s that further ‘anti-territoriality mechanisms’ were introduced. Most of these instances consist of fictive localization: the liability of (professional) users for copyright claims arising in different Member States is reduced by the introduction of a presumption that the user only performs relevant acts in one place, e.g., the place of establishment. The earliest and perhaps best-known instance of fictive localization is in the Satellite and Cable directive of 1993. In the past few years, fictive localization has been used for example for educational institutions engaging in digital teaching and distance learning across borders (the Digital Single Market directive), for consumers of (audio-visual and other content) services temporarily abroad (Online content services directive), and in the context of so-called ancillary broadcasts (Online broadcasting directive). Viewed over time, there is a rise in the number of these solutions, which tend to have a narrowly defined scope of application. Taken together, it creates a more complicated legislative landscape.

The territorial organization of copyright and related rights as such is not addressed by policy makers at the EU level. Harmonization of substantive law and enforcement continues at pace, for 30 years now, but the territorial character of rights seems like the proverbial elephant in the room. This is why it's an interesting time to ask the question whether the introduction of EU wide titles for copyrights and related rights should now be seriously considered. Almost 20 years ago, the so-called Wittem group of copyright scholars have drafted a European Copyright Code, but the idea of creating a uniform title for copyright (or related rights) has since not been taken up. In the context of the *ReCreating Europe* project, we seek to analyse what the advantages and disadvantages are of having a uniform title (the topic of Roundtable 1) and create a first inventory of what issues would need solving should the legislator consider the introduction of EU titles.

2 Approach of the first roundtable

To maximize discussion, 20 participants were divided in groups of around 5, and discussed three statements. Each time, a statement was first discussed in groups, whereby each group designated a rapporteur who presented the major findings & points of discussion in a plenary session moderated by the chair, who was assisted by a technical co-host. The roundtable then moved on to the next statement, repeating the process. Participants were aware that the report would not present their individual contributions, this was done to maximize a free exchange of ideas. A draft report was circulated to participants, providing opportunity for further input.

3 Outcomes

3.1 Statement I: Uniform titles are good news for creators and performers

There was general agreement that it is important to distinguish between different groups of creators and performers (real persons, engaged in various creative types of work), and to distinguish these from producers/investors. Creators of copyright works generally seem to have a weak bargaining position and are active in many different kinds of industries. Granting authors a uniform EU wide copyright may not necessarily benefit them, especially not when individual authors do not have the proper legal knowledge needed to safeguard their own interests. With respect to performers, in some member states they are more unionized. Also, the interests of performers might be more aligned with e.g., phonogram producers where exploitation is concerned; transfers of rights mean performers will mostly have remuneration claims. It is important to take into account what is in the interest of creators, what they are primarily interested in? Are they more interested in maintaining control over exploitation rights, or in remuneration, or exposure (attracting followers/audiences)?

What the effect of unitary titles would be also depends on the extent to which creators & performers transfer (all) their rights for the entire EU, and whether licensing at the local level would still be possible. Often now, creators already transfer rights for all territories, so from their perspective it might not feel like they are dealing with different national titles; a uniform title would not change this.

Considering that owners are in principle free to decide how to exploit their IPRs, licensing locally (language based, geographically) would still be possible, even if a transfer of the rights would have to be for the entire EU, as is the case with EU trademarks. A point raised by various groups was that one cannot have a uniform copyright title without also addressing aspects of copyright contract law; the importance of the latter would only grow. So further harmonization or possibly unification would be needed in that area. In addition, of course, there are various aspects of copyright law that have not been (fully) harmonized, e.g., initial ownership, transfer, limitations & exceptions, so unification of substantive law would also have to be completed. In the area of neighbouring rights, diversity across Member States was considered to be even greater than in copyright law.

A key advantage of unitary titles was considered to be the reduction of costs it could bring. It is a fair presumption that a unitary copyright would reduce transaction costs involved in licensing and distribution of works which would be good for all involved. At the level of law-making, costs for member States and the EU would also be reduced. Currently with each step in the harmonization process come the (social) costs of

lobbying at Member State level and in Brussels, the cost of implementation at local level, and costs associated with litigation caused by legal uncertainties. Possibly enforcement costs would go down as well.

3.2 Statement II: Uniform titles will change business models in the creative industries and facilitate new ones

The perception is that all previous adaptations of copyright to digitization and the single market have led to new business models and new forms of intermediaries. But these have not immediately resulted in better outcomes for e.g., creators in the music or film industries. The question is what changes a unitary title would bring for creators and performers, especially from counties/regions with smaller audiences for local works?

To make sure a uniform title would actually contribute to better distribution of the value of IP to creators, it seems one would need institutions that are much stronger on a European level, or regional level, although competition law concerns would need addressing. Perhaps having collective organizations at the European level ('unitary institutions') for the management of rights would help balance market powers? It may also be of value to have these institutions stronger at a regional level, at least for the creators and performers, to enhance their negotiating power.

A distinct issue that was raised by various groups concerns cultural diversity. How would unitary titles affect the possibility of copyright law to serve as an instrument of cultural policy, in particular, would a uniform title negatively affect copyright as an instrument of promoting cultural diversity? This question arises because it might be the case that unitary titles lead to bigger (EU wide) playing fields, which may favour bigger players. Possibly, there will be fewer stakeholders able to provide for culturally diverse production and access to works. The extent to which unitary titles would hamper price differentiation between countries / local markets is also relevant here. It is also worth considering how large one wants the role of copyright law to be in promoting cultural diversity: is it a prescriptive instrument, or is its role more to facilitate?

It was also raised that one would need economist / business studies input to predict how models would change if there were to be unitary titles. Arguably, the impact on creative industries will be different for different sectors. Music, software, film, games etc. can be consumed throughout EU, but text-based works perhaps less due to cultural preferences and language. If a unitary title would play into the hand of big firms, the question is what policies to develop to ensure SMEs have a role to play. One advantage of a unitary title could be that for new entrants into the EU market, the transaction costs are lower because they do not have to license for multiple territories under multiple national laws. But then again, if a unitary title would make it less attractive to seek permission to use IP locally (in parts of the EU), it could have a detrimental effect.

For unitary trademarks, designs, etc. there are specialized community courts. We should think about the effect of having unitary copyright and related rights, without having unitary courts to adjudicate. What will this mean for business and the development of new business models? The impact may be negative because of legal uncertainty around enforcement and rights clearance. So how unitary rights can be effectively enforced and disputes adjudicated is a major factor to consider.

3.3 Statement III: New related rights should be legislated as unitary rights by default

The discussion around new related rights was marked by general reservations about the necessity and desirability to have yet more related rights to begin with. With respect to uniformity, it was widely observed that even a recent right such as the press publishers right has led to very diverse implementation. As a

consequence, users need to license at the national level in multiple jurisdictions, where in some Member States the right is fashioned as a remuneration right. From that perspective, having unitary rights would probably work better.

More generally, in areas where there are new businesses and stakeholders who do not already have distribution models or business models based on country-by-country exploitation, the introduction of unitary rights can help lower transaction costs. On the other hand, in theory having room for national rights means there is some space for regulatory experiment, discovering what models work best for new rights. It will also depend very much on what the new right protects whether it makes sense to have it locally (and not necessarily in each Member State even) or not. If the right holders are mainly active locally, a unitary right may not have advantages.

For new related rights, it would also be necessary to consider whether contract law and enforcement matters would need to be unified. Looking into how unitary (unregistered) design right functions can be useful.

3.4 Summing up

After three hours of intense discussions, the roundtable concluded with a number of key take-aways:

- There is a need to identify what it is we don't know and what we should know before we can progress our thinking on the legal side on whether it makes sense to have a unitary title.
- A major question is: what would the economic effects be? The evidence base needs to be strong enough. Can economic and business studies shine a light on questions like: what types of actors would be affected in which markets/industries, would a unitary title impact behaviour, of which stakeholders? etc.
- Promotion of cultural diversity is one of the policies the EU pursues. What would be the effect of uniform titles? Would copyright law still be a useful instrument to pursue cultural diversity (is it currently?) or do we need other instruments that can fulfil that function better, e.g., like in media law?
- It is a likely advantage of uniform titles that it reduces legal uncertainty in the digital single market. But it is unclear under what conditions uniform titles would actually provide more legal certainty. Is it necessary to have a holistic approach, taking on board contract law, enforcement issues, the role of courts?

4 Approach of the Second Roundtable

The Second Roundtable took place in Amsterdam in person, on the understanding that here too a free exchange of ideas was crucial and individual contributions would not be reported. Participants introduced themselves and said a few words about the particular interest they take in the topic of territoriality and specifically the notion of having a uniform title for copyright. There was a short retrospection on the outcomes of the first roundtable as these were important inputs for the second one, and the programme for the day was explained. The programme consisted of three major sessions, each dedicated to a larger theme and addressing multiple questions. These were:

- Session I: Revisit & expand upon the findings of the first roundtable
- Session II: A unitary title – fundamental rights aspects
- Session III: Moving forward

An e-tool was used by all participants to facilitate joint brainstorming and elaboration of ideas. Since the objective was to make maximum use of the expertise present, blue sky thinking was encouraged. This also meant that certain topics and ideas featured across sessions and not just ‘neatly’ in one. For clarity of reporting, the discussions are presented as much as possible under the most appropriate themed heading.

5 Outcomes

5.1 Session I: Revisit & expand upon the findings of the first roundtable

In the initial discussion, there was consensus that if the EU were to embark on legislating a uniform copyright title, this will be a major undertaking that would raise many issues large and small along the way. Discussion converged on the matter whether the first steps taken should indeed be to seek ex ante clarity on the impacts across the various creative industries, for consumers/users, etc. It was noted that so far, evaluation of economic impacts of harmonisation initiatives tabled by the European Commission have come after the objectives of harmonisation had been formulated, not beforehand. The consensus that emerged was that from the perspective of the European project for continuous (market) integration, it is logical to have unification in the form of a uniform title. There has been a continuous growth of the copyright *acquis*, which by now is very complex. At the same time, implementation in Member States of harmonization measures continues to produce local differences, e.g., the implementation of article 17 DSM Directive is a recent case in point. The legal uncertainty associated with this increasing complexity and diversity is likely to continue or even grow.

Moving towards a uniform title would provide the opportunity to articulate a clear(er) vision on what European copyright aspires to. The piecemeal approach to harmonisation to date, driven by the desire to remove large differences between Member States’ laws lacks such vision. It is telling that even article 17(2) of the EU Charter of fundamental rights merely states ‘intellectual property shall be protected’, without any

vision of why, unlike e.g., the US constitutional copyright clause.¹ Participants agree that a unification project provides the opportunity to think again, ensure better quality of law, promote legal certainty and create a less complex system.

On the issue of how copyright can or should retain its role as instrument of cultural policy, the group discussed some examples of how this currently operates. Collective management organizations have traditionally played a role in this space. Some of the examples named were the music sector which supports local creation through pension schemes for local authors, prizes, promotion of local music. In France licensing fees collected for the use of out of commerce works with unidentified right owners are fed back in the creative sector. In e.g., film production tax facilities, subsidies and (European) production ‘quota’s’ (as in the Audio-visual Media Services Directive) are much more important instruments. The general feeling was that although copyright is not the only (or even most important) instrument, it is important to consider in uniform title project how rules can safeguard a role for copyright especially for language based cultural production in smaller languages.

Discussion then moved to the question what the scope of a uniform title would ideally be. Should it be limited to core substantive norms, or also address aspects of copyright contract law, deal with adjudication of disputes (e.g., specialized courts)? It was recognized that the scope would be determined by the particular model chosen (see further below), i.e., if there were an opt-in model, where authors can choose EU wide effect and adjudication, there would need to be some kind of structure in place like there is for EU trademarks and other EU IP rights (it was felt the structure such as exists for a unified patent may be less suitable). Considering the importance of authors (actual creators) to copyright, it makes sense that any such structure has mechanisms in place that ensure authors themselves have appropriate agency at EU level. Also, where the *acquis* prescribes that lawmaker must facilitate stakeholder dialogues or negotiations, for topics that are regulated in the EU title, there would need to be provision for that at EU level. Perhaps if an ‘EU copyright office’ were to be set up, this could be one of its tasks. As a baseline a uniform title would need to cover subject-matter, authorship/ownership, exclusive rights, exceptions and limitations and duration.

5.2 2nd session: A unitary title – fundamental rights aspects

This session was the larger one of the three, were participants explored the nexus between the status of copyright as a fundamental right, especially under the EU Charter of Fundamental Rights (CFREU), the introduction of a unitary title and the question how this would relate to the protection of existing works under national law. Also taken on board where the compatibility of EU law with the existing international copyright system, specifically the principle of national treatment enshrined in the Berne Convention and the prohibition to subject the existence or exercise of copyright to formalities.

From the fundamental rights perspective, to have a copyright with EU wide territorial reach is as such unproblematic, and article 118 TFEU creates explicit legislative competence for its introduction. There are no clear boundaries in the Charter as regards form and content of a unitary copyright. The Charter provision’s wording ‘intellectual property shall be protected’ leaves open many alternative ways of protecting copyright, and itself offers no guidance as to subject-matter, proper scope or duration.

¹ Article I, Section 8 United States Constitution states: ‘Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’

Article 17(2) CFREU does not prescribe a minimum level of protection, or set a clear boundary how rights might be scaled back (i.e., in terms of duration). Caselaw is of limited help, as judgments of the CJEU addressing article 17(2) are scarce. What is more, the superficial nature of fundamental rights analysis in CJEU judgments further contributes to uncertainty about the impact of article 17(2) CFREU on copyright law. There is also little caselaw from the European Court of Human Rights (EctHR) on intellectual property as property protected under Article 1 First Protocol European Convention on Human Rights (ECHR). Such judgments are relevant at EU level due to the conformity clause of article 52 CFREU and article 6(2) TEU.

Taking inspiration from the existing models in the EU for industrial property, the group tentatively identified four different models for unitary rights. More models are conceivable, as are combinations of features, but the idea was that identifying a number of different models would help grasp what moving to a unitary title would entail and what fundamental rights implications stand out a first sight. The premise of all models is that it is non-sensical to have works that are subject to national rights and an EU wide right simultaneously, as this would only add a territorial layer of protection to the existing situation, increasing complexity and transaction costs. Two important characteristics of the current copyright system informed debate. The first is that copyrights arise upon mere creation of a work, and that the Berne Convention prohibits the imposition of formalities (article 5(2): the enjoyment and the exercise of these rights shall not be subject to any formality...) with respect to (simply put) foreign works. The second is that the term of protection is long and as a rule dependent on the life of the author(s). Currently the duration of copyright is as a rule 70 years post mortem auctoris (PMA), and international conventions require a minimum of 50 years PMA.

In short, the models identified are:

- A. Uniform title for all works, existing and new.
- B. Uniform title for new works, with continuation of national rights for pre-existing works.
- C. Uniform title with supplementary national rules (e.g., for some limitations & exceptions for off-line use).
- D. National rights with a trigger point for transformation into a uniform title.

These models represent two ways in which the relationship between the EU and member state level can be seen: moving towards one uniform title for the entire EU or maintaining national territorial rights as well (geographic scope); aiming for a full unification of copyright law or maintaining some discretionary room for Member States (unification scope).

If the ultimate aim is to replace all bundles of national rights with a uniform title, then **Model A** requires some kind of conversion regime with respect to rights in existing works, as these have arisen upon creation. A major challenge here is how to deal with ownership of rights. Who qualifies as author or initial owner is a matter that is far from fully harmonized and the laws of Member states differ in this regard. What is more, copyrights in most jurisdictions are transferable, also in part. There is no particular authenticated system of registration of ownership (although in the music industry for example, registries exist for collective management purposes). Any transitory regime needs to safeguard the fundamental right to property of current copyright owners.

Model B would phase out national territorial rights eventually, but this would take a very long time (i.e., more than a century). During that time a highly complex system would continue to exist, although of course the vast majority of works have a much smaller economic lifespan than 70 years PMA so would pose a theoretical problem and not so much a practical one. The model would be simpler to implement from the fundamental rights perspective –at least on paper-- because it leaves rights in existing works intact.

Model C is based on the idea that it might not be necessary (principle of subsidiarity of EU law) to have full unification of copyright law. For example, there may be certain local uses that have no or little impact on the internal market, or there might be cultural or linguistic needs that are specific to a certain region which could justify local rules.

Model D accounts for the fact that a substantial part of works created will never be of commercial interest or are exploited or used only locally. In those cases, one can question the need to have an EU wide, unified title as the default form of protection. A system of national rights with a certain ‘trigger point’ for unitary effects might be more appropriate. For example, the author could be given agency to transform rights into a unitary right, or the trigger point could be that an act of exploitation occurs (e.g., the first transfer of copyright as a sign of exploitation, akin to the historical example from the UK where the first sale of a manuscript would trigger copyright protection). More variations are conceivable, for example that the right holder can opt in for EU wide enforcement. Generally speaking, the more autonomy there is for the author/owner, the easier it becomes to meet the standard for protecting copyright as a fundamental right.

Because of the limited time available, there was no debate on the potential conflict between the protection of copyright as a fundamental right and other fundamental rights notably freedom of expression (Articles 10 ECHR, 11 CRFEU) and privacy and data protection (Articles 8 ECHR, 7 and 8 CRFEU). Obviously, these rights and more general public interests would need safeguarding as well in any model.

5.3 3rd session: Moving forward

In the final session, the focus was on what the participants see as the biggest opportunities and challenges for the realization of a uniform title. Why would the EU engage in such a project? What would be sensible next steps? On the level of knowledge creation, the group also sought to identify what questions are relevant for copyright scholarship to address in the future.

Building on what was brought forward in the earlier sessions about the need for unification, key points made about the what & how of an EU copyright ‘code’ were: the need to start from the existing *acquis* but not automatically retain all its rules; the desirability of having a shared vision on copyright; the need to be both pragmatic and idealistic.

A precondition for the introduction of a uniform title is that shared norms are developed for those areas of copyright law which are still unharmonized. These would need to be comprehensively identified and will also involve a demarcation of what legal aspects to include – as belonging to the core of copyright—and which aspects to leave out. National copyright laws differ for example with respect to copyright contract law, transferability of rights, treatment of moral rights, initial ownership and collective ownership and may regulate issues that are indirectly related to intellectual property (e.g., publicity rights). The academics of the Wittem group, when drafting a European Copyright Code had a clear focus on core aspects of copyright such as definition of the work (and excluded works), authorship and ownership, moral and economic rights, key limitations and exceptions.² What to include in a shared copyright act will also depend on an articulated vision: what role must copyright play in the EU legal order, underpinned by which fundamental principles?

² Wittem Group, European Copyright Code, 1 (2010) JIPITEC 123. <https://nbn-resolving.org/urn:nbn:de:0009-29-26220>

The existing acquis as enshrined in the many different directives enacted in the past 30 years, in judgments and in recommendations could be brought together, simplified and updated where necessary. A 'simple' recasting exercise that would bring existing norms together and fill in remaining gaps would not suffice. It is important that the question is asked: if an EU wide copyright title were the default situation, what is it in current EU and domestic norms that we should not want to leave behind? Finding answers would be helped by a clear vision on EU copyright. At the same time, from the outset already it is important to keep a problem-solving focus: make clear what specific issues an EU title would need to solve (e.g., facilitating enforcement online, effective collective management, remuneration of creators, clarity on ownership). To strengthen the evidence-base for policy, it would be helpful to study from a macro-economic perspective the potential reduction in transaction costs and social costs of various models.

A European copyright code with matching institutional structures has the potential to make the copyright system less complex, more predictable and more suited to the demands of digital society. An example discussed was how the exhaustion doctrine plays a major role in facilitating the free flow of goods in the internal market, while for digital services there is no equivalent. This despite the continued shift towards trade in services across many sectors like software, entertainment, news, games, music, film and information services. Another example concerned rights clearance for cross-border uses of protected material which needs to take place on a territorial basis; this involves legal uncertainty and transaction costs. Even in areas where there has been some legislative intervention to improve cross-border licensing, problems caused by the territorial nature of rights persist.

On the more political question why the EU would engage in a uniform title project, it was recognized that some Member States may be less inclined to see the advantages, especially in creative industries when there is a large domestic market for (domestic) works. On the other hand, many creative industries are deeply international and the twins of digitization and networked economy expose creators and users to powers concentrated in relatively few players.

Moving towards a uniform title would fit the ambitions expressed in the 2022 European declaration on digital rights and principles.³ The EU increasingly takes on a role in setting standards for a digital world where the rights of citizens need protection against powerful actors. An initiative by the EU to create a fit for the digital age uniform title can show global leadership. A 'Brussels effect' is already visible in other areas of regulation of digital society, such as in data protection, digital services and AI.

A separate reason why an EU copyright act may be good to have, is that copyright legislation does not exist in isolation. It is only one dimension of the regulation of the digital single market, and in other domains legislation is becoming more extensive and often takes the form of unification. There is an interplay between EU legislation in the media and communications domain and intellectual property, e.g., the Audio visual Media Services Directive promotes production and dissemination of European audio-visual productions through quota. The General Data Protection Regulation impacts enforcement of copyright. The Digital Services Act is relevant to content creators, distributors and users mainly because of its renewed rules on intermediary liability, and there is an interplay between intellectual property law and the Digital Markets Act, the Data Governance Act, the AI Act, etc.

The session ended with a short discussion on what the contribution of copyright scholarship might be.

³ Put forward by the European Commission in January 2022, Commission, Parliament and Council reached agreement on the declaration in November 2022. See <https://digital-strategy.ec.europa.eu/en/library/declaration-european-digital-rights-and-principles>.

For one, legal scholars can elaborate various models of the kind tentatively identified above to help inform policy makers. When doing so it is wise to take on board the historical experience of unification in the area of especially EU trademarks and (unregistered) design rights. The history of the Unified Patent and the accompanying court system (Unified Patent Court Agreement) is also an interesting case to consider, and there might be other instructive historical examples of unification of IP in federalized legal systems (US, Switzerland, German unification). An interesting topic for research is how an EU copyright would relate to other EU intellectual property. Is cumulation desirable, under what circumstances, how could this be addressed?

One of the bigger challenges identified is how in a system based on a unified title, the EU can safeguard diversity in local (language) markets where this is justified for social welfare, cultural needs, etc. Also, it will be necessary to elaborate what mechanisms are suited to safeguard the interests of authors (creators), as they are more often than not in a weak bargaining position. Research will also be necessary into the interface of a uniform title with competition law. Currently, the fact that copyright is territorial has impact on the question whether certain licensing practices, including refusals to license, are anti-competitive under EU competition law. How would or should a shift to a single title change this?

Another key topic for research is the interplay between processes of unification and the obligations that the EU and its Member States have under international copyright and trade treaties. What are the limitations stemming from the Berne Convention for example with respect to formalities in relation to opt-in models; how would national treatment operate in a dual system?

As a final observation, it is worth noting that as legal scholars, participants were very much aware that one must look to other disciplines as well to ensure the impacts of legislative interventions are understood (and ideally predicted). This is not just about other legal disciplines (e.g., competition law, media law, consumer law, information law more broadly) but also about economics, business studies, media studies, cultural studies etc. Together these disciplines can create knowledge about impacts on creative practices and loci of cultural production, on distribution chains, business models, fora for public debate and competitiveness, etc.

6 Participants

Michelle	de Graef (assistance, 1)	University of Amsterdam (IVIR)
Estelle	Derclaye (1)	University of Nottingham
Graeme	Dinwoodie (1)	Chicago-Kent School of Law
Thomas	Dreier (1)	Karlsruhe Institut für Technologie
Séverine	Dusollier (1-2)	Sciences-Po École de Droit
Alexandra	Gianopoulou (1)	University of Amsterdam (IVIR)
Thomas	Hoeren (1-2)	University of Münster
Bernt	Hughenoltz (2)	University of Amsterdam (IVIR), University of Bergen (emeritus)
Martin	Husovec (1)	London School of Economics
Marie-Christine	Janssens (1-2)	University of Leuven (CITIP)
Arlette	Meiring (1-2)	University of Amsterdam (IVIR)
Péter	Mezei (1-2)	Szeged University
Valentina	Moscon (1-2)	Max Planck Institut for Innovation and Competition, Munich
Alexander	Peukert (1)	Goethe-Universität, Frankfurt am Main
Antoon	Quaedvlieg (1-2)	Radboud University
Luna	Schumacher (1)	University of Amsterdam (IVIR)
Caterina	Sganga (1)	Santa Anna Pisa
Alain	Strowel (1-2)	UCLouvain
Elenti-Tatiani	Synodinou (1-2)	University of Cyprus
Paul	Torremans (1)	University of Nottingham
Mireille	van Eechoud (moderator, 1-2)	University of Amsterdam (IVIR)
Stef	van Gompel (1-2)	Vrije Universiteit Amsterdam