

BOOK REVIEW

RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT

By Estelle Derclaye (Editor),
Cheltenham, Northampton: Edward Elgar, 2009, XXI + 643 pp, £175.00, ISBN 978-1-84720-392-2

The Research Handbook on the Future of EU Copyright is the fourth title in the Edward Elgar series of Research Handbooks in Intellectual Property. It brings together contributions from 28 intellectual property (IP) scholars, organised in 23 chapters, framed by a short introduction and conclusion by the editor, Estelle Derclaye. Each chapter analyses a particular facet of copyright law, from a markedly European perspective. A broad array of different aspects is consequently examined.

The first two chapters in the collection address the dimensions of territoriality and fundamental rights in copyright, followed by a series of contributions on the general principles of copyright law. Topics range from criteria for the establishment of rights (subject-matter, originality, fixation) to the characteristics of granted rights (economic rights, moral rights, ownership, duration) and their exceptions. It also includes papers on the dealings in, and the collective management of, rights. Computer programmes and databases are then discussed as special protection regimes. Following a further chapter on the choice of law in copyright, the focus shifts to the relationship of copyright with other areas of law (other intellectual property rights, contract law, competition law and unfair competition). The final chapter is dedicated to the effect of the external trade and IP policy of the European Community (EC). As a result of this rich variety of issues, the contributions appear as pieces of a mosaic which – viewed as a whole – provide a fairly accurate picture of EC copyright law.

The collection does not, however, content itself with tracing prior European harmonisation in copyright law through a mere stock-taking exercise. Derclaye also wanted the book:

[T]o question what the future of EU copyright should be, by answering questions such as: what went wrong with the harmonisation acquis? What did the Directives do well? Should copyright be further harmonised? (p 2)

To this end, each chapter, more or less, follows a uniform path in providing a critical examination of past EC intervention in the relevant area of copyright law before analysing whether future harmonisation would be desirable.

The task of reviewing this remarkable collection is not without a certain delicacy. An attempt to scrutinise every chapter would be futile in light of the given space and probably not even make for an engrossing read. As the introduction to the handbook provides a brief summary of all the contributions, I will therefore simply highlight what I consider to be the most interesting ideas and chapters, and conclude with some general and abstract observations.

A topic that is much discussed at the moment is the current European regime of copyright exceptions. A perception that has recently gained momentum is that the current set of EC exception rules does not fulfil the intended goal of harmonising the national laws of Member States. In fact, there is now broad support among IP scholars, at least in the UK, for recasting the rules in order to counterbalance the existing copyright system – increasingly perceived as being unjustly biased toward a strong protection for rights holders – with a more robust regime of exceptions. This issue is analysed in the present handbook by Marie-Christine Janssens who, after delivering a convincing account of the deficiencies of the existing rules, rejects the idea of an open fair use norm (pp 337-338). She argues, instead, in favour of setting out a considerable number of precisely worded mandatory exceptions under EC law – exceptions that would be required to be transposed by the Member States into their national laws. In addition, she suggests that exceptions that are underpinned by fundamental rights or public interest concerns should be construed as binding: national laws must not permit them to be overridden by contractual agreements or technical protection measures. Finally, in her view, EC law should provide for optional exceptions “which have no or little impact on multi-territorial exploitations”. This list of optional exceptions should not be open-ended but should be supplemented by a “window” or “mini-fair use provision” that would allow Member States to add or maintain purely national provisions subject to certain conditions (pp 344-345). The benefit of the overall proposal is that it would create a system of exceptions of graduated robustness. The degree of robustness would be determined by clear and foreseeable criteria based on the rationale of a given exception. Such a model would extend the scope of exceptions on the whole, while still catering for national exceptions which do not impede the internal market. The advantage of the advocated ‘window provision’ and its possible content, however, requires further demonstration.

Equally topical is the relationship of copyright and contract law. Lucie Guibault argues persuasively that restrictive licensing contracts create an imbalance between the interests of rights holders and end-users. She offers detailed and well argued alternatives for restoring the right balance. The most efficient measure, she concludes, concurring with Janssens’ findings, “would be to declare null any unilateral contractual provision eliminating or impeding the normal exercise of the limitations recognised in the copyright act” (p 542).

In her chapter on copyright and competition law Valérie Laure Benabou focuses on the recent application of Art 82 EC to IP monopolies. She suggests that the standard application of competition law to copyright constitutes an ‘abuse of competition rules on copyright’ and creates a situation “which may act as a deterrent against funds being invested in creation” (p 566). To remedy the situation, she proposes that certain competition law constraints should be accommodated within copyright law, in order to reduce the risk of *a posteriori* intervention by competition authorities. Moreover, competition offices should be required to assess in more detail the consequences of their decisions on innovation and redistribution to the end-user, and to elaborate market definition guidelines through meetings of joint experts. It might be added that the question as to whether competition law should apply with unfettered scope to IP monopolies also continues to be highly relevant for European performing rights societies. The system of reciprocal representation of such societies has recently been

held to be an anti-competitive concerted practice under Art 81(1) EC.¹ An appeal against this decision by twenty-two collecting societies has yet to be heard by the Court of First Instance.

The last chapter highlighted here is Anselm Kamperman Sanders' brief contribution. Analysing Dutch case law, he identifies a current judicial trend to rely on notions of unfair competition law when interpreting copyright law or, indeed, when copyright is not available. In his eyes, courts do this because they "feel that the plaintiff has something worthy of protection that the defendant is copying without justification". That the problem transcends the Dutch jurisdiction, as well as the confines of copyright law, can be inferred from the example of search engine keyword advertising. In France, search engines are regularly obliged to pay large damage awards for these activities and most courts have had little difficulty in basing their liability on unfair competition, even where liability for trade mark infringement was denied.² This demonstrates clearly the danger that unfair competition law – an area in which EC intervention is absent – can be employed in a way that would circumvent all European harmonisation efforts in the field of intellectual property. Kamperman Sanders' conclusion should therefore be wholeheartedly supported:

What remains to be undertaken is a fundamental discussion of the appropriate ambit and place of the law of unfair competition in the context of European harmonisation, but most important of all on the role of unfair competition law as a supplementary, alternative, or subsequent method of protection for intellectual and industrial property rights. (p 574)

The following paragraphs offer some general observations, the first of which pertains to the diversity of the contributing authors, who have deliberately been chosen "from as many European Member States as possible to give a truly European, and therefore hopefully balanced outlook" (p 2). This has a number of consequences. In the first place, the contributions are a clear reflection of the different academic traditions of their respective authors; they differ considerably in the style of writing, the use of footnotes and the composition of the argument. At times, these may be unfamiliar and necessitate a re-reading of a section, or indeed a whole article, to fully appreciate the argument. The additional effort, however, seems not only unavoidable but well worth while. How are we, after all, to harmonise varying national copyright provisions if we are not prepared to endeavour to understand them in their respective legal context and tradition?

Secondly, and this is a clear advantage of the book, the diversity of views generates a strong comparative accent. As authors draw on their respective experiences, the reader learns about national particularities which could influence further harmonisation on different levels. Andreas Rahmatian, for example, in his excellent chapter on dealings in rights, offers a clear and sharp analysis of the widely diverging national rules on assignments and licences in copyright and authors' rights traditions,

¹ European Commission, "Commission Decision of 16/07/2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC)" C(2008) 3435 final, art 4(2).

² See T Bednarz and C Waelde, "Search Engines, Keyword Advertising and Trade Marks", in L Edwards and C Waelde (eds), *Law and the Internet* (Oxford and Portland: Hart, 2009), at 284 *et seq.*

which leads him to advise against harmonisation in this area (pp 286-316). Some contributors mention particular examples of national transposition of EC law which might serve as a role model for further harmonisation. The Portuguese Copyright Act, for example, already declares null any unilateral contractual provision impeding uses which are permitted by the Act (p 538). Finally, national specificities may serve as “early warnings” of problems that might arise in the future in other Member States, as illustrated by the Dutch experience referred to by Kamperman Sanders (pp 567-574). All of this makes the handbook a riveting and enriching experience.

As a third - and somehow natural – consequence, the general attitudes of the authors toward EU intervention differ as well. Bernt Hugenholtz, seconded by Derclaye, displays approval of large-scale European intervention and militates for a unified European copyright which would pre-empt national regimes (p 26 and p 615, respectively). Rahmatian, for his part, warns that any future harmonisation of copyright should leave untouched any underlying national contract laws. Attempts to harmonise these are marked by “intellectual insensitivities with which [they] treat the various European jurisdictions through their neglect of the different legal mentalities” and are “in fact an atavistic expression of nationalism, disguised as ‘European’ internationalism” (p 316). Much in the same line, albeit in less polemical terms, Guilbaut, too, rejects the notion of a harmonised copyright contract law (pp 525-527). Ansgar Ohly, writing about already largely harmonised economic rights, on the other hand, believes that “copyright law could become a model for a future European private law methodology, which combines broad statutory definitions familiar to Continental lawyers with the careful analysis of precedent known from common law” (p 232). Each of these statements is, of course, made in a specific context and they should not therefore be construed as contradictory. They do, however, reveal something about the authors’ preconceptions about what European efforts towards harmonisation can and should do, and it is stimulating to note that the views are not necessarily identical.

Just as the authors’ general attitudes towards European intervention shine through only by way of background to their arguments, preconditions and justifications for European intervention are not always fully outlined either. Yet, EC involvement should not be a (tacitly assumed) default rule, but needs to be carefully justified, as all European harmonisation encroaches upon the national sovereignty of Member States. The contributions are written, however – understandably - from the perspective of an IP rather than an EC lawyer. And while most of them diligently substantiate their proposals for further European reform, there is not a more open discussion regarding the conditions under which European harmonisation is desirable, and the forms that such harmonisation could take. To a certain extent, Derclaye addresses these aspects in her conclusion when she touches on the principles of subsidiarity and proportionality as well as the internal market model. Her remarks, however, cannot do much more than name the relevant issues; dedication of a chapter to the general theory of EC harmonisation would have added further benefit to the book.

A related topic mentioned only in passing is that of upwards harmonisation, or rather how to avoid it. Hugenholtz notes the “political and legal problems that a scaling back of intellectual property rights would cause individual Member States” (p 17). Brigitte Lindner, explaining a reform that scaled back the duration on performances fixed on phonograms, observes that the German Federal Constitutional Court considered “the change of the starting point of a term of protection which was already running at the time the law was modified ... incompatible with constitutional law” (p 174). Finally,

the danger of upwards harmonisation is also picked up by Derclaye who concludes that:

[A] return to the history of copyright, its general justifications and those for its specific conditions and limits, with a comparative outlook, and an analysis of the consequences of legislating upwards or downwards beforehand, combined with some empirical or at least theoretical economic evidence, is necessary before adopting a Directive or a Regulation on any copyright aspect. (p 623)

These passages notwithstanding, a more nuanced analysis explaining the trend of upwards harmonisation and, more importantly, how downwards harmonisation can be achieved without impeding legitimate expectations of rights holders, would have made for interesting reading. On the other hand, a detailed theoretical examination of EC harmonisation of copyright law in general, and the issue of upwards harmonisation in particular, would arguably have exceeded what the book could realistically provide.

The preceding comments should in no way be misinterpreted to detract from the overall excellent quality of the handbook. To offer a consistent and complete survey of EC copyright law in one work is a novel undertaking and, as such, a remarkable achievement in itself. What is more, the editor's intention that the book should not only describe the *status quo* but also propose ways in which European intervention should develop in the future is equally realised in almost all chapters. Often concrete and innovative proposals are made, as illustrated by the examples mentioned above. Be they contentious at times, they are well researched and deserve to be taken seriously. At any rate, they provide an excellent starting point for further debate.

That such debate will take place cannot be questioned. Indeed, this research handbook could not be more timely. At the end of October 2009, the European Commission, in what is referred to as a "reflection paper", outlined its views on the challenges for the future when attempting to foster creative content in a European digital single market.³ The Commission seems particularly open at the moment to (also) academic input, and seeks to start a broad debate on how to create "a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online". To instigate this, the paper invites interested parties to comment on a number of previously tabled proposals. Interestingly, it does not shy away from mentioning even the most controversial proposals, such as the introduction of a European Copyright Law or alternative forms of remuneration. Many ideas put forward in the present handbook could provide suitable solutions to many of the issues raised in this debate. It is therefore to be hoped that "the – admittedly ambitious – aim of influencing European copyright policy" will also be attained by the book (p 1). The scholarly IP community, in any case, ought to take the opportunity to build on proposals made in the handbook in order to actively engage in these imminent discussions. As Willem Grosheide concludes his chapter: "there is still a lot to be analysed and researched" (p 266).

³ European Commission, *Creative Content in a European Digital Single Market: Challenges for the Future* (22 October 2009), available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf (accessed 4 December 2009).

The Handbook on the Future of EU Copyright provides an excellent resource for policy makers and researchers alike. It may also be of great benefit to post-graduate students who could easily use it as a step by step accompaniment to university courses on copyright. The only hindrance to this appears to be the price: £175.00 would inevitably exhaust any student budget. Past titles in the same book series have, however, been released in a paperback version – something that Edward Elgar would do well to consider here as well.

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