

### III. Copyright, territoriality and P2P

This Chapter explores the challenges placed on the territorial nature of copyright by digital age technology, in particular P2P. It begins, in section A, by putting copyright law and its territoriality principle into perspective, especially in the E.U. framework, in an effort to understand the context in which P2P uses and collective management must be analyzed. Section B provides a legal qualification of P2P uses under the exclusive rights categories of reproduction and making available. Section C then proceeds with a similar treatment of P2P related exceptions and limitations. The analysis carried out in this Chapter provides the essential legal framework for understanding file-sharing under the *acquis* and, as such, the necessary foundations for the examination of collective management made in Chapter IV and of potential collective rights management solutions for P2P discussed in Chapter V.

#### *A. Territoriality and harmonization*

Implementing an alternative design for P2P in the E.U. requires assessing its legal *status quo* under the *acquis*. This is greatly influenced by international copyright law, namely the WIPO Internet Treaties, which are in turn part of a more complex system featuring the Berne Convention and TRIPS.

The TRIPS and the Berne Convention establish international minimum standards for copyright protection.<sup>78</sup> Higher levels of protection are available under the WIPO Internet Treaties, both signed and ratified by the E.U. and each of its Member States.

It has been a long standing ambition of the E.U. to solve the problem of territoriality of copyright through the harmonization of Member States' laws.<sup>79</sup> Such ambition set in motion an harmonization program since the 1980's that has spawned

- 78 Art. 9(1) TRIPS incorporates the Berne Convention's most relevant substantial provisions. TRIPS further encompasses copyright subject matter not covered by the Berne Convention in arts. 10 (computer programs) and 11 (rental rights).
- 79 On the problem of territoriality in E.U. copyright law see, for all, P. Bernt Hugenholtz, *Copyright without frontiers: the problem of territoriality in European copyright law*, in, RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 12 (Estelle Derclaye Ed., Edward Elgar 2009).

a remarkable number of Green Papers (and respective Follow-ups),<sup>80</sup> Resolutions,<sup>81</sup> Communications,<sup>82</sup> Studies,<sup>83</sup> Recommendations,<sup>84</sup> Reports,<sup>85</sup> and, most

80 See *Commission Green Paper on Copyright and the Challenge of Technology*, COM (88) 172 final (June 7, 1988), *Commission Follow-up to the Green Paper 1988 – Working Programme of the Commission in the Field of Copyright and Neighbouring Rights*, COM (90) 584 final, (Jan. 17, 1991), *Commission Green Paper on Copyright and Related Rights in the Information Society*, COM (95) 382 final (July 19, 1995), *Commission Follow-up to the Green Paper on Copyright and Related Rights in the Information Society*, COM (96) 568 final (Nov. 20, 1996), and the *Commission Green paper on the online distribution of Audio-visual works in the European Union: opportunities and challenges towards a single digital market*, Brussels, COM(2011) 427 final (July 13, 2011) [hereinafter **Green Paper on Online Distribution of Audiovisual Works**].

81 See European Parliament, *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights* (2002/2274(INI)), P5\_TA(2004)0036, 2004 O.J. (C 92) [hereinafter **Community Framework Resolution**], European Parliament, *Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services* (2005/737/EC), P6\_TA(2007)0064, 2007, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0064&language=EN> [hereinafter **EP Resolution OMR**], European Parliament, *Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services*, P6\_TA(2008)0462, 2008, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0462+0+DOC+XML+V0//EN> [hereinafter **EP Resolution CCBM**] and European Parliament, *Resolution of 16 November 2011 on European cinema in the digital era* (2010/2306 (INI)), P7\_TA(2011)0506, 2011 available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0506> [hereinafter **EP Resolution Cinema in Digital Era**].

82 See *Communication from the Commission to the Council, the European Parliament and the European and Social Committee – The Management of Copyright and Related Rights in the Internal Market*, COM (2004) 261 final (Apr. 16, 2004) [hereinafter **Communication on Management of Copyright**], *Communication from the President in agreement with Vice-President Wallström – Commission Work Programme for 2005*, COM (2005) 15 final, (Jan. 26, 2005) [hereinafter **Commission Work Programme 2005**], *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on Creative Content Online in a Single Market*, COM (2007) 836 final (Jan. 3, 2008) [hereinafter **Creative Content Online Communication**], the IPR Strategy and the Communication on E-commerce and Online Services.

83 See *Commission Staff Working Document – Study on a Community Initiative on the Cross-Border Collective Management of Copyright* (July 7, 2005) available at: [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf) [hereinafter **Study CBCM 2005**].

84 See Commission Recommendation 2005/737/EC of 18 Oct. 2005 on collective cross-border management of copyright and related rights for legitimate online music services, 2005 O.J. (L 276); Corrigenda, 2005 O.J. (L 284) [hereinafter **Online Music Recommendation**].

85 See *Commission Report on the Monitoring of the 2005 Music Online Recommendation*, (Feb. 7, 2008), available at: [http://ec.europa.eu/internal\\_market/copyright/docs/management/monitoring-report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf) [hereinafter **OMR Monitoring Report**] and *Commission Final Report on the Content Online Platform* (May 2009), available at: [http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_platform\\_report.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf) [hereinafter **Final Report Content Online Platform**].

importantly, seven E.U. Directives (all during the 1991-2001 decade)<sup>86</sup> exclusively related to copyright and related rights—namely the Software Directive, Rental Right Directive, Satellite and Cable Directive, Term Directive, Database Directive, InfoSoc Directive and the Resale Right Directive—as well as the broader Enforcement Directive (of 2004), which also applies to copyright.

In this process of “upwards harmonization” the copyright Directives managed to not only tackle the better part of the issues addressed in the Green Papers, but also to surpass the minimum standards set forth in the Berne Convention and the Rome Convention, to which the Member States are parties, all with the purpose of removing disparities amounting to barriers to the free movement of goods and services.<sup>87</sup> Among the non-harmonized areas, collective rights management features prominently.

However, harmonization efforts have hitherto failed to address the main underlying reason for such disparities—the territoriality principle—, which is both enshrined in art. 5(2) Berne Convention and confirmed by E.U. case law.<sup>88</sup> This has prompted some authors to propose a more fundamental approach to the territoriality conundrum and achieve the Internal Market goal: introducing of a Community copyright modeled upon the existing unitary Community Trademark<sup>89</sup> and Community Design,<sup>90</sup> to be implemented through a Regulation (using art. 118 TFEU as the relevant legal basis).<sup>91</sup> To be sure, this is the only path to effectively unify (rather than merely harmonize) a right which is fragmentary by nature.

Putting things in perspective by way of example: for an E.U.-wide user of digital musical works, the territorial matrix of copyright implies the need to get a license on each divisible use (e.g. reproduction and making available online) in each of the twenty seven Member States. This amounts both to a competitive disadvantage vis-à-vis other competing markets (e.g., U.S.)<sup>92</sup> and to a negative impact on online uses

86 Although some Directives have since been amended, most notably the Rental Right Directive (in 2006), the Software Directive (in 2009), and the Term Directive (in 2006 and 2011).

87 See Hugenholtz, *supra* note 79, at 17.

88 *Id.* at 18. See also Case C-192/04, *Lagardère Active Broadcast v. SPRE and Others*, 2005 E.C.R. I-7199 [*Lagardère*].

89 See Council Regulation 207/2009 of 26 February 2009 on the Community trade mark (codified version), 2009 O.J. (L 78/1).

90 See Council Regulation 6/2002/EC of 12 December 2001 on Community designs, O.J. (L3/1), as amended.

91 See Hugenholtz, *supra* note 79, at 25-26, and M.M.M. VAN EECHOUD, P.B. HUGENHOLTZ, S. VAN GOMPEL, L. GUIBAULT & N. HELBERGER, HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING, 19 INFO. L. SERIES, 316-325 (Kluwer Law International 2009). In this context, a group of scholars (the Wittem Group) has produced a draft version of a European Copyright Code (see Wittem Group, *European Copyright Code*, 33 EURO. INTELL. PROP. REV 76 (2011)). For a critical analysis of this draft see Jane C. Ginsburg, “*European Copyright Code* – Back to First Principles (with Some Additional Detail), COLUM. PUB. L. & LEGAL THEORY WORKING PAPERS, Paper 9193 (2011), [http://lsr.nellco.org/columbia\\_pltt/9193](http://lsr.nellco.org/columbia_pltt/9193) (last visited Jan. 31, 2012).

92 See Hugenholtz, *supra* note 79, at 12.

of works (and, *ergo*, P2P uses), as already noted by the Commission, particularly in the field of online music distribution.<sup>93</sup>

In its 2011 IPR Strategy, the Commission proposes a strategy to shape the future for intellectual property rights in the E.U., focusing on the design of “enabling legislation” for the regulation and optimization of the relationship between creators, service providers and consumers, with the aim of achieving a true single market.<sup>94</sup> On online content uses (potentially impacting P2P) it refers to the creation of a comprehensive framework for copyright in the digital single market.<sup>95</sup>

This includes the presentation of a “proposal to create a legal framework for the collective management of copyright to enable multi-territorial and pan-European licensing”, in particular in the music sector; such framework containing common rules on transparent governance and revenue distribution (e.g., by incentivizing the creation of European “rights brokers”).<sup>96</sup> Such proposal was initially foreseen for the second semester of 2011,<sup>97</sup> which proved to be an overly optimistic deadline; at the time of this writing, the Commission expected to present said draft proposal for a framework Directive on “online copyright licensing of multi-territorial and pan-European services” by “early 2012”<sup>98</sup>

The IPR Strategy further states the intention to amend the Enforcement Directive so as to better combat infringements of intellectual property rights via the Internet, with the aid of ISPs and respecting user’s fundamental rights.<sup>99</sup>

The Commission goes however one (surprising) step further, setting forth the foundations for a veritable “jump” from the harmonization approach of the last three decades towards a unification approach, by expressly recognizing the admissibility (and future examination) of a “more far reaching overhaul of copyright at the European Level” through the “creation of a European Copyright Code... on the basis of Article 118 TFEU”—along the lines proposed by the Wittem Group—while also opening the door for the review of the InfoSoc Directive’s exceptions and limitations.<sup>100</sup> This intention is also mentioned and developed in the Green Paper on Online Distribution of Audiovisual Works, where it is suggested that a “a unitary European Copyright Code could be based on a codification of the existing EU copyright directives”, and that the E.U. will examine the feasibility of “an optional unitary copyright title on the basis of Article 118 TFEU”, which “could be made

93 See, *inter alia.*, the Online Music Recommendation.

94 See IPR Strategy, at 6.

95 *Id.* at 9-14.

96 *Id.* at 10-11 and 23-24.

97 *Id.*

98 See Green Paper on Online Distribution of Audiovisual Works, at 12. See also Communication on E-commerce and Online Services, at 6-7.

99 See IPR Strategy, at 19.

100 *Id.* at 11.

available on a voluntary basis and co-exist with national titles".<sup>101</sup> However, such suggestion comes with advice for a thorough examination of the "feasibility, actual demand for, and the tangible advantages of, such a title, together with the consequences of its application alongside existing territorial protection", thus hinting at the potential problems arising from the overlap between national and E.U.-based rights.<sup>102</sup>

#### *B. Legally relevant P2P acts and exclusive rights*

Although often occurring in the same economic context, we can identify three legally relevant acts in the "technical constitution" of P2P:

- (i) The making of a copy of a work in a first user's computer memory;
- (ii) The making available of a copy of a work (upload) to other users on a P2P network; and
- (iii) The download of a copy of a work by such other users in the network.<sup>103</sup>

Despite the absence of international harmonization for exclusive economic rights, most existing differences relate to scope.<sup>104</sup> The Berne Convention sets forth minimum standards for some economic rights, namely translation, reproduction, public performance, broadcasting, public recitation, and adaptation.<sup>105</sup> The P2P relevant acts of download and upload might call into question the application of the Berne Convention rights of *reproduction* and *communication to the public* (i.e. public performance and recitation), and the WCT-WPPT *making available right*.<sup>106</sup>

101 See Green Paper on Online Distribution of Audiovisual Works, at 13.

102 *Id.*

103 See Lewinsky 2005, *supra* note 8, at 5.

104 SILKE VON LEWINSKY, INTERNATIONAL COPYRIGHT LAW AND POLICY 54-55 (Oxford University Press 1st Ed. 2008) [Lewinsky 2008].

105 See, respectively, arts. 8, 9, 11, 11bis, 11ter and 12 Berne Convention.

106 See arts. 8 WCT, 10 and 14 WPPT.