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The Competence of the European Union in Copyright Lawmaking. A Normative Perspective of EU Powers for Copyright Harmonization

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This book aimed at inquiring into the competence of the EU to legislate in the field of copyright. For that purpose, two research questions were formulated: has this functional character of Article 114 TFEU resulted in a normative gap in copyright lawmaking? And, if so, how ought the EU legislator address that gap? In order to answer these research questions, chapter 2 demonstrated the existence of a normative gap in copyright lawmaking. The chapter mapped the objectives of legislative activity in the field of copyright. The data retrieved showed that the main policy goals pursued by the EU legislator were mostly of an economic nature, with a predominance of the goal of protecting content industries. Consequently, it was possible to conclude that there is indeed a normative gap in copyright lawmaking, since neither the protection of specific interests nor the prevalence of some of those interests over others are grounded in Treaty norms or other higher sources of law. Having already identified the normative gap, the following chapters looked into two possible sources for dealing with that problem: the activity of the CJEU in the pre-legislative era (chapter 3) and the EU treaties (chapter 4).

The early CJEU decisions established concrete solutions for the conflict between Treaty provisions on free movement and national copyright laws. Due to the territorial nature of copyright and to the differences between national laws, copyright could indeed qualify as an obstacle to the free movement of goods and services. An analysis of the Court's solutions revealed that copyright's specific subject matter could justifiably restrict cross-border trade. According to the Court, that specific subject matter amounts to the protection of the moral and economic rights of its holders. However, in the Court's view, this has to be seen against the social function of the right and implies a balance between the different interests at stake. Such a balance is achieved through the application of the principle of proportionality – as a result, the exploitation rights that are part of the specific subject matter of copyright should consist of a "normal exploitation" of the right, that is, one that guarantees an adequate income to its holder. It also flows from the Court's jurisprudence that the principle of non-discrimination plays a central role in the Treaties, serving as a guiding proposition when assessing free movement of goods and services vis-à-vis restrictions thereof. As a consequence, the principle of non-discrimination ought to be considered in the context of harmonizing national copyright laws.

Another source of normative inspiration are the EU treaties, since they are the equivalent to a constitutional charter in the EU legal order. This was the object of chapter 4. There, having the evolution of the EU as a background, it was highlighted that two elements can contribute to the normative content of EU competences: the objectives of the EU and certain principles that govern the application of competence rules. The objectives of the EU should work in tandem with its competences, as they are what justified the grant of powers to the EU in the first place. The EU objectives considered relevant for copyright were the establishment of an internal market; the promotion of EU's values (which include the respect for fundamental rights and the rule of law); and the respect for cultural diversity. These objectives, which are not hierarchized in the Treaties, yield both economic and non-economic elements. Consequently, it was concluded that, in so far as the objectives of the EU are used to provide Article 114 TFEU with normative content, the latter ought to reflect a balance between those different objectives. This conclusion reflects the need to integrate the different EU policies and the fact that functional competences should also be used to achieve specific objectives of the Union. At the same time, the principles that underlie the competence system – conferral, proportionality and subsidiarity – provide guidelines for the use of the EU's competence, but also for the creation and operationalization of benchmarks for copyright lawmaking.

The conclusions reached in chapters 3 and 4 paved the way for chapter 5, which established benchmarks of legislative activity. This chapter provides a concrete answer to the research question of how the legislature can address the normative gap in copyright lawmaking. The solution proposed there was to create benchmarks that the legislator should meet when designing copyright legislation at the EU level, since such benchmarks can supply the normative content missing from the main competence norm (Article 114 TFEU). The challenge was then to choose the benchmarks, in order to have an adequate normative content that is in accordance with EU law. This was done through a strict abidance by the principle of constitutional legality and the rule of law, both implying that benchmarks of legislative activity should be derived from the highest possible source of law. In the EU legal order, that would be primary law, which consists of the Treaties, fundamental rights and general principles of law, including the ones developed by the CJEU. However, other CJEU jurisprudence was also weighed in, since – besides defining general principles of law – the case law of the Court determines

the scope and meaning of norms of primary law. The benchmarks for copyright lawmaking were thus derived from the normative basis established by chapters 3 and 4 and defined as follows: harmonization of national laws; respect for national cultures and traditions; protection of creators; protection of end users; promotion of competitiveness of EU industries.

The first benchmark – harmonization of national laws – comprises two elements, which are the need for harmonization measures and the harmonizing effect of such measures. Secondly, the respect for national cultures and traditions as a benchmark carries an obligation to take those cultures and traditions into consideration when drafting copyright legislation. Importantly, the definition of "national cultures and traditions" comes down to cultural diversity in the traditional sense of "cultural expression," but also to legal cultures and traditions. Hence, this benchmark mandates that both national cultures and national legal systems should be taken into account in EU legislation. The third benchmark is the protection of creators, where "creators" include authors and performers. It entails both guaranteeing income and recognition to creators, as well as facilitating the use of existing works for further creative purposes. The fourth benchmark is the protection of end users, which is achieved by granting them access to cultural goods and services while taking into account their rights. Finally, the fifth benchmark – the promotion of competitiveness of EU industries – requires a moderate protection of industry, i.e., one that fosters both competitiveness and competition concerns. The five benchmarks can point in opposite directions, since the underlying rationales represent different interests that can at times be in conflict with one another. This may cause a given legislative measure to rank high vis-à-vis one benchmark and to score low in another one. Ideally, however, a balance between the benchmarks should be reached.

Chapter 6 followed to field-test the benchmarks in order to assess how copyright legislation might in practice operationalize the benchmarks. By applying the benchmarks to the copyright *acquis*, some examples of good and bad practices were examined. The analysis suggests that the benchmark of harmonization is the one which finds more expression in the *acquis*. Legislative practice shows that the use of total harmonization techniques (together with the occasional employment of mechanisms of mutual recognition) are a good starting point to achieve a high harmonizing effect, although care should be taken to avoid certain practices that decrease it (such as the permeability of harmonized rules vis-à-vis non-harmonized areas and the use of undefined key concepts).

The protection of creators also seems to be high on the EU policy agenda: as a rule, the total harmonization technique is used to harmonize rights, thus ensuring that certain acts of exploitation are covered by exclusive rights. Moreover, the scope of the rights granted is broad. However, due to some legislative shortcomings, the rights granted to creators might end up favouring creative industries instead. In the absence of harmonization of rules on authorship and contracts, this shift of benefits can be avoided by conferring unwaivable remuneration rights to creators, as demonstrated (although not very frequently) by the *acquis*. Another problem in this realm is that the high level of protection sought has the disadvantage of disregarding the interests of the user-creator, who is often prevented from using protected works for creative purposes.

Unlike the benchmarks of harmonization and the protection of creators, the benchmarks that relate to the respect for national cultures and traditions, the protection of end users and the promotion of competitiveness of EU industries reveal a lack of consistent policies in pursuing those subject matters. The respect for national cultures and traditions can be achieved by finding a middle ground between the systems of copyright and *droit d'auteur*, which does not seem to constitute a problem in general regarding EU copyright legislation, since a compromise has often been reached. However, this benchmark is materialized in other legislative aspects that do not seem to be as present in the *acquis*, such as, for instance, a well-devised system of exceptions that can accommodate national specificities. The map of exceptions in the *acquis* lacks consistency.

Importantly, the way in which exceptions are designed is a relevant factor not only for the benchmark of respect for national cultures and traditions, but also for the protection of the end user and for facilitating further creation in the interest of the user-creator. A scattered and inconsistent system of exceptions does not favour the end user, as his access to copyright works is usually enabled through exceptions to the exclusive rights. The same is applicable to the user-creator. In this respect, it is noteworthy that the harmonization of exceptions, mostly carried out through partial harmonization techniques, stands in sharp contrast with the total harmonization of economic rights. Moreover, if the

exceptions are made non-mandatory – as is mostly the case in the *acquis* –, the right holder can override them by contract and effectively prevent access.

With regard to the promotion of competitiveness of EU industries, there seems to be an overprotection of creative industries in the *acquis*, rather than a promotion of competition on the market. The strengthening of copyright protection through the grant of broad rights, together with a lack of regulation of contracts and authorship, concentrates much of the available protection on creative industries, with the result of the standard of moderate protection of industry being overstepped in relation to creative industries.

Chapter 6 concluded that the *acquis* displays examples of a lack of balance between the different benchmarks, although there are also cases where the EU legislator has succeeded in making apparently contradictory benchmarks compatible. The main challenge inherent to the benchmarking exercise is therefore reaching a balance between the different benchmarks. Chapter 7 outlined some recommendations in that regard. First, it was concluded that one of the main sources of the lack of balance between the benchmarks was the piecemeal approach to harmonization. Thus, the first necessary step would be to carry out an overhaul of the *acquis*. This should be done through a strict abidance by the principle of proportionality, which implies inter alia that the legislator should meet all the benchmarks to a certain extent, instead of only a few to a large extent.

Moreover, while the proportionality test should be applied having the totality of benchmarks in mind, it should also be taken into account that most of the compromises between benchmarks that proportionality requires will likely take place where conflicts are found to begin with. The conflicts between benchmarks usually occur in two separate spheres: on the one hand, the harmonization of national laws might be at odds with the respect for national cultures and traditions; on the other hand, the benchmarks that relate to private interests – creators, end users, and industry – can also be incompatible with one another. In other words, special attention should be given to achieving a balance between the first two benchmarks, on the one hand, and between the last three, on the other hand. An additional question that should be considered in order to achieve a balance in the realm of the three last benchmarks is the fact that the benchmarks of protecting creators and promoting the competitiveness of EU industries entail, in and of themselves, an internal balance (for instance, in relation to the protection of creators, a balance should be achieved between guaranteeing income and recognition to creators, on the one hand, and facilitating the use of existing works for further creative purposes, on the other hand). In order to achieve both the internal and the external balances, the legislator ought to draw upon good and bad practices from the past, which were highlighted in chapter 6.

In sum, the blueprint for a solid normative bridge is given, first, by considering what each benchmark entails, and by reaching an internal balance within each benchmark where needed. Second, it is necessary to reach a balance between the different benchmarks, and especially within the two groups of benchmarks mentioned above.