9 A Unitary Title for Copyright

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1. A copyright universalist

In my experience, Antoon Quaedvlieg was at once a copyright scholar of the Romantic tradition, and a pragmatist who understood very well that copyright is an instrument to control the use of the most mundane information products and services. Quite often in cases where it is not at all obvious that there is a need to recoup investments made or to protect the author's moral interests. In his scholarly contributions he shows himself a cosmopolitan and great supporter of international norms, while at the same time valuing the idiosyncrasies of domestic copyright laws.

On the topic of European harmonization, he regularly shone his light on its successful and more obscure sides. The European Copyright Code that he drafted together with a wonderful group of legal scholars remains a beacon for those navigating the ever more complex copyright acquis, a succinct and clear text that reminds us of what the core of copyright ought to be. On the territorial nature of copyright however, he has been rather silent. But as the transition to a European digital single market continues and copyright and related rights keep their value in the 'data economy' – somewhere along the road the terms 'knowledge economy' and 'information society' have gone out of fashion – this is a topic that must now really move to the foreground in EU policy-making. The academic discussion on it would have benefited greatly from his contributions, I am sure.

So what's the story with territoriality? Copyright and related rights – for brevity's sake I shall limit myself to copyright mostly – are unlike other intellectual property because at the EU-level there are only national rights. For trademarks, designs, plant varieties, geographical indications indeed even for patents (albeit in a very complicated way) there are EU wide rights, and debate on their introduction started over half a decade ago. For copyright, the EC has floated the idea a decade ago, but it has so far not gained significant political traction.[1] In legal scholarship voices have also been advocating for a move towards a unitary title, but over all compared to industrial property discussion is moving at a snail's pace.

A major complication compared to the registered rights of industrial property is that introducing EU wide titles while maintaining national rights for copyright and for the various related rights does not make much sense; it would only add to the layers of rights and not resolve problems caused by territoriality. For that reason alone the project is more daunting than it was for e.g.

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1 European Commission, *Communication A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, COM(2011)287 final (announcing work on a consolidating directive and on looking into the possibility of a title), European Commission, *Communication Towards a modern, more European framework for copyright*, COM(2015) 626 final (signaling the complexities of moving towards a uniform title but also that 'The EU should pursue this vision [a single copyright code and a single copyright title] for the very same reason it has given itself common copyright legislation: to build the EU's single market, a thriving European economy and a space where the diverse cultural, intellectual and scientific production of Europe travel across the EU as freely as possible.').

trademarks and plant variety rights. In this contribution I take stock of where we are at and make some suggestions about how to move forward, drawing on the history of the EU trademark and plant variety rights. My thinking on territoriality has been influenced notably by earlier work on private international law and intellectual property, by the extensive review a team at the Institute for Information Law did of the copyright acquis (way back in 2007/8) and subsequent literature and most recently by the research we undertook on territoriality problems in the context of the ReCreating Europe project which ran from 2020-2023.[2]

2. EU copyright thirty years on – characteristics of the acquis

The piecemeal approach to harmonization that the EU has taken so far, makes sense if one considers the EU's legislative jurisdiction and the fact that the main legal ground for intervention is the realization of the (digital) internal market. Yet, this approach has produced a complicated web of directives and recently regulations, where some large issues are ignored and small ones regulated in great detail. It has certainly led to the laws of Member States being much more similar, but significant differences remain. The EU's Court of Justice (CJEU) has, in answering preliminary questions from Member States' courts, taken an expansive role e.g. in the elaboration of the work concept. Other areas where harmonization is lacking or very patchy and where one would not expect the CJEU to be able to engage in adequate gap-filling concern for example authorship and initial ownership (who qualifies as author, when is there collective authorship, etc.), transferability of rights, adaptation rights, moral rights, and actual harmonization of exceptions and limitations. Thomas Dreier's contribution elsewhere in this volume sets out the main challenges in this regard.[3]

Territoriality in copyright is viewed as problematic also at the global level, with some arguing that persisting in applying national copyright laws to internet-based cases can amount to a 'denial of right' for right owners.[4] Suggestions have been made to mitigate the effects of territoriality through rules of private international law, but there too, territoriality of rights remains the starting point.[5] As is the case indeed with EU private international law, specifically in the Rome II regulation that provides for infringement of copyright and related rights that the applicable law is that 'of the country for which protection is claimed'.[6]

2 See a.o. International Law Association Committee on Intellectual Property and Private International Law, 'Guidelines on Intellectual Property and Private International Law ('Kyoto Guidelines'),' *JIPITEC* 12 (1) 2021; European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property (Text and Commentary)*, Oxford: OUP 2013; M. van Eechoud & P.B. Hugenholtz et al (red.), *Harmonizing European copyright law: The challenges of better lawmaking.* Alphen aan den Rijn: Kluwer Law International 2009; M. van Eechoud, *Choice of law in copyright and related rights: Alternatives to the lex protectionis*, Den Haag: Kluwer Law International 2003. The publications associated with the ReCreating Europe project are available on Zenodo, on territoriality see: M. van Eechoud, *Copyright territoriality policy recommendations* (ReCreating Europe project). https://doi.org/10.5281/zenodo.7756568; M. van Eechoud, *D4.4 Territoriality Roundtables* (combined report), 2022, https://doi.org/10.5281/zenodo.7564660; M. van Eechoud & R. van Es, *D4.2 Report on EU policy space in light of international framework*, 2021, https://doi.org/10.5281/zenodo.5069608; M. van Eechoud & R van Es, *D4.1 Territoriality scoping paper*, 2021, https://doi.org/10.5281/zenodo.5040173.

3 On EU harmonization in relation to international norms see also D.M. Vicente, *La propriété intellectuelle en droit international privé*, Leiden: Brill | Nijhoff 2009, esp. p. 495–502.

4 P. Torremans & K. Keosomphan, 'Towards a European copyright law: territoriality and limitations and exceptions as major outstanding issues', in: *EU Copyright Law*, United Kingdom: Edward Elgar 2021, p. 1087–1103.

5 See the projects listed in note 1 above.

6 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 2007/199.

2.1 *National copyright in the internal market*

Although the territorial nature of copyright continues to pose challenges at the global level, in this contribution I stick to the intra-EU perspective. That, as I shall set out, is complicated enough. The tension between the project to create an internal market and national territorially delimited intellectual property rights has been recognized from the very start. The original Treaty of Rome (1957) already contained the provision that arbitrates the free flow of goods that Member States must not hamper and the protection of industrial and commercial property. Article 30 of the Treaty establishing the European Community (TEC) did so, currently the main provision is in Article 36 Treaty on the Functioning of the European Union (TFEU). Long before the first copyright directive, the CJEU developed caselaw that sets some boundaries. Its exhaustion doctrine put limits to the exercise of copyright and related rights as a means to prevent (re)sale of products across the EU and has since been codified.[7]

In an age when the single market was still mainly shaped by achieving free movement in goods, arguably the exhaustion doctrine went a long way. The exclusive rights nature of intellectual property and the indispensable role that contracts play in exploitation meant that competition rules prohibiting the abuse of a dominant market position and cartels also offered scope to curb overly ostentatious demarcation of markets along national borders. With the increasing shift from product to service in the information society, the need for other corrective mechanisms grew. By now, the acquis features a growing number of them.

Given the CJEU's case-law, the exhaustion doctrine can only be used as a mechanism where the distribution of physical copies incorporating works is concerned. This includes digital works recorded on a physical medium. The *UsedSoft* ruling ten years ago provided an opening for application of the exhaustion doctrine in the digital environment, but the subsequent *Tom Kabinet* judgment on eBooks seems to have closed it.[8] Competition law has a role to play alongside the exhaustion doctrine in combating artificial geographic market partitioning, but it has the disadvantage of being a tool that operates primarily *ex post*. Moreover, the body of case-law in this area creates considerable legal uncertainty. Certainly, as regards the question when (distribution) agreements providing exclusive territorial protection violate the prohibition on distortion of competition and abuse of dominant market power Article 101 TFEU, the answer is unclear.[9]

2.2 *Mechanisms overcoming territoriality*

If we consider legislative measures to overcome territoriality, it is true that in some cases promoting fair competition played a role in their design, but mostly they serve other purposes. Think of easing the process of obtaining consent in the case of cross-border exploitation (such as the case of satellite broadcasting) or promoting legal certainty for cultural and educational institutions which, by virtue of their public mission, are expected to also operate in the digital

7 See for a description of the relevant early caselaw M. van Eechoud & P.B. Hugenholtz et al (red.), *Harmonizing European copyright law: The challenges of better lawmaking*. Alphen aan den Rijn: Kluwer Law International 2009, esp. Chapter 1 and 3.1.

8 CJEU 3 July 2012, C-128/11, ECLI:EU:C:2012:407 (*UsedSoft*); CJEU 19 December 2019, C-263/18, ECLI:EU:C:2019:1111 (*TomKabinet*).

9 See the analysis of C. Signoretta, 'Cracking the Walls of IPRs Through Article 101 TFEU: When Territorial Restrictions Become 'Abusive' under IP Law', *IIC* 2025 (forthcoming).

environment. The most commonly used technique[10] is what can be called 'fictitious localisation' (terms like 'country of origin' or 'home-country rule' do not capture it well in my opinion), whereby an act of (potential) cross-border nature is deemed to take place exclusively in one specific Member State.

The connecting factor used may be the place of action, as in satellite broadcasting: the place where the programme signal enters the communication chain, determines where authorization should be sought for cross border communications, this is what Article 1(2)(d) SatCab Directive achieves.[11] More often, the connecting factor is the place of establishment of the user of protected material. This is the approach taken in the Online broadcasting directive ('Satcab II'), which takes as connecting factor the place of establishment of the broadcasting organisation that engages in communicating.[12] Another case concerns the use of copyrighted material for (non-profit) educational purposes in secure electronic environments, for example in the context of distance education. Art 5(3) DSM Directive contains the fiction that such use 'shall be deemed to occur solely in the Member State where the educational establishment is established.'[13] The connecting factor can also point to the end user, as happens in the Online content portability regulation. To make it easier for a provider of e.g. streaming services to deliver to its consumers that are temporarily abroad, the regulation prescribes that a consumer is presumed to access the content service from her normal place of residence when staying temporarily in another Member State.[14]

In principle, these kinds of rules increase predictability and legal certainty for users – and for rights holders. However, because the rules have a very specific scope and more of them have been adopted in recent years, they do make the field of copyright as a whole more complex and difficult to navigate. They are also likely to lead to questions of interpretation, creating years of uncertainty while proceedings move through the courts.

Even without tweaks to help solve territoriality problems, there are already a lot of concerns with the acquis as it has developed over the past 30-plus years. In essence, these have not diminished since the Copyright directive ('Infosoc') of 2001, the first more horizontal directive that took a big step in harmonising exclusive rights for both copyright and neighbouring rights. One of them are the transaction costs that follow from having to deal with all the different territorial rights. Some of the other more obvious drawbacks are that the fragmented harmonization and ambiguities in the acquis create legal uncertainty; it takes expert knowledge to assess how national law must be adapted and interpreted in the face of subsequent EU instruments. It is also likely that at the national level a 'homing trend' causes divergences among national copyright systems, as the drive to fit EU norms in pre-existing national ones tends to be strong. Gaps, inconsistencies and demarcation problems also invite the CJEU to engage in expansive interpretation and sometimes

10 For a full analysis, see M. van Eechoud & R. van Es, *D4.1 Territoriality scoping paper*, 2021, https://doi.org/10.5281/zenodo.5040173.

11 Council Directive 93/83/EEC 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* 1993 L 248 (SatCab directive).

12 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* 2019 L 130 (Online broadcasting or SatCab II directive).

13 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* 2019 L 130 (DSM directive).

14 Art. 4 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 2017/168 (Online content portability Regulation).

play an unexpected role; above I mentioned the interpretation of the work concept as an example. Starting with the Infopaq decision of 2009, the CJEU crafted a harmonized work concept that most scholarship and courts did not see in the Copyright directive.[15]

3. Some major challenges

From the above it is clear that territoriality as such is recognized as problematic from an internal market perspective. There is quite some work to be done still on the path to a system of unitary titles for copyright and related rights. The switch must be made from (partial) harmonization to full unification of (substantive) law, which includes the removal of inconsistencies in the current acquis. With respect to making the transition from rights with a national scope to ones with EU-wide effect, this territoriality angle brings some challenges to address. I mention just a few here: duration is an issue, as is dealing with the fundamental rights dimensions of copyright, and overcoming the Berne Convention's prohibition on formalities.

3.1 *Term of protection*

Tough questions come with any fundamental change to a system of rights that arise 1) by the mere act of creation and that 2) last a very long time. In practice, it may be the case that the vast majority of works has become obsolete from an economic and cultural viewpoint well before the time copyright expires. The special provisions on out of commerce works and on orphan works try to help wrestle at least some works from oblivion.[16] Under strict sets of rules they allow the use of works that are still in copyright, but that are no longer exploited or whose right owners seem to have disappeared in the mist of time. But consider all manner of prosaic texts, images, designs, video, games, software, databases in the oceans of information that are produced daily, and clearly the term of copyright is much longer than it needs to be to protect the authors' economic and moral interests – if copyright is justified at all.

Whatever the criticism of the term of protection, all things remaining equal, in the design of system of unitary rights, the legislator will have to make provision for the transition based on the full length of copyright. This is a long time. For example, if a single work is created by one individual 30 year-old author today, it will likely be that copyright in the work will not run out for another 120 years, assuming our author enjoys the average lifespan of her generation. Creative solutions need to be designed to deal with the sheer length of rights, otherwise the positive effects of a unitary title might not materialize in time for the whole project to be worthwhile.

15 M. van Eechoud & P.B. Hugenholtz et al (red.), *Harmonizing European copyright law: The challenges of better lawmaking.* Alphen aan den Rijn: Kluwer Law International 2009; P.B. Hugenholtz, 'The Creeping Unification of Copyright in Europe' in: T. E. Synodinou (red.), *Pluralism or Universalism in International Copyright Law,* Kluwer Law International 2019; B. Raue, 'Urheberrechtsschutz im digitalen Binnenmarkt', *Europarecht,* 2023, p. 364-380.

16 Out of commerce works, art. 8-11 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; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, *OJ* L 2012/299.

3.2 *Fundamental rights dimension*

A second issue that deserves highlighting concerns the fundamental rights nature of copyright and related rights, especially as regards existing rights. To navigating this space there is little in the way of legislation and case-law to go by. Both the continued development of substantive copyright and changes to its national territorial character require consideration of fundamental rights. Undeniably, especially since the EU Charter of Fundamental Rights (2009), there has been growing attention in the literature to fundamental rights in relation to copyright, and to copyright itself as a fundamental right.[17] Yet there is surprisingly little legal scholarship that addresses in depth the question of what Article 17(2) Charter in particular means – or should mean – for how rights come into being, for the scope of exclusive rights and their enforcement. What visions of copyright may lie in that brief command 'intellectual property shall be protected'?

The increasing attention to fundamental law in ECJ case law leads to more reflections but these often concern conflicting fundamental rights and the question of how, in particular, freedom of expression, the right to privacy and the freedom to conduct a business place limits on the exercise of copyright powers. These are important questions. But the introduction of an EU-wide right raises more. How can EU copyright replace existing national rights without coming into conflict with Article 17 Charter (or the European Convention on Human Rights and national constitutional guarantees for that matter)? What type of transitional mechanisms are possible, how do we assess whether they are 'Charter proof', also taking into account countervailing fundamental rights?

3.3 *Formalities prohibition Berne Convention*

A third important puzzle is how to ensure that a unitary copyright complies with the norms of international treaties, and in particular the Berne Convention and subsequent multilateral treaties, notably TRIPs and the WIPO Copyright Treaty (WCT). On the face of it, there is little to worry about here, partly of course because the EU had great influence in the creation of those treaties, exported some of its own (substantive) law in them and, where necessary, brought its own law into line with them. Regarding territoriality, the more modern treaties explicitly recognise that intergovernmental organisations like the EU can become parties. This is true for inter alia WCT which is a special treaty within the meaning of Article 20 Berne Convention, the Marrakesh Treaty (art. 15) and TRIPS (the EU being a WTO member).[18] While all these treaties assume the territoriality of rights, they do not oppose EU-wide intellectual property rights.

The WCT imposes on its contracting parties the duty to comply with the Berne Convention, as does TRIPS.[19] The Berne Convention, of course, predates the EU, and it does not explicitly provide for the accession of parties other than nation states. Considering the large number of contracting states, it is unlikely that the BC itself will be revised. Yet the biggest challenge lies with the Berne

17 Case-law on Article 1 First protocol to the European Convention on Human Rights is scarce, but we do know that the European Court of Human Rights regards intellectual property to come within the scope of the fundamental right to property of art. 1 First protocol.

18 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013).

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

Convention, specifically in the area of the prohibition of formalities in copyright law. 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'. Interpretations on what this means differ, but there is general agreement that at a minimum no formalities can be imposed as a precondition for the existence of copyright. What is less clear is to what extent rules on the actual enforcement of rights are captured by the prohibition. It is also important to note that the prohibition only applies to foreign works/authors, since the Berne Convention does not regulate protection of domestic authors (art. 5(3) BC).[20] Because TRIPs and WCT oblige states to honour the provisions of the Berne Convention, these treaties too 'import' the prohibition on formalities.

The mere fact that it may not be easy to adapt the BC or take the edge off the formalities prohibition through a special treaty, should not mean that the whole idea of a uniform title is to be considered as a hopeless exercise a priori. It is worth noting that the current system of formalities is already criticized for not being suited to the digital environment.[21]

4. Ways forward

A decade has passed since the European Commission put full unification and a unitary copyright forward as its long-term vision. The EC recognized it would be a complex undertaking and this might explain why not much progress has been made to date. Perhaps inspiration can be drawn from the making of the EU trademark and especially the EU plant variety rights.[22] Both were the outcome of long processes. For trademarks it started in the mid seventies, culminating in the 1994 EU trademark regulation.[23]

4.1 Taking inspiration from EU trademark and Plant variety rights

Looking back at the genesis of unitary rights, one can see the territorial nature of trademarks justified the creation of an EU wide right. Even more than substantive differences in national laws, the territorial nature of those national rights was seen as a major barrier to the single market and thus a problem to be solved.[24] At the same time, it was recognised that it might be more attractive (because cheaper) for locally operating companies to opt for a national rather than a union-wide trademark. But the ideal was that eventually union-wide rights would supplant national trademarks.[25] Besides, the policy of allowing co-existence of national and community trademarks was primarily

20 What 'domestic' is depends on a works country of origin as defined by the BC, depending on the situation this can be tied to the author (national or resident) or to place of first publication. See art. 3 and 5(4) BC.

21 S. van Gompel 'Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing', *Berkeley Technology Law Journal* 2013; Vol. 28, No. 3. p. 1425-1458; Stef van Gompel, 'Les formalités sont mortes, vive les formalités! Copyright formalities and the reasons for their decline in nineteenth-century Europe', in: R. Deazley, M. Kretschmer & L. Bently (red.), *Privilege and Property: Essays on the History of Copyright*. Oxford: Open Book Publishers 2009.

22 This section benefits hugely from the background research done by R. van Es while working on the ReCreating Europe project.

23 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark. *OJ* L 1994/11. See for historic account A. Kur & M. Senftleben, *European Trade Mark Law*, Oxford: Oxford University Press 2017.

24 Commission of the European communities, Competence of the community to create a European trade mark system and the need for such action (working document), October 1979 (doc IIIID/1294/79-EN)

25 See e.g. E. Armitage & D. Tatham, 'The Community Trade Mark: comments on the latest draft directive and the draft implementing rules for the regulation', *EIPR* 1986 Vol.8, No.5, p.135-138.

motivated by the fear that otherwise the community trademark system would never really take off.[26] This had to do with the potentially infinite term of protection of trademarks. There were simply too many existing trademarks for national laws and rights to ever 'wither away and die'.[27]

The choice for coexistence of national and an EU trademark system was made early on. But the aim was to avoid cumulative protection. The initial proposals still contained a provision that where a community trademark was registered, an identical national trademark would lose effect as long as the community trademark was in force. Eventually, that provision was dropped.[28] The EU trademark has not driven national systems to obscurity and cumulative protection remains possible. During the creation of community design law, the discussion on preventing co-existence did not really take place. This was different where plant variety rights are concerned.

Uniform plant variety rights also first appeared on the EC agenda in the seventies, as a result of European plant breeders calling for an international system of protection. This International Convention for the Protection of New Varieties of Plants of 1961 (UPOV, entry into force 1968) started out small with ratifications by The Netherlands, Germany and the United Kingdom, later joined by other (then) EC member states and ultimately obtaining global reach. It was later revised (last in 1991) and the development of the unitary plant variety title closely tracked these revisions and therefore took quite a long time. After a twenty-year gestion period, a first draft of the Council Regulation on Community plant variety rights was published in 1990, and the regulation adopted in 1994. The EU also became party to UPOV, in 2005.[29]

The Plant Variety Regulation allows for the co-existence of national rights and a EU title, but a right holder cannot rely on cumulative protection. The system also contains a mechanism to make plant breeders opt for an EU registration rather than national ones. It does this by prohibiting national registrations for varieties that are the subject of an EU registration. That is, once a breeder opts for a unitary title, subsequent national rights are no longer available. Only with respect to national rights obtained prior to the grant of a unitary right, is it possible to have cumulative rights. However, these national rights cannot be exercised while the unitary right is in effect.[30] This system is much more likely to promote a shift to unitary rights than the trademark and design systems. It might show a way to deal with the problem of cumulative national and EU-wide rights in copyright and related rights.

26 This is stated in various forms in European Communities Commission, Memorandum on the creation of an EEC trade mark, adopted by the Commission on 6 July 1976, Bulletin of the European Communities, Supplement 8/79, SEC (76)2476, July 1976 (notably paras 64-66); Draft Council Regulation on the Community trade marks, document III/D/753/78 of July 1978; Proposal for a Council Regulation on Community trade marks (submitted by the Commission to the Council on 25 November 1980), OJ C 351/5, 31.12.1980; Amended proposal for a Council regulation on the Community trade mark (submitted by the Commission to the Council pursuant to Article 149(2) of the EEC Treaty), COM(84) 470 final.

27 E. Armitage, 'Community Trade Mark Directive and Regulation and the consequences for UK trade mark law', *EIPR* 1990 Vol.12, No.6, p.222.

28 Proposal for a Council Regulation on the Community Trade Mark, COM(85) 844 final, 23.02.1986).

29 See for a history G. Würtenberger et al, *European Union Plant Variety Protection*, Oxford: Oxford Academic 2021.

30 The relevant article reads: Article 92 Cumulative protection prohibited. 1. Any variety which is the subject matter of a Community plant variety right shall not be the subject of a national plant variety right or any patent for that variety. Any rights granted contrary to the first sentence shall be ineffective. 2. Where the holder has been granted another right as referred to in paragraph 1 for the same variety prior to grant of the Community plant variety right, he shall be unable to invoke the rights conferred by such protection for the variety for as long as the Community plant variety right remains effective.

Of note, unlike for EU trademarks and designs, for EU law on plant variety rights no system of specialized community courts was set up. This shows it is possible to have uniform rights without such a system, contrary to what the European Commission stated in its 2015 Communication namely that 'Uniform application of the rules would call for a single copyright jurisdiction with its own tribunal, so that inconsistent case law does not lead to more fragmentation'.[31] It is of course a legitimate question whether a uniform title for copyright or related rights would work best if there is also a system of designated specialized (national) courts.

4.2 *A modest start?*

The example of the plant variety regulation suggests it could also help to shift our attention from copyright proper to related rights to see whether these are simpler to do first. Specifically I am thinking of the press publishers' right and the sui generis database right. Like the plant variety right, these rights did not exist at the national level in most member states so the slate from which to start was relatively clean. Of all intellectual property rights, copyright might be the hardest to turn into a unitary right, so perhaps it is wiser to start with rights where it may be a bit easier. The recently introduced press publishers right has a short duration and is not specifically regulated by multilateral copyright and related rights conventions. And why not start with turning the sui generis database right into a unitary right? Assuming there is reason to keep rather than abolish it (much is to be said for abolishing it, but that is another topic), it has the advantage of being a EU-made intellectual property right with not too much national histories behind it, it has a 'mere' 15 year term of protection, and is not subject to complicated international norms.

A reform of database law is also appropriate considering larger developments, in particular the roll-out of the EU data strategy. This has an impact on intellectual property rights. Intellectual property experts tend to see everything through the lens of 'protected subject-matter', but certainly for data collections and software, EU data policy is shifting from an exclusive rights-based model to approaches that promote sharing and reuse.[32] This is a different logic. For the success of the European 'data spaces' being developed, for example, a system of sui generis territorial rights is an obstacle. Possibly then, when it comes to data, it is easier to reach political action. The lessons learned in the process could then be useful in realising the vision of a unified copyright. Those would not be just 'legal-technical' lessons about how to make the change from a directive mandating national rights to a regulation creating EU wide rights. Undoubtedly there will also be strategic lessons about how to forge a path for copyright and other unitary rights, and as important: it may broaden the view on the role of intellectual property law in digital society and how it can fulfil its objectives in an ever more complex system of digital legislation.

31 EC 2015, o.c. note 2.

32 On the data strategy and database rights see a.o., E. Derclaye & M. Husovec, 'Sui Generis Database Protection 2.0: Judicial and Legislative Reforms', *EIPR* 44(6) 2022, p. 323-331; M. van Eechoud, 'Please share nicely – From Database directive to Data (governance) acts', Kluwer Copyright Blog, 18 augustus 2021; M. van Eechoud, 'A Serpent Eating Its Tail: The Database Directive Meets the Open Data Directive', *IIC* (52) 2021, p. 377; E. Valgaeren & S. Despreeuw, 'Data Governance Act en Data Act: naar een nieuw datarecht?', *Computerrecht* 2023/113, p. 181-187; M. van Eechoud & D. Buijs, 'Van databankindustrie naar data-economie: 25 jaar Databankenwet', *Auteursrecht* 2024-2, p. 67-76.

4.3. *Tabling unitary copyright*

The European Commission has long recognized the role of copyright as 'a key element of the EU's cultural, social and technological environment and of the digital economy', and recently it reiterated that it is the territorial nature of copyright combined with territorial restrictions in licensing agreements and the practices of service providers that limit cross-border availability.[33] Arguably, the current ambition to prepare the EU for the next significant transitions, from the 'semantic' web 3.0 to web 4.0 and a virtual reality future, will expose the shortcomings of territorial rights even more. In its communication on what is presented as this next technological transition, the Commission flags the (continued) importance of copyright and related rights, but also problems of localizing infringements in virtual worlds and thus of effective enforcement. It highlights the 'immense potential for the uptake of XR technologies and virtual worlds within the creative and cultural industries from gaming industry to fashion and design. Surprisingly perhaps, no reference is made to unitary rights as a solution.

Any progress on the matter eventually depends on the EC's willingness to seriously table unification and unitary rights. The problem does not lie with its competence to enact such a system, as Article 118 TFEU specifically grants authority to create unitary intellectual property rights, valid in all EU Member States. Moving forward is however not just a matter of policy makers putting unitary IP on the agenda. If legal scholarship can ramp up its interest in the project of unitary rights,[34] surely all necessary pieces of the puzzle can be identified, shaped and put together.

33 See EC Staff working document A Digital Single Market Strategy for Europe – Analysis and Evidence, COM(2015)100, para 3.5 (Accompanying Commission Communication A Digital Single Market Strategy for Europe, (COM(2015) 192 final).

34 To name but a few scholars who have already engaged: R. Hilty, 'Intellectual Property and the European Community's Internal Market Legislation – Copyright in the Internal Market', *IIC* 2004, p. 760; D.M. Vicente, *La propriété intellectuelle en droit international privé*, Leiden: Brill | Nijhoff 2009, p. 496; M. van Eechoud & P.B. Hugenholtz et al (red.), *Harmonizing European copyright law: The challenges of better lawmaking.* Alphen aan den Rijn: Kluwer Law International 2009 and more outspoken since P.B. Hugenholtz, 'The Creeping Unification of Copyright in Europe' in: T. E. Synodinou (red.), *Pluralism or Universalism in International Copyright Law,* Kluwer Law International 2019; more recent P. Wehrmann, 'Nationale Umsetzungen des Art. 17 DSM-RL und Territorialitätsprinzip. Risiken und Lösungsmöglichkeiten der Zersplitterung des digitalen Binnenmarkts' *GRUR* 2023, 1411 (who also suggests a reform of Article 8 Rome II Regulation) and B. Raue, 'Urheberrechtsschutz im digitalen Binnenmarkt', *Europarecht,* 2023, p. 364-380.