



Recent and future developments in EU copyright legislation

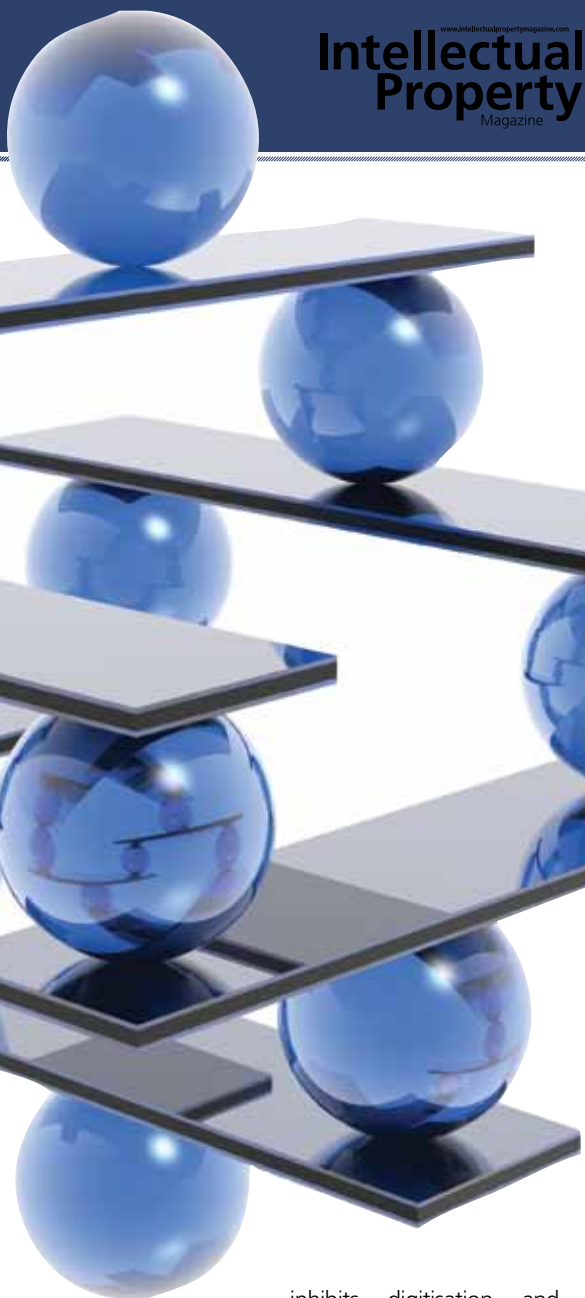
Jan Bernd Nordemann and **Matthias Berberich** describe the ongoing struggle to harmonise EU copyright law

The past years have witnessed a significant harmonisation of copyright law in Europe which, driven by the common market objective, increasingly aligned the member states' copyright laws. However, shaped by inevitable political compromise, this process has only led so far to a partial harmonisation. At this stage, the term "European copyright" denotes hardly more than a piecemeal approach. On the one hand, the current legislative framework covers the full scale of exclusive rights over specific subject matter, such as computer programs¹ and databases² whose industrial significance precipitated a swift harmonisation at the beginning of the 1990s. For other works, traditionally rooted in the sphere of arts and culture, the political reluctance to overcome individual copyright traditions was strong.

As a start, the EU confined itself to several directives, which aligned at least the term of protection³ and specific exploitation issues such as rental rights⁴, satellite and cable retransmission rights⁵, and resale rights for original works of art⁶. The commercial breakthrough of the internet brought not only new forms of digital cross-border exploitation, but also the challenge of keeping pace with technological developments and piracy. In 2001, the EU managed to establish the first wider set of pan-EU rules on copyright and related rights in the Information Society Directive⁷. Complying with the 1996 World Intellectual Property Office treaties, it harmonised among others the rights of reproduction, distribution, communication to the public for all copyrighted subject matter and the legal protection of anti-copying devices and rights management systems. It also introduced a mandatory exception for transient technical copies and an exhaustive list of other optional limitations. This "pick-and-choose" list was born of a political compromise, since the struggle to reach

common ground while adhering to different copyright traditions was especially strong in the field of limitations. The latest legislation, urged by the vast number of infringements, was the Enforcement Directive⁸. Bringing the national legislation on sanctions and remedies closer into line across the EU, it requires all member states to apply effective, dissuasive and proportionate civil remedies, including damages, corrective measures, provisional measures to preserve evidence and injunctions against intermediaries.

Against the background of this *acquis*, future legislation might either fill the remaining gaps or will consolidate the already harmonised



inhibits digitisation and heritage preservation. While libraries and archives, again, favour a statutory exception, publishers and collecting societies suggest that the collecting societies should be empowered to grant any necessary authorisation. It is, however, realised that any approach will require a reasonable, due diligent search for the author. In January 2011, EU Commissioner Barnier announced that the Commission will propose a Directive on orphan works.

A similar licensing problem exists for cross-border teaching and research by using modern communication technologies. While libraries and universities criticise the fragmentation of licences and call for one central organisation as licensor (as well as several teaching and research limitations which cover distance learning), publishers favour contractual solutions and maintain that electronic database access is widely granted. Again, the Commission will primarily concentrate on facilitating licensing. It might also look at scientific publications' open-access regimes for publicly funded research, which might pose an alternative solution.

Other topics on the agenda are

equal access for people with disabilities and rights clearance for user-generated content on the internet. For the latter, it is commonly felt that any regulation eg, by new statutory limitations, would be too soon, because its impact has not yet been investigated. For now, the Commission emphasises the need for an easy, user friendly rights clearance.

and piracy, such as its IPR strategy vis-à-vis third countries¹⁵, negotiations on an Anti-Counterfeiting Trade Agreement (ACTA), a closer administrative cooperation among member states' authorities, and establishing an EU Counterfeiting and Piracy Observatory. The latter is designed as an instrument for regular assessments of EU IP law and practice by gathering, monitoring and reporting information of IP infringements, sharing of

“It regarded the current enforcement practice as insufficient especially for online infringements and proposed to consider a further harmonisation of procedure as well as criminal sanctions.”

Collective management, pan-European licensing

At the moment, an efficient pan-European online rights clearance concerns primarily the music sector. The Commission has identified several deficiencies: Internet-based services such as EU-wide webcasting or on-demand downloads require a licence which covers all territories throughout the EU. Such licences are usually obtained through collective rights management organisations (CRMs). Since CRMs traditionally operate in their domestic territory, users would have to approach a large number for a pan-European rights clearance, with high transaction costs. So far, CRMs have sought to solve that problem with a set of reciprocal representation agreements, allowing each CRM to grant EU-wide licences covering the others' repertoires. The Commission's 2005 proposal was that instead of improving this existing cooperation, it favoured the elimination of territorial restrictions and customer allocation provisions in existing licensing contracts¹³. This would give rightsholders the choice to appoint one CRM for the online use of their works across the entire EU. Since 2005 the situation has improved. Various CRMs and publishers have endorsed the proposal and, formed new joint ventures which issue EU-wide licences. However, the Commission is following further developments attentively.

IP enforcement

In the field of IP enforcement, the Commission has identified several deficiencies which may require further legislative action. In 2009¹⁴, the Commission proposed mainly non-legislative measures to combat counterfeiting

national best practices and spreading private sector strategies. It may even become a platform for stakeholders, especially small- and medium-sized enterprises, and a pan-European resource of knowledge.

Several studies conducted by the Observatory on national enforcement practice revealed deficits, which presumably necessitate legislative measures. This view was shared by the European Parliament in its 2010 *Gallo Report*¹⁶ which criticised the Commission's reluctance and urged for additional legislative measures to combat IP infringements. It regarded the current enforcement practice as insufficient especially for online infringements and proposed to consider a further harmonisation of procedure as well as criminal sanctions. (Notably, a proposed directive on criminal enforcement measures, after facing severe political resistance, was recently withdrawn¹⁷). The European Parliament also stressed the role of internet service providers to find a solution – and thus seems to endorse for example the French “Three Strikes” approach to block infringers' internet access.

The Commission picking this up responded¹⁸ and following its response has launched a consultation in January 2011 for a possible review of the Enforcement Directive. Different interpretation and application by the courts might require further clarifications. For example, the scope of the directive might be clarified by introducing a minimum list of what “intellectual property” means and whether it encompass trade secrets or unfair competition law. Furthermore, the Commission is troubled by the considerable problem of IP rights infringement on the internet. The Commission will address injunctive enforcement against



“In January 2011 the Commission launched a consultation on the implementation and effect of the Resale Right Directive on the art markets.”

internet intermediaries where national courts require a lot of evidence, and uncertainties about contributory infringements persist. Here, it should be clarified that the right of information and injunctive relief should not depend on liability of the internet intermediary. Rather, even if an internet intermediary is not responsible for the infringement, it should be possible to raise information and injunction claims against it. Also, the principles of a proportionate balance between the right of information and piracy on the one hand and efficient IP rights enforcement on the other hand will have to be clarified¹⁹. The directive requires damages to be effective, proportionate and dissuasive. However, the actually awarded amounts are rather low, which might necessitate invoking unjust enrichment claims. Further issues to discuss are the personal liability of the managing director of an insolvent company, a further definition of corrective measures and gathering of evidence on cross-border cases.

Term of protection and resale right

The Commission's 2008 proposal to extend the term of protection for performers and sound recordings from 50 to 95 years²⁰ has now been cropped by the European Parliament to 70 years. Nonetheless, this legislative proposal would further strengthen the position of performers; for example, it introduces a new claim for session players amounting to 20% of record labels' sales revenue. Additionally, it provides for fall back of the rights to the session player after 50 years, should the producer fail to market the sound recording. The proposal, however, seems to be stuck in the legislative process and there are uncertainties surrounding whether it will come into effect.

Furthermore, in January 2011 the Commission launched a consultation on the implementation and effect of the Resale Right Directive²¹ on the art markets. The resale right – often called *droit de suite* – secures remuneration for authors of works of fine art and of photographs, whenever such works are resold. The sale must involve a professional party or intermediary.

Practical implications

This overview has shown several mid-term developments which, especially in the fields of knowledge economy, cross-border licensing and enforcement, deserve special attention. With the exception of performers' rights, specific legislative measures have not yet taken shape.

For rightsholders and CRMs, it appears important to establish cost efficient rights clearance systems soon if they want to avoid legislative measures. This is in particular true for the music sector, but less likely for other sectors.

IP enforcement is likely to improve following the Commission's review of the Enforcement Directive scheduled for 2012. The fight against internet piracy plays the most prominent role here. The Counterfeiting and Piracy Observatory may serve as a platform to share IP enforcement strategies. Stakeholders should also submit by the end of March 2011 feedback on the Commission's report on the implementation of the Enforcement Directive.

A diligent and documented database search (like the ARROW project²²) is imperative for dealing with orphan works. A legislative proposal from the Commission on orphan works is expected soon.

It appears that EU legislation will remain fragmented. Academic efforts for example by the *Wittem Group* in drafting a model EU copyright code²³, do not seem to be driven by the wish to harmonise EU copyright law on the current protection level.²⁴ This makes it less likely that the Code will be a driving force for an over-all harmonised EU copyright legislation.

Footnotes

1. Directive 91/250 EEC, repealed by 2009/24/EC.
2. Directive 96/9/EC.
3. Directive 93/98/EEC, repealed by 2006/116/EC.
4. Directive 92/100/EEC, repealed by 2006/115/EC.
5. Directive 93/83/EEC.
6. Directive 2001/84/EC.
7. Directive 2001/29/EC.
8. Directive 2004/48/EC.
9. Just recently, the CJEU ruled on the non-harmonised originality requirement: Case C 5/08, *Infopaq International AIS v Danske Dagblades Forening*. This (common) practice to stretch substantive EU law beyond what

in fact has so far been harmonised will surely fuel debates.

10. SEC(2007) 1556.
11. COM(2008) 466/3.
12. COM(2009) 532 final.
13. 2005/737/EC, OJ L 276/54.
14. COM(2009) 467 final.
15. 2005/C 129/03, OJ C 129.
16. 2009/2178(INI).
17. OJ C 252, 18.9.2010.
18. COM/2010/0779 final.
19. Since this balance is rooted in primary EU law, any Directive must respect it, cf CJEU Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*.
20. COM/2008/0464 final.
21. Directive 2001/84/EC.
22. <http://www.arrow-net.eu>.
23. <http://www.copyrightcode.eu>.
24. For example, the copyright code states that the term of protection is “too long” and wants to provide for more extensive limitations of copyright protection.

Authors



Professor Dr Jan Bernd Nordemann is a German-certified copyright and media law attorney at Boehmert & Boehmert, Berlin. Since 1999, Jan Bernd Nordemann has lectured at the Humboldt University Berlin on unfair competition, trademark and copyright law and was awarded a honorary professorship.

Matthias Berberich qualified from Humboldt University, Berlin with stages at the German Federal Ministry of Justice (copyright department) and Boehmert & Boehmert. Since 2004, he has been a lecturer at the Humboldt University Berlin.