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ARTICLE

# European Copyright Inside or Outside the European Union: Pluralism of Copyright Laws and the "Herderian Paradox"

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**Abstract** The agenda of the EU includes the harmonisation or unification of laws of its Member States for promoting the common market, improving free movement of goods, free movement of capital, free movement of services, and free movement of people. This also applies to copyright law. However, harmonisation or unification of laws through legislation or CJEU decisions does not necessarily further European integration. In the light of recent political and social events, a movement towards further harmonisation, also in copyright law, could even be detrimental to the European cause. This article argues that the more one pursues integration, harmonisation and unification of national laws across Europe, the more one may endanger the fabric and framework of a union of European states. Further legal unification prompts a tendency of the EU Member States to move away from one another. Increased unity causes further diversity, and a certain level of diversity effects unity. This dialectical process can be called the "Herderian paradox", inspired by the philosophical history of Johann Gottfried Herder (1744–1803) which is outlined in this article. Some of the problematic areas of copyright harmonisation that illustrate the dangers of the "Herderian paradox" are discussed: the concept of copyright work, the interpretation of originality, the role of moral rights, exceptions and limitations, and, as a possible but dangerous remedy to overcome difficulties of harmonisation, EU law pre-emption and intergovernmental treaties outside EU law.

**Keywords** EU copyright · Originality · Moral rights · Exceptions and limitations · EU law pre-emption · Herder

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## 1 Introduction

It is part of the agenda of the EU to harmonise and unify laws of its Member States to further the cause of greater integration, especially a common market, free movement of goods, free movement of capital, free movement of services, and, in reality to a lesser extent, free movement of people.[1] Differences of national laws and regulations which could hinder this free movement or discourage investors from other Member States should therefore be ironed out.[2] Copyright is but one example of that general principle.[3] This agenda has led to research by intellectual property scholars into the possibility of a harmonised European copyright law,[4] also in view of already existing harmonisations and even unifications of trade mark and patent law. There are several reservations to an unrestrained harmonisation or even unification of private or commercial law,[5] and although this is a topic of general comparative law, copyright is a good example for demonstrating the problems. Harmonisation or unification of laws does not necessarily further European integration. In the light of recent political and social events, a movement towards further harmonisation (also in copyright law) could even be detrimental to the European cause.

The European Union is currently in a profound crisis. The weakening of the European idea and its values started especially with the rescuing of the banks during the financial crisis of 2009–2010. This was mostly implemented through the states taking on large public debts funded by taxpayers' money, and this created sovereign debt was then collectivised in the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) devices.[6] That situation was used to justify economic austerity measures, and Greece in particular was forced to agree to an extended policy of austerity[7] in long bailout negotiations with EU representatives

[1] *See e.g.* the website of the EU Commission: http://ec.europa.eu/growth/single-market/index_en.htm (accessed 8 April 2016).

[2] *See e.g.* the recent Communication from the Commission to the European Parliament, the Council, etc., *Upgrading The Single Market: More Opportunities for People and Business*, COM(2015) 550 final, 28 Oct. 2015; *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, 2016/0280 (COD), Recitals (1) and (3).

[3] *See e.g.* Recitals (6) and (7) of the Information Society Directive 2001/29/EC.

[4] *E.g.* The Wittem Group (2011); Fitzpatrick (2003), pp. 215–223, at 222–223; Cook and Derclaye (2011); Rosati (2010a); Sterling (2002), pp. 270–293, at 285–290. Critical, Cohen Jehoram (2001); Taylor (2009).

[5] *See* the well-known, vociferous criticism by Legrand (1997); a newer and more topical discussion by Hesselink (2012). These authors discuss European private (contract) law, but similar problems appear in relation to European intellectual property law.

[6] *See e.g.* in more detail as to the technicalities, Hofmann (2012), pp. 426–455, at 426–430; Armstrong (2013), pp. 601–617, at 605–606.

[7] Well-known economists across the political spectrum have always pointed out that austerity measures made it impossible for the Greek economy to recover, though with different arguments and consequences, *see e.g.* Krugman (2015a); Sinn (2011).

on 13 July 2015[8] – a course of action which was widely seen as undemocratic and potentially humiliating to a Member State of the EU.[9] Since Germany had a leading role in these negotiations and the method of conduct, perhaps to divert from its then negative image,[10] in summer 2015 it invited, initially unrestrictedly, a large number of refugees from the war-torn Middle East.[11] Now Germany and the EU send refugees and migrants back, assisted by an agreement with Turkey.[12] German and EU representatives complain about the lack of solidarity among Member States in the refugee crisis.[13] But the lack of solidarity among Member States cannot come as a surprise with a supranational entity which is completely and almost exclusively grounded on free market competition[14] – the exact opposite of solidarity. The competition in relation to ever-lower corporation tax rates and advantageous tax deals among Member States to the detriment of their national economies illustrates that problem nicely.[15] The referendum on 23 June in the UK which decided in favour of Britain leaving the EU could also be seen a symptom of this crisis, but it was not really. The referendum campaign was largely devoid of intellectual argument and mainly devoted to xenophobia[16] and political infighting within the governing Conservative Party,[17] or to abusive personalised quibbling instead of judicious critique.[18] The existent problems with the EU had hardly ever been discussed genuinely and intelligently, and featured far less in the minds of the voting public than some commentators may now claim when rationalising the result. The decision of the referendum was very unfortunate und unwise. It was, however,

[8] *E.g.* Traynor (2015); Traynor and Rankin (2015); Uken (2015).

[9] *E.g.* Krugman (2015b), Opinion Pages, 12 July 2015; Evans-Pritchard (2015).

[10] The treatment of Greece was highly controversial in Germany itself, even among politicians, *e.g.* J. Fischer, former German minster of foreign affairs, J. Fischer (2015).

[11] The ulterior motive for this seemingly generous invitation to Germany was mostly to obtain the cheap labour force of educated young people – which Germany needs because of its demographic situation.

[12] The Council of Europe has voiced serious human rights concerns in relation to this "refugee deal", *see* Rankin (2016).

[13] *E.g.* Juncker (2016).

[14] For intellectual property, *see e.g.* the statement in Recital (8) of the IP Enforcement Directive 2004/48/EC: "The disparities between the [enforcement] systems of the Member States […] [do] not promote free movement within the Internal Market or create an environment conducive to healthy competition."

[15] Luxembourg has become notorious for that, *see e.g.* "LuxLeaks: Jean-Claude Juncker se défend d'être 'l'ami du grand capital'", *Le Monde* (online), 12 November 2014, Bower and Watt (2014). But other EU States, such as Ireland, Britain, or the Netherlands are similar examples.

[16] Notably the only ones in Europe who welcomed the British EU referendum result were far right-wing political parties.

[17] It has been amusing to witness that the principal and popular – and populist – campaigner for "Brexit", and winner of the referendum, who used the question of EU membership only for trying to propel himself to the office of prime minister has been brutally eliminated in the last minute by this closest political allies. He used the people for his career but forgot that others would use his for theirs. *See e.g.* Rayner (2016).

[18] A good illustration was the warning in a publication of the Institute for Fiscal Studies (IFS) of 25 May 2016 (http://www.ifs.org.uk/publications/8296) (accessed 25 May 2016) that the effect of leaving the EU on public finances would require at least an additional one or two years of austerity, which prompted the reaction by the "Vote Leave" campaign that the IFS is a "paid-up propaganda arm of the European Commission," *see e.g.* Weaver and Asthana (2016).

foreseeable because of its xenophobic rhetoric, not because of any trenchant criticism of EU institutions.

It has nevertheless become more difficult to make a convincing argument in favour of the EU at present, and its program of incessant and ever-increasing legal harmonisation plays an important part in that. More harmonisation could be prejudicial to the European idea. This perhaps unexpected argument is what I will call in the following the "Herderian paradox", after the German philosopher and man of letters Johann Gottfried Herder (1744–1803) who became influential (and misunderstood) particularly in his native Germany.

## 2 The "Herderian Paradox" as an Explanation for Potential Damage to the "European Idea" by Further Harmonisation in the Present Political Situation

For an understanding of the possible damage which the centrifugal forces of EU copyright unification can cause, one must appreciate certain intellectual movements in history, and here one can draw inspiration from Herder. Johann Gottfried Herder's *magnum opus* was the *Ideen zur Philosophie der Geschichte der Menschheit* (*Ideas on the Philosophy of the History of Mankind*) (1784–1791), a voluminous work in which he developed his philosophy of history. It is not possible and not necessary for present purposes to explain the overarching concept and thesis of this idiosyncratic work of over 900 pages. The relevant point in Herder's theory here is that he emphasises a principally irreducible innate cultural difference in peoples while all human beings are, at the same time, ultimately the same.[19] There is a distinctive "national character" (*Nationalcharakter*) of peoples,[20] an idea which could already be found with Montesquieu[21] and in the Scottish Enlightenment especially with Lord Kames,[22] David Hume[23] and Adam Ferguson, all of whom exercised some influence on Herder. Herder's "national character" results from a somewhat mystical combination of history and tradition, and education and civilisation, but also from nature and climate.[24] The kind and extent of nation states is shaped by that national character[25]:

> Nature raises families; the natural State is also one people, with one national character. For millennia this character is retained in it and can be developed most naturally if its prince, born with its people, wishes to do that: for one people is both plant of nature and one family; only that with several branches. Nothing therefore appears more obvious against the purpose of governments

[19] Herder (1989), II, 7, i, at 253; II, 8, ii, at 298.

[20] Herder, *Ideen*, II, 9, iv, at pp. 369–370.

[21] *E.g.* Ch. de Montesquieu, *De l'esprit des lois*, book 19, chap. 10.

[22] Rahmatian (2015), pp. 115, 151, with further references to Kames's works.

[23] Hume (2003).

[24] Herder, *Ideen*, II, 7, iii, at pp. 268–270; II, 7, v, at pp. 280–281; II, 8, at pp. 298–299.

[25] Herder, *Ideen*, II, 9, iv, at pp. 369–370 (my translation).

> than the unnatural augmentation of States, being the wild intermixture of species of humans and nations under one sceptre. The sceptre of man is far too weak and small as that so contradictory parts could be inserted in it; hence they are glued together in a fragile machine which one calls State's machine, without inner life and sympathy of the parts towards one another.

This short passage gives an idea of Herder's pre-romantic and post-"storm and stress" (*Sturm und Drang*) style[26]; he operates with analogies, metaphors and allusions, not exact logical reasoning,[27] precisely what Kant would criticise about Herder's *Ideen*.[28] But Herder was perhaps the first champion of general synthetic observation and holistic contemplation ("*Anschauung*"). Although he was an empiricist, he rejected the "cold" analytical and dissecting scientific examination of humanity and society, and in this he positioned himself against the French Enlightenment in particular.[29] Contrary to what an eminent scholar has asserted,[30] Herder was not an opponent of the Enlightenment, as has been shown more recently.[31]

Herder's imaginative style of loose associations, sweeping generalisations and elegant imprecision is not only extremely difficult to translate into English (something that can hardly be held against the English "national character"), it also makes it complicated to ascertain Herder's concepts with sufficient precision. The idea of the "national character" is no exception. How a people's "national character" can be described *specifically* and what it is shaped by remains hard to establish. Herder says that the character of nations depends not only on climate, the geographical situation and features of nature (such as mountains),[32] but is also influenced by political circumstances.[33] The national character is emphatically not based on race; in fact Herder sees the term "race" as entirely inappropriate for humans – every people is a people with a national culture (*National-Bildung*), race has no relevance here.[34] Reading the *Ideen*, one can distil a certain notion of "national character": a culture which is influenced and moulded by climate and topography, genetic predisposition, education, tradition, language, myths, poetry,[35] arts and science – elements which are the result and at the same time the makers of

[26] Compare the passages of similar content in Herder, *Ideen*, III, 12, vi, at pp. 507–513.

[27] But not without logical reasoning, *see* the example of logical conclusions in the explanation of the grounds (according to Herder, of course) of polygamy in the orient, *see* Herder, *Ideen*, II, 8, iv, at pp. 317–318.

[28] Bollacher (1989); I. Berlin, "Herder and the Enlightenment", p. 187.

[29] Berlin (2000), pp. 168–242 at 198. Herder was favourable to the Scottish Enlightenment in which he saw much more similarity to his own approach, however, partly through some erroneous interpretations, *see* Rahmatian (2015), pp. 147–148.

[30] I. Berlin, "Herder and the Enlightenment", pp. 195–199.

[31] Norton (2007).

[32] Herder, *Ideen*, IV, 16, at p. 677.

[33] Herder, *Ideen*, IV, 16, iii, at pp. 690–691, in this context in relation to the German peoples.

[34] Herder, *Ideen*, II, 7, i, at pp. 255–256.

[35] "The "genius" of a people manifests itself nowhere better than in the appearance of its speech", Herder, *Ideen*, II, 9, ii, at p. 353.

this culture. This culture binds together, or forms, a "people" or a "nation", and all peoples or nations are different. From that follows a plurality of cultures and a diversity, a challenge to the then prevalent Enlightenment view of certain principles of the "science of man" that supposedly applied universally. Different as these peoples and their ways of life are, they are still equal and equivalent, a point Herder keeps stressing.[36] There are no inferior or superior peoples and nations,[37] and historiographers should refrain strictly from favouring a particular people.[38] The diversity of human peoples is also one reason why humans are not really made for the State, an artificial and "inorganic" institution which will hardly lead to happiness.[39] The state of nature of humanity is not war, but peace.[40] A natural, "organic" government is the state of nature of societies, and (wrong) education creates more inequality than nature provides.[41] Diverse and dissimilar as these peoples in their seemingly irreconcilable plurality may be, there is still a "general spirit of Europe" (*Allgemeingeist Europas*) which will gradually extinguish the national characters.[42] Elsewhere Herder refers to the "European Republic" (*Europäische Republik*).[43]

As intellectual and humanist as Herder's "nationalism"[44] is, it is still perilous in the wrong person's hands. Attempts at determining the specific national character of a particular people invariably lead to wide generalisations, oversimplifications and stereotyping or relatively bland findings which essentially reiterate facts from the history of the people in question.[45] It is characteristic for Herder that he himself was perfectly aware of this danger when he said in his earlier philosophy of history *Auch eine Philosophie der Geschichte zur Bildung der Menschheit* (1774) (*Yet Another Philosophy of History for the Formation of Mankind*) that precedes the *Ideen*: "Nobody in the world feels the weakness of general characterising more than I do. One paints a whole people, age, area – *whom* has one painted?"[46] But this hermeneutic approach with its fine shades of sympathetic understanding at all levels got lost in a crude reception of Herder's thought in the nineteenth century,

[36] *E.g.* Herder, *Ideen*, II, 6, iv, at p. 233; II, 7, i, at p. 253; II, 8, iii, at p. 312; II, 8, v, at p. 333; II, 9, iii, pp. 358–359.

[37] Consequently, Herder presents the Jews as a people who have preserved their cultural identity and national character over hundreds of years of prosecution; and Herder rejects strongly the persecution of Jews and what would later be called anti-Semitism, *see* Herder, *Ideen*, III, 12, iii, at pp. 483, 490–492; IV, 16, v, at p. 702.

[38] Herder, *Ideen*, IV, 16, vi, at p. 706.

[39] Herder, *Ideen*, II, 8, v, at pp. 333–335.

[40] Herder, *Ideen*, II, 8, iv, at p. 316.

[41] Herder, *Ideen*, II, 9, iv, at pp. 362, 367. Herder's indebtedness to Rousseau is obvious here.

[42] Herder, *Ideen*, IV, 16, vi, at pp. 705–706.

[43] Herder, *Ideen*, IV, 16, at p. 678.

[44] It is a form of nationalism, *see* I. Berlin, *supra* note 29, pp. 179, 205–206, but it is anachronistic to equate this "nationalism" with the nineteenth century nationalism and present nationalist movements.

[45] *See*, for example, for the first case, Herder's characterisation of the Saxons, Normans and Danes, Herder, *Ideen*, IV, 18, iv, at p. 789, for the second case, Herder's remarks about the Slavonic peoples, Herder, *Ideen*, IV, 16, iv, at p. 696–699.

[46] Herder (2012).

particularly where it was supposed to serve political nationalistic objectives. Herder was used as an educational source for the promotion of German nationalism from the 1870s onwards with the foundation of the German Reich in 1871, but largely devoid of Herder's essential and multifaceted idea of (universal) humanism.[47] Herder was also (mis)used by nationalists to justify the rejection of the international organisation of the League of Nations in the Weimar Republic,[48] and he was invoked for patriotic and racist conceptions from the late nineteenth century onwards through the Weimar Republic and the Third Reich.[49]

Why is then reference made at all to this long past and rather complicated German thinker who may invite objectionable interpretations? Because Herder does help explain some movements and developments among the nations within the European Union today. The ubiquitous critical stance in Europe from Britain to Poland towards the European Union and the movement against economic and political globalisation in favour of a national, domestic, seemingly manageable world steeped in a perceived national tradition and culture shows features of Herder's "national character". Thus there is a notion of "national character", but in contrast to Herder, I consider such a national character as not coming from a mystical alchemistic source of nature, culture and tradition, language, education and art. The national character is rather deliberately created, a political construct by humanity, sometimes left to the forces of modern society, such as politics, economics, media, the arts and sciences, sometimes deliberately imposed and fabricated for political ends. Thus the national character is invented by humanity and at the same time given some spiritual force beyond the powers of humanity so that it escapes rational scrutiny and critique, in the same way as religion. Humanity creates the national character by behaving as if there were one. And so it exists indeed, human-made, often irrational, sometimes even through specific purposeful acts, but disavowed as human-made. Try to convince a Scot that he is actually English, or a Pole that he is German or Russian. (He will be quick to point out which nationality he is not, but will typically struggle if you insist on an answer to which nationality he actually belongs, i.e. what "Scottishness" or "Polishness" is supposed to be and what national identity does or should consist of.) If the European Union is to have a future, it cannot ignore the existence of national character and national identity, however questionable it is as to its pedigree, its meaning and as to its rationality. Law is an important part in the making and maintenance of such a national character and identity.

Herder had very little to say about law. The only relevant passage can be found in Herder's earlier work *Auch eine Philosophie der Geschichte*. Herder states that a universal law as a means of nation building is much less useful than is commonly thought because a universal law can only provide broad common principles that cannot take account of the individual characteristics of specific peoples.[50]

The "Herderian" jurist in Germany was Friedrich Carl von Savigny (1779–1861). Herder's influence on Savigny was profound; his "*Volksgeistlehre*" ("spirit of the people doctrine") is imbued with Herder's idea of a national

[47] Becker (1987).

[48] *Ibid*., at 123.

[49] *Ibid*., at 115–117, 127, 133.

[50] J. G. Herder, *Auch eine Philosophie*, pp. 66–67.

character. For Savigny there is an organic connection of law with the nature and character of a people, and this remains with the evolution of the people throughout the course of history. The actual foundation of law is the common consciousness of an individual people. Codification of law in a (civil) code is detrimental to the organic body of the law and its legal science because it detaches law from the specific people's consciousness, history and culture. The law of a nation is peculiar to a people's individual national character, shaped by tradition, history, education, literature and the like; it is not ahistorical, universal or generic as the Enlightenment would see law (at least in Savigny's interpretation). Consequently Savigny opposed the codification movement in the first half of the nineteenth century and the then already existing Prussian, French and Austrian civil codes.[51]

Savigny's argument is clearly Herder's understanding of a national character and identity applied to the origin and evolution of law.[52] It is therefore strange if a comparative lawyer hails Herder as a kind of proto-postmodernist particularist thinker and at the same time rejects Savigny as a conservative German nationalist ethnocentric jurist who was supposedly hostile to comparative law.[53] It is equally curious if another comparative lawyer, notably from Germany, refers to Savigny of all people when canvassing for a unifying Europe-wide civil code based on a "European" *ius commune* and legal science.[54] This only underlines that Herder's multifaceted and ambiguous thought can be used as an authority for contradictory conclusions and, in any case, is potentially dangerous material, especially if used by populist politicians. The problems in relation to a European civil code[55] re-appear with the harmonisation of European copyright law. A difference is that EU copyright law is already much more harmonised than European private law, largely based on international conventions (some dating back to the nineteenth century), and copyright harmonisation deals with a much narrower, specialist area than the EU civil code projects. However, while with regard to private law harmonisation the problem is manifest, in the case of copyright law it is beginning to emerge. The vigorous drive for further integration of copyright law at the EU level may no longer be supported by the existing international harmonisation. Furthermore, only because harmonisation is already in place, this does not mean that it is necessarily acceptable to EU Member States, so that a movement against the EU agenda may seek to dismantle existing harmonisation even where it has been a reasonable achievement.

After this detour into intellectual history, one can formulate for legislative projects at the European level a certain paradox which is inherent in Herder's idea of a diverse cultural unity of humanity itself[56]: the more one pursues integration, harmonisation and unification of national laws across Europe, the more one impedes and endangers the fabric and framework of a union of European states. Further legal

[51] Rahmatian (2007), pp. 1–29, at 5–7 with references to Savigny's German text.

[52] For extensive criticism of Savigny's *Volksgeistlehre*, *see* Rahmatian (2007), pp. 1–29, at 9–13, 17–18.

[53] Legrand (2003), pp. 260–261 (n. 66), 266, 268.

[54] Zimmermann (1996).

[55] The (rather academic) project of a European Civil Code never obtained a clear endorsement from the EU, *see* Whittaker (2009), pp. 616–647, at 623.

[56] "Unity in difference", *see* I. Berlin, *supra* note 29, p. 177.

unification prompts a tendency of the EU Member States to move away from one another. Further (imposed) unity causes further diversity, and a certain level of diversity effects unity.[57] This somewhat dialectical process can be called the "Herderian paradox". The unity through, and within, diversity is then indeed what Herder saw as the overarching humanist culture that unites mankind (and not only in Europe). The reason for the tendency away from the European Union because of the further harmonisation of national laws is that people perceive their laws as a part and expression of their "national character", therefore a certain plurality of laws among different peoples is inevitable. One will have to disagree with Herder and see this national character as a human-made, and deliberately created, political and socio-economic phenomenon, often fabricated and imposed, but one has to be pragmatic and recognise its existence, even if there is no beautifully mystical origin which may give its coarse nature a noble lustre.

Thus with regard to European copyright law, one can say that insistence on a harmonisation or even unification of fundamental concepts of copyright only contributes to a further disintegration of an already weakened European Union. This will be shown with the examples of work, originality, moral rights and exceptions. One should not underestimate copyright and dismiss it as a small area of the law with little relevance within the huge body of legislation of the EU. In particular, moral rights are easier to understand than, say, technical banking law (including the measures for the rescuing of the banks), and can therefore be communicated and packaged more easily in political discourse, irrespective of whether the concepts of copyright are really understood. "Are the paternity right and integrity right not legal safeguards for a specific national character and culture as they manifest themselves in literature and the arts?", populists may argue. In a world of social media, symbols can be conveyed much more easily than complex content that requires reading and study. Symbols can denote, highlight, simplify and mask, like trade marks. For example, even the preservation of the symbolic, but legally irrelevant specific Scottish banknotes (against their replacement by banknotes from the Bank of England) was worth a warning statement against the UK central government by the nationalist First Minister of Scotland when their abolition was discussed following the collapse of the Northern Rock bank in 2008.[58] Leaving aside the legal-technical difficulties of the harmonisation of copyright and the interpretation of European copyright law vis-à-vis national laws, in the current political climate it may be advisable not to press for further integration and unification of copyright to avoid the encouragement of political centrifugal forces.

The present endorsement of legal particularism and relative autonomy under a uniting power of all-encompassing legal principles (especially human rights) is

[57] This idea of an underlying unity in the appearing (not only apparent) diversity or variety can also be found in Goethe's idea of the archetypal plant ("*Urpflanze*"), and this approach would also influence Alexander von Humboldt. *See* Goethe (1982), pp. 64, 579. Goethe was of course profoundly influenced by Herder.

[58] First Minister Alex Salmond, *The Scotsman*, 11 June 2008: "This is great news. It's a victory for Scotland and its financial sector. I'm delighted the Treasury have dropped their ludicrous proposals that threatened the very existence of Scottish banknotes. Let's hope they've finally learnt their lesson and never jeopardise our banknotes again."

incidentally not a neo-romantic or postmodernist approach that invokes Herder as a supposed prominent critic of the Enlightenment. It has its roots squarely in the Enlightenment itself, more precisely in Montesquieu[59]:

> There are certain ideas of uniformity, which sometimes strike great geniuses (for they even affected Charlemagne) but infallibly make an impression on little souls. They find therein a kind of perfection they recognise, because it is impossible for them not to discover it; the same weights by the market authorities, the same measures in commerce, the same laws in the State, the same religions in all parts of the country. But is this always right, and without exception? Is the evil of changing always less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity for differences? … If the peoples observe the laws, is it relevant whether they observe the same?

## 3 An Illustration of the "Herderian Paradox": The Problems with EU-Wide Harmonisation of Copyright Law

The agenda of the European Union continues to be directed towards further harmonisation of copyright law. The European Parliament passed a resolution on 9 July 2015,[60] in which it confirmed that, especially in view of digital technology, consumers should not face geographical restrictions of services which conflict with the objectives of the Information Society Directive[61] to implement the four freedoms of the internal market. Furthermore, multi-territorial licensing according to the recent Directive on Collective Management of Copyright[62] should be simplified, and film production and financing depending on exclusive territorial licensing should be facilitated by taking account of cultural specificities of the markets and cultural diversity.[63] At the same time the resolution "calls for a reaffirmation of the principle of territoriality" (in the context of fair remuneration) and notes "that the right to private property is one of the fundaments of modern society"[64] which creates, apart from interesting political implications, some tension

[59] Montesquieu (1977), p. 378, (with slight changes of the translation by the author).

[60] European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256 (INI)).

[61] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, *see also* Recitals (3) and (4).

[62] Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi–territorial licensing of rights in musical works for online use in the internal market, OJ L. 84/72.

[63] EU Parliament Resolution of 9 July 2015, paras. 3, 9, 12, 13.

[64] Paras. 7 and 50.

with a Europe-wide harmonisation of copyright law. After all, intellectual property rights as a form of property rights have territoriality as an essential feature, and territoriality is a critical hurdle in the harmonisation project.[65] The recently proposed EU Directive on Copyright in the Digital Market also seeks to tackle the problem of territoriality in a digital environment in relation to exceptions and limitations within digital and cross-border uses in the area of education, text and data mining for scientific research, and preservation of cultural heritage. Again, the property nature of copyright has been stressed.[66]

The proprietary quality of intellectual property rights becomes difficult with enforcement and the fragmentation of the (online) licencing market.[67] In a linked context both problems have been addressed with the Directives on Enforcement[68] and on Collective Management of Copyright.[69] These are instances of what property theorists would refer to as the right to exclude (enforcement) and the right to use (multi-territorial licencing) which are intrinsic to a property right, such as an intellectual property right.[70] Since copyright is conceptualised as a property right,[71] a harmonisation of copyright systems in Europe will find it difficult to overcome its constitutive territorial element. International conventions, beginning with the Berne Convention, the factual effects of the internet and digitisation, and the existing approximation of special aspects of copyright by EU legislation have watered down the territoriality principle somewhat in reality, but the *lex loci protectionis* still stands.[72] It can only be removed at the EU level if a strictly unified copyright law for the whole European Union were enacted, a property right with the EU as a whole as its territory and probably even as a separate regime, like the Community Trade Mark. Then, however, one will have to determine the content and constituting factors of this unified copyright-property right, realistically in a series of compromises between the national jurisdictions of the Member States in the unification process. That will be difficult, but an illustration of the "Herderian paradox". The following section highlights only a few particularly problematic issues.

[65] Rosati (2013), pp. 47–68, at 65–66; Cook and Derclaye (2011), pp. 259–269, at 262–263; Geiger et al. (2015) pp. 683–701, at 686, questioning the role of territoriality for fair remuneration.

[66] Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (COM (2016) 593 final), Explanatory Memorandum, pp. 2, 9, Recital (5), Arts. 1 and 2.

[67] Seville (2011), pp. 1039–1055, at 1042.

[68] Directive 2004/48/EC on the enforcement of intellectual property, and Recitals (7)–(9).

[69] Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72. A predecessor of this Directive was the (non-binding) Commission Recommendation 2005/737/EC of 18 May 2005 on Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services [2005] OJ L 276/54.

[70] Rahmatian (2011), pp. 361–383, at 366–367, 373–375.

[71] This is in reality so everywhere despite formal conceptual differences (*e.g.* the German *Immaterialgüterrecht*) or academic discourse about whether copyright is really a property right; *see* discussion in A. Rahmatian, *Copyright and Creativity* (2011), pp. 25–35, 60–67.

[72] For the international situation, *see* Dinwoodie (2009).

### 3.1 The Scope and Content of the Concept of "Work"

The extent and meaning of the technical term "work" is an important element in a Europe-wide harmonisation of copyright. Currently the definition of "work" is arguably in the competence of the Member States.[73] Is the copyright-work to be ascertained according to a conclusive list of separate work categories, as classically in Britain,[74] or does the law provide a demonstrative list of types of work without being exhaustive, such as in France or Germany?[75] Does the law presume a creation being a work if that creation is "original" in the copyright sense, as some more recent decisions of the ECJ/CJEU suggest?[76] The CJEU's interpretation is closer to the European author's rights approach, but it is not the same and is actually a circular argument: the creation must exist as a work if it is to be assessed as original, and the originality must confer on the creation the status of being a work. This circularity appears strongly in *Football Association/Murphy*: "[The claimant] cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works. To be so classified, the subject-matter concerned would have to be original in the sense that it is its author's own intellectual creation [with reference to *Infopaq*]."[77] In other decisions the connection work-originality is less strong.

Contrary to the CJEU's view in some judgments (at least according to some interpretations[78]), there cannot be originality on its own in the author's rights countries either. Every creation must materialise in the form of a work to obtain protection[79]; this is ultimately an application of the idea-expression dichotomy,[80] which also exists in the author's rights countries,[81] and which the ECJ has stated fairly recently as well.[82] The work represents the physically realised expression of an idea. Strictly speaking, it represents, not *is* this realisation, because the work is only an instance or social *reifier* of the expressed idea.[83] Music is a good example: the idea in the copyright sense, melody, harmony, rhythm, condenses to an idea in

[73] Derclaye (2014), pp. 716–732, at 719.

[74] CDPA 1988, Secs. 3–8; Bently and Sherman (2014).

[75] France: CPT 1992, Art. 112-2; Germany: Sec. 2(1) Author's Rights Act (*Urheberrechtsgesetz*) 1965.

[76] Especially *Football Association Premier League and others v. QC Leisure and others, and Murphy v. Media Protection Services* (C-429/08) [2012] Bus LR 1321, paras. 96–97. Perhaps also *Bezpečnostní softwarová asociace v. Svaz softwarové ochrany v. Ministerstvo kultury* [2011] FSR 18 (Case C-393/09), para. 46.

[77] *Football Association Premier League and others v. QC Leisure and others, and Murphy v. Media Protection Services* (C-429/08) [2012] Bus LR 1321, paras. 96 and 97.

[78] *See* discussion in Rosati (2013), pp. 47–68, at 60.

[79] Vivant and Bruguière (2013); Rehbinder (2010).

[80] TRIPS Agreement 1994, Art. 9(2), Directive 2009/24/EC (Software Directive), Art. 1(2), US Copyright Act 1976, § 102(b).

[81] Vivant and Bruguière (2013).

[82] *Bezpečnostní softwarová asociace v. Svaz softwarové ochrany v Ministerstvo kultury* [2011] FSR 18 (Case C-393/09) [2011] ECDR 3, para. 49; (indirectly) *Football Association Premier League and others v. QC Leisure and others, and Murphy v. Media Protection Services* (C-429/08) [2012] Bus LR 1321, especially para. 98; *Football Dataco Ltd and others v. Yahoo! UK Ltd and others* (Case C-604/10) [2012] ECDR 10, para. 39.

[83] A. Rahmatian, *Copyright and Creativity* (2011), pp. 17–18.

the philosophical sense, a specific melody/harmony/rhythm in a composer's head. It manifests itself in a physical expression in the outside world, through sound and/or a score in which the music is written down as a performance instruction: this expression is the work in the copyright sense. This is the same in the copyright and the author's rights systems: the difference is only that the copyright system of the UK requires recording/fixation of this physical expression,[84] for example in form of a musical score, while in the author's rights countries the fixation is facultative,[85] but in reality inevitable for obtaining evidence in a copyright infringement trial. In both cases we have a creation which would qualify as a musical work, whereby the work is not the score (or, in case of a poem, not the printed paper in a book), but the score is one instance of the manifested materialisation of the work. This is the starting point for establishing whether that work is also original.

If the CJEU is understood as not distinguishing between work and originality, but considers these two concepts as united in one as "original work", this creates a theoretical muddle, and it is doctrinally doubtful because the Berne Convention also presupposes a certain work-originality duality (though it is silent as to the criteria for originality and keeps the fixation requirement expressly open[86]), otherwise its non-exhaustive list of "literary and artistic works" would be superfluous.[87] A better interpretation of the CJEU decisions sees them as only establishing that the list of work categories does not have to be a closed one.[88] The model European Copyright Code drafted by the Wittem Group in 2010 proposed the same solution of a non-exhaustive list.[89] However, the practical effect of this change is limited. In the UK the special categories of literary, dramatic work etc. are either very broad by virtue of the statute itself (literary or artistic work[90]), or the courts were usually rather generous in ascertaining the limits of the categories.[91] It is unlikely that something broadly from the creative-artistic or scientific sector[92] does not fit into any of the existing work classifications. Usually "new" types of work are combinations of established work

[84] CDPA 1988, Sec. 3(2).

[85] There are exceptions: In the UK broadcasts need no fixation, in France choreographic works need fixation.

[86] Berne Convention, Art. 2(2).

[87] Berne Convention, Art. 2(1), (2) and (5).

[88] That may also apply to the UK: Bently and Sherman (2014).

[89] Wittem Project, European Copyright Code, Art. 1.1(2): "The following [works] *in particular* …" (emphasis added).

[90] CDPA 1988, Secs. 3(1)(a)–(d) and 4.

[91] For example in *Hi-Tech Autoparts v. Towergate Two Ltd.* (Nos. 1 and 2) [2002] FSR 254 and 270 (moulds for car rubber floor mats as engravings), *Norowzian v. Arks* (No. 2) [2000] EMLR pp. 67, at 73 (dramatic work capable of being performed also as a film). However, this was not always so: *Creation Records v. News Group* [1997] EMLR p. 444 (independent photographing of an arranged scene); *Lucasfilm v. Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 (Star Wars storm trooper helmet is not a sculpture).

[92] Compare the umbrella term of the Berne Convention, Art. 2(1): "literary and artistic works" include every production in the literary, scientific and artistic domain.

categories.[93] The excluding factor is rather not qualitative but quantitative, because the work in question does not cross the *de minimis* threshold.[94] The interpretation of "work" in some of the CJEU decisions can be seen as a certain undesirable imprecision in relation to the use and shaping of constitutive elements of copyright which may introduce, involuntarily and accidentally, a Herderian "unity in diversity" simply for lack of clear guidance by the CJEU. But it could also be the start of a unification by case law, which may stand against both copyright and author's rights systems in Europe. The potential problem is more visible in the case of originality.

### 3.2 The Content of the Concept of "Originality"

The understanding of the concept of originality in copyright is at the centre of the development of a harmonising impact of CJEU case law on copyright. Otherwise unified areas only comprise rather special issues, such as the question of copyright levies for the use of private copying exceptions as fair compensation.[95] The CJEU has declared the concept of "fair compensation" (deriving from the Rental and Lending Right Directive[96]) as an autonomous concept of EU law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, since this concept does not contain any reference to national laws of the Member States.[97] Very recently the CJEU stretched the "autonomous concept" considerably in the *EGEDA* decision, in which the Court ruled that the scheme of fair compensation for private copying should not be funded only from the general state budget,[98] although the Information Society Directive in Art. 5(2)(b) is silent about that, and there is arguably no regulatory *lacuna*. The CJEU has also stated that parody is an autonomous concept of EU law.[99]

Apparently originality in copyright law is now evolving towards an autonomous concept of EU law, but this is more problematic, both as to its genesis and as to its content. The narrowly confined special areas (fair compensation, parody) are ultimately based on specific EU-directives and their interpretation by the CJEU, and

[93] On the way fashion could be covered within the closed list of work categories in the UK, *see* Silverman (2013), pp. 637–645, at 639–640, 645.

[94] *Cramp v. Smythson* [1944] AC 329, effectively also *Exxon Corp. v. Exxon Insurance* [1982] RPC 69 (one single word: no literary work, whether that is a decision on qualitative or quantitative grounds is debatable).

[95] Strowel (2014), pp. 1127–1154, at 1130.

[96] Directive 2006/115/EC, Art. 8(2).

[97] *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)* (C-467/08) [2010] ECR I-271, para. 33; Discretion of the EU Member State within the limits of EU law to determine the obligation under the Directive (fair compensation under Art. 5(2)(b) of the Information Society Directive 2001/29) in the absence of sufficiently precise community criteria, *Amazon and others v. Austro-Mechana GmbH* (C-521/11) [2014] 1 CMLR 11, para. 21.

[98] *EGEDA* (C-470/14), 9 June 2016, paras. 38, 42.

[99] *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* (C-201/13) [2014] ECDR 21, paras. 14–17.

are easy to define and demarcate.[100] In contrast, the development of an EU law of copyright originality, starting with *Infopaq*,[101] derives from the CJEU's problematic drawing together of several EU Directives dealing with special issues of copyright law ("transversal" or "notional" approach[102]), and from a particular interpretation of the wording in these directives of "author's own intellectual creation"[103] – on its own an empty definition of originality.[104] In this way, the CJEU regards these instances of a definition of originality in these specific directives as concrete applications of a general principle of a non-existent comprehensive copyright code, and extracts from these the meaning of originality in general. Thus one could argue that the CJEU's supposedly autonomous concept of EU originality is not drawn from a comprehensive statutory basis in the form of a directive or regulation (embodying general copyright law, such as the Trade Marks Directive[105] for trade mark law). There was no precedent in EU law either – only possibly influential definitions in the national laws of Member States – which could fill the empty vessel of the definition of originality ("the author's own intellectual creation") with meaningful content. The CJEU case law that brought about this development has been dealt with extensively, so that a detailed discussion need not be repeated here.[106]

The fairly broad Information Society Directive 2001/29 obviously serves as the best basis for the development of "autonomous concepts of EU-law" as kernels for a future unified copyright law by CJEU case law. In *Infopaq* the ECJ observed that in relation to the provision in question, Art. 2 of the Information Society Directive, a provision of EU law that makes no express reference to the law of the Member States for the purpose of determining their meaning and scope, must normally be given an autonomous and uniform interpretation throughout the EU, especially in view of Recitals (6) and (21) of the Directive. Therefore Member States cannot individually define concepts set out in the Directive (here: "reproduction in part" in Art. 2).[107] The Information Society Directive refers to "works"[108] which are only protected if they are original. At the EU level, three Directives define originality as

[100] In these specific instances this is in effect still so, although the interpretation by the ECJ does not necessarily confine itself to one single Directive but combines several for its findings, for example in *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v. Belgische Staat* (C-271/10) [2011] ECDR 19, para. 27: "… regard being had for the requirements deriving from the unity and coherence of the legal order of the European Union, that concept of remuneration must be interpreted in the light of the rules and principles established by all of the directives on intellectual property, as interpreted by the Court.".

[101] *Infopaq* (Case C-5/08), paras. 27–28.

[102] Geiger and Schönherr (2014a), pp. 434–484, at 456.

[103] Directive 96/9/EC (Database Directive) Art. 3(1); Directive 2009/24/EC (Software Directive), Art. 1(3), Directive 2006/116/EC (Term Directive), Art. 6.

[104] Rahmatian (2013), pp. 4–34, at 11–12, 18.

[105] Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks.

[106] Derclaye (2010); L. Bently, "Harmonisation by stealth: The role of the ECJ", at the CRID/IvIR Conference, European Parliament, Brussels, 13 January 2012; Rosati (2013); Rahmatian (2013).

[107] *Infopaq International v. Danske Dagblades Forening* [2009] ECDR p. 16 (Case C-5/08), paras. 27–29.

[108] Directive 2001/29/EC, Art. 2(a).

the author's own intellectual creation[109] in relation to computer programmes, databases and photographs.[110] The ECJ then concludes there is copyright protection for a "work"[111] only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.[112]

Subsequent cases confirm this approach and elaborate on the definition of originality, particularly *Football Association Premier League/Murphy*, which may support the view discussed earlier that the CJEU regards "original work" as a single concept and not as two separate terms,[113] e.g. *Bezpečnostní*[114] and *Painer*.[115] The latter case gave the concept of "European" originality its clearest contours, expressed in relation to a portrait photograph[116]:

> [Following *Infopaq*], copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author's own intellectual creation. As stated in [recital 16 of the Term Directive], an intellectual creation is an author's own if it reflects the author's personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices […]. As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production. […] By making those various choices, the author of a portrait photograph can stamp the work created with his "personal touch".

This decision is not without some unexpected creativity. The definition of "own intellectual creation" as reflecting the author's personality is based on a Recital of the Term Directive in which photographs are, somewhat accidentally, included; the main provision, however, does not define "own intellectual creation".[117] Nor does the Term Directive make any statements concerning originality beyond the work category of photographs, and even within this category there is a proviso. Recital 16 itself says that a photographic work is original "if it is the author's own intellectual creation reflecting his personality, *no other criteria such as merit or purpose being taken into account*" (own emphasis). This rather reads as a contrasting statement to

[109] In Art. 1(3) of Directive 2009/24/EC (originally Directive 91/250): Software Directive; Art. 3(1) of Directive 96/9: Database Directive; Art. 6 of Directive 2006/116/EC: Term Directive.

[110] *Infopaq* (Case C-5/08), paras. 33, 35.

[111] "Work" according to the meaning in Art 2(a) of the Information Society Directive.

[112] *Infopaq* (Case C-5/08), para. 37.

[113] *Football Association Premier League and others v. QC Leisure and others, and Murphy v. Media Protection Services* (C-429/08) [2012] Bus LR 1321, especially paras. 96–97. Perhaps also *Bezpečnostní*, para. 46: "… the graphic user interface [the work at issue] can, *as a work*, be protected by copyright if it is its author's own intellectual creation." (emphasis added).

[114] *Bezpečnostní softwarová asociace v. Svaz softwarové ochrany v Ministerstvo kultury* [2011] FSR 18 (Case C-393/09) [2011] ECDR 3, paras. 45–46, 51.

[115] *Painer v. Standard Verlags GmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co. KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG* (C-145/10).

[116] *Painer* (C-145/10), paras. 87–92.

[117] Directive 2006/116/EC, Art. 6.

emphasise the boundary to works considered in the following sentence: "The protection of other photographs should be left to national law." This refers to the neighbouring rights, particularly in Germany, for photographs which do not fulfil the required level for originality to be protected by core author's rights law for photographic works.[118] The recital clarifies that these other types of photographs remain protected according to national law, and EU law does not interfere. The UK does not have this distinction between copyright photographs and neighbouring right photographs: why should *Painer*-originality have to apply to all photographs in the UK, while in Germany this is not necessarily the case? (The boundary between authorial and neighbouring right photographs is difficult to draw.[119]) And why does the *Infopaq-Painer* originality, seemingly an autonomous concept of EU law, have to apply to all types of copyright works, although only photographs are specifically mentioned in the Term Directive? The Database and the Software Directives cover databases and computer programs with the same originality definition of "own intellectual creation", and these works are considered in *Bezpečnostní* (computer programs, graphic user interface), *Football Dataco* (copyright protection of databases alongside the *sui generis* database right)[120] and *SAS* (functionalities of a computer program and computer language).[121] These cases reiterate the *Infopaq-Painer* originality definition.[122] Other works are not mentioned anywhere, except the passing reference to phonograms, films and broadcasts in Art. 2, the reproduction right provision of the Information Society Directive.

The *Football Dataco* decision is relevant particularly for the originality criterion of the copyright system of the UK because it declared "the significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains."[123] This means that the classical "skill and labour" criterion for originality in UK copyright law no longer suffices (for all types of works?) and has to be supplemented with the vague "own intellectual creation" criterion, which is directed at some change to UK law, though nobody knows exactly in which way. The Advocate General's opinion was here more explicit, but also more openly against the UK tradition: "copyright protection is conditional upon the database being characterised by a 'creative' aspect, and it is not sufficient that the creation of the database required labour and skill", and "intellectual creation" … "echoes a formula which is typical of the continental copyright[124] tradition."[125] That such moves eventually seek to eliminate legal diversity by imposing a different, but not exact, concept is obvious. Indeed, the CJEU decisions

[118] Section 72 German Author's Rights Act (*Urheberrechtsgesetz*) 1965; Rehbinder (2010), 87, 319.

[119] Schulze (2013), p. 1157.

[120] *Football Dataco Ltd and others v. Yahoo! UK Ltd and others* (Case C-604/10) [2012] ECDR p. 10.

[121] *SAS Institute Inc. v. World Programming Ltd* (C-406/10) [2012] ECDR 22.

[122] *Bezpečnostní*, paras. 45–46; *Football Dataco*, paras. 37–38; *SAS*, para. 67.

[123] *Football Dataco Ltd and others v. Yahoo! UK Ltd and others* (Case C-604/10) [2012] ECDR 10, paras. 42, 46.

[124] "Continental copyright" tradition is a flawed term, but in the original Italian of the Advocate-General's opinion it says correctly: "tradizione continentale del diritto d'autore", at para. 37.

[125] Opinion of the Advocate General Mengozzi (Case C-604/10), paras. 35, 37.

have been understood in this way and were not too favourably received by a number of lawyers in the UK. Certainly, that which labels itself "own intellectual creation" or "creativity" appears as a different concept compared with the UK approach, but can only be regarded as a technical legal term, because the preparation of a database is by no means a "creative act" as one would ordinarily understand it.

The further definitions the CJEU provides for "author's own intellectual creation" do not provide as much information as one would need for a judicial development of the meaning of originality in EU law. Furthermore they are likely to be adapted in accordance with individual national laws and legal traditions in the respective Member States. Thus the desired judicial harmonisation may not really be achieved. This starts with the problem that the term "author's own intellectual creation" does not mean anything if it is not filled with practical case law, and such case law does not exist at the EU level. In fact it cannot exist, because the reference to the CJEU for preliminary rulings provides authoritative interpretation of EU law[126] and cannot make factual decisions for the concrete case that is assigned to the national courts. We do not know from the ECJ's decision in *Infopaq* whether eleven subsequent words which a search engine extracts *are* original and therefore protected by copyright; we are only given the legal rule for the assessment.[127] But harmonisation requires equal realisation of the legal rule across the Member States. An abstract rule, either in a Directive or in the form of a more concrete rendering by the CJEU, cannot achieve that with the complex and multifaceted concept of copyright originality. It is not surprising that the conceptually different laws of the UK and of France have no statutory definition for originality at all, but rely on case law.[128] Germany has a statutory definition,[129] but also relies on case law in practice.[130] The main element of "author's own intellectual creation" is that of "choice" and *Painer* explains further how this can be realised in case of a portrait photograph[131]:

> In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.

In short, the criterion is that of artistically irrelevant choice.[132] The exercise of human choice can be interpreted as conferring a "personal touch" on the work. But that is also especially realised in form of "judgement" in the classical British understanding of

[126] Art. 267 TFEU.

[127] *Infopaq* (C-5/08), paras. 48, 51.

[128] *See*, for France, Vivant and Bruguière (2013), p. 232.

[129] Section 2(2) German Author's Rights Act (*Urheberrechtsgesetz*) 1965.

[130] Loewenheim (2010), "Einleitung" note 6.

[131] *Painer* (C-145/10), para. 91.

[132] Incidentally, here the ECJ is a child of its time, because the central principle of prevalent "neo-liberalism" is also that of (politically and socially) irrelevant choice in the marketplace.

originality as "skill and labour".[133] One could rephrase the findings of the CJEU for the UK as the author being required to apply his judgement to make selections and choices in the creation of the work to obtain originality. Through these choices he expresses creative ability, irrespective of whether this "creativity" has any artistic merit.[134] That only moves the UK towards the US approach in *Feist*,[135] but it does not turn the UK into an author's rights country, as some academics have indicated.[136] The author's rights countries protect the work through the protection of its author's personality, while the copyright systems protect the author through the protection of his work as property.[137] The practical difference is, however, very limited. Thus one can interpret the concept of originality in UK copyright law in outward conformity with the CJEU decisions on originality (which might – simplistically – be regarded as having more of an author's rights flavour), and so achieve, at least ostensibly, harmonisation. It is unclear whether that approach was intended by the CJEU – if one can establish at all what was intended. Other countries may do the same as the UK: if that is regarded a harmonisation, then the CJEU was successful, if that is not the idea of harmonisation, then the CJEU's respective attempts have failed.

However, it is obvious that, in line with the agenda of the EU towards harmonisation and unification of laws to enable and support the common market, the CJEU seeks to achieve a harmonisation of the *understanding* of originality across all areas of copyright and across all jurisdictions of the Member States. The fact that the exact extent and meaning of this harmonised EU originality is rather vague at present does not quell the pressure towards an overriding concept, which may be perceived as a forceful intrusion into Member States' laws without their parliamentary consent. A complex concept such as originality in copyright that has grown in a particular cultural and legal tradition with an individual body of case law is probably unsuitable for proper harmonisation across the EU.[138] It is telling that the Wittem European Copyright Code does not attempt a definition of "originality" using instead "author's own intellectual creation." The footnotes make clear that the Code does not decide generally in favour of either the "personal stamp/touch" or the "skill and labour" notion of originality.[139] The Herderian paradox can

[133] *University of London Press v. University Tutorial Press* [1916] 2 Ch 601, at pp. 609–610, per Peterson J; *Ladbroke (Football) v. William Hill (Football)* [1964] vol. 1 WLR p. 273.

[134] I have suggested this interpretation in Rahmatian (2013), pp. 4–34, at 30.

[135] *Feist Publications Inc. v. Rural Telephone Service Co Inc*. 499 US 340.

[136] Derclaye (2010); Rosati (2010b), pp. 524–543, 542–543.

[137] A. Rahmatian, *Copyright and Creativity* (2011) pp. 47–48.

[138] Usually the CJEU has to deal with highly complex technical matters of IP law which makes judicial harmonisation more complicated. As to the problem of the judges' expertise on the relationship between copyright and design law, Bently (2012), pp. 654–672, at 663–664 (on *Flos* (C-168/09).

[139] Wittem Project, European Copyright Code, Art. 1.1(1) and footnotes 6 and 7: "(6) The Code does not use or define the term original, but in practice it might still be used to indicate that the production qualifies as a (protected) work. (7) The term 'the author's own intellectual creation' is derived from the *acquis* (notably for computer programs, databases and photographs). It can be interpreted as the 'average' European threshold, presuming it is set somewhat higher than skill and labour. This is possible if emphasis is put on the element of creation. For factual and functional works, the focus will be more on a certain level of skill (judgement) and labour, whereas for productions in the artistic field the focus will be more on personal expression."

become apparent in such a situation: even if a desired harmonisation is ineffective, it can nevertheless drive EU Member States apart.

### 3.3 The Role of Moral Rights and Copyright Transferability

The concept of originality and the philosophical differences between copyright and author's rights systems are closely connected with the position of moral rights within the corresponding protection system. As mentioned, copyright systems are concerned with the creation of the property of copyright by its author through his/her *own* skill, labour, effort and judgment and protect the author for the investment in the making of the copyright property. Thus copyright is essentially a protection against parasitical unfair competition in the continental European understanding, but does not require an individualisation of a distinct authorial personality for the definition of originality.[140] A personality protection in form of moral rights is therefore not part of the copyright protection system, and indeed, moral rights rules have been tacked on like the scaffolding to a building, mostly in light of Art. $6^{bis}$ of the Berne Convention – in the UK in 1988, in the US (as a partial protection system) in 1990, and in Australia in 2000.[141] One could see the copyright-moral right relationship as an extremely dualist system.[142] In contrast, the moral rights regime in author's rights countries is the skeleton and metal frame of the author's rights house, without which it would collapse. Hence the concept of originality in author's rights countries requires some personal features in the work which refer back to an individual author: the work must "bear the stamp of the author", be "the imprint of the author's personality",[143] or, as the German statute states, must be a "personal intellectual creation".[144] The Austrian equivalent provision is even more instructive when it says "specific/peculiar intellectual creations".[145] This is to be distinguished from the originality rule in the EU Directives, "*own* intellectual creation", which stresses that the work must originate from the author, but not necessarily that it must be specific and too personal. Thus EU law, as it stands, does not invite a more comprehensive moral rights regime, nor would the lobbying groups of the copyright industries be interested in that: the absence of the moral rights rules of Art. $6^{bis}$ in the otherwise wholesale import of the Berne Convention in the TRIPS Agreement[146] illustrates that well. This also shows how weak Art. $6^{bis}$ is as a harmonising force. The argument that harmonisation of moral rights in the EU should not be problematic because Art. $6^{bis}$ exists already as an accepted common basis in the

[140] A. Rahmatian, *Copyright and Creativity* (2011), pp. 40–42, 55 and note 379 (on the concept of *ergänzender Leistungsschutz* in German law).

[141] UK CDPA 1988, Part I, chap. IV, Secs. 77 *et seq.*; US Copyright Act 1976, § 106A (incorporation of Visual Artists Rights Act 1990); Australian Copyright Amendment (Moral Rights) Act 2000, No. 159.

[142] Cornish (1989): "an extreme form of dualism".

[143] Vivant and Bruguière (2013), pp. 237, 240 with critical comments as to the practical application of this principle.

[144] German Sec. 2(2) Act on Copyright and Related Rights (*Urheberrechtsgesetz*) 1965.

[145] Austrian Copyright Act (*Urheberrechtsgesetz*) 1936, Sec. 1(1) ("*eigentümliche geistige Schöpfungen*").

[146] TRIPS Agreement, Art. 9(2).

copyright and author's rights' world alike, overlooks the fact that Art. 6[bis] does not attempt a harmonisation but only introduces these personal rights of authors, without making a statement as to the position of that right within the respective copyright/author's right concepts – and herein lies the problem for EU-wide harmonisation. Because the Berne Convention is silent, it can cater to copyright and author's rights systems alike. Similarly, in the case of fixation (protection requirement for copyright systems), the Berne Convention does not regard fixation requirements as formalities for copyright protection, which the Berne Convention otherwise prohibits[147]: relinquishing harmonisation or unification allowed copyright countries to join.

However, a comprehensive harmonisation of EU copyright will have to take a position on moral rights, since the author's rights systems lose their basis and their justification without moral rights. A compromise will be difficult to achieve. Either one restates the international obligations of Art 6[bis] Berne Convention (attribution and integrity right) and then one does not really attempt any harmonisation for the reasons just stated, or one goes further by adding one or two moral rights, such as the Wittem Group does in its draft EU Copyright Code (divulgation right), with the option to restrict the exercise of moral rights or even allow complete waiver in defined cases.[148] The possibility of limited non-exercise would meet with resistance particularly in France and Germany. Furthermore, a moral right limited in time, as the Wittem Group suggests,[149] may not be acceptable in France. One can just imagine the negotiations among 28 (or likely 27) Member States on the decision of which moral rights should be included in a harmonising law, how they should be defined and to what extent they can be renounced.

One cannot address this problem with a superficial and toothless compromise dressed up as the triumph of a democratic process of decision-making. A proper harmonisation of EU law, if such is to have any substantive relevance at all, would have to make significant incisions in the moral right regimes of the Member States. Otherwise any legislative project would be weak and possibly insignificant, something of which the Wittem Project[150] and (as a real legislative act of the EU) the Information Society Directive have been accused.[151] The matter is not a side issue. The precise definition of originality is influenced by the role of the moral rights in a harmonised EU copyright system. A proper harmonisation is pointless and may create disuniting chaos among the Member States without at least a clear definition of originality and a clear communication as to how this definition is to be understood. Besides, it is ultimately the moral rights philosophy that determines the transferability of the economic rights, which is an eminently important commercial issue. The monist systems of Germany and Austria do not allow the assignment of an author's right, because the inalienable personal aspect of the moral right and the economic aspect of the author's right are so intertwined that these form an

[147] Berne Convention, Art. 5(2), together with Art. 2(2).

[148] Wittem Project, European Copyright Code, Arts. 3.1–3.6 and footnotes 31–36.

[149] Wittem Project, European Copyright Code, Arts. 3.3(2) and 3.4(2).

[150] Rosati (2010a), pp. 862–868, at 864.

[151] Hugenholtz (2000), pp. 499–505, at 499–500.

inseparable whole. In these countries an assignment is largely emulated by an extensive exclusive licence. But transferability would presumably be of major interest to the copyright industries and their lobbying groups. A possible compromise could be the change of the monist approach in Germany and Austria to a dualist approach, as in France,[152] so that assignability would be formally possible,[153] but the moral rights regime would not be weakened at all. The monist approach in Germany and Austria is the result of legal doctrine; it is not an entirely inevitable interpretation of the statute.[154] Although such a modification would be in legal interpretation and doctrine only, it is unlikely to happen in Germany – or in Austria, where the monist theory originated.[155] A more radical departure by way of statutory amendment is even less realistic. Any attempt at the approximation of the author's rights systems' concept of moral rights towards that of the copyright regime of the UK and the US, with free assignability of copyright and an almost irrelevant status of the moral rights, would probably lead to an all-out war with the author's rights countries, although the practical importance of the moral rights is surprisingly limited there.[156]

The matter is ideological – one can make politics with copyright. In the recent past, copyright has become one of the best known areas of law among the general public. The principles of moral rights are easy to understand and are suitable to be packed into political and populist slogans which political parties, especially EU-sceptical parties, may use. In the present unstable political climate it is possible that a populist mass movement might add a further argument against the already weakened EU by pretending to fight for the indefeasibility of the national and traditional paternity and integrity rights against the "undemocratic dictates from Brussels".[157] It is true, almost nobody knows what the dualist and monist approaches are, but that is irrelevant[158]: an academically informed populism is a contradiction in terms. Who understood the theological implications of the word "*filioque*" added to the credo which contributed to the division between the Western and the Eastern Churches?[159] Conceptually a compromise on moral rights is very hard to imagine; politically it can probably not be achieved. That said, without a compromise, a functioning harmonisation of core copyright law in the EU is unrealistic in the long run. Therefore, it would probably be wise to drop altogether any ambitions to harmonise or unify the copyright laws in Europe for the

[152] Strowel (1993), pp. 494–495.

[153] Discussion in A. Rahmatian, *Copyright and Creativity* (2011), pp. 206–208, with references to national laws.

[154] But the monist theory is uncontroversial in Germany and Austria, *see* Ulmer (1960), pp. 97–104, and (less clearly) Secv. 11 German Copyright Act (*Urheberrechtsgesetz*) 1965.

[155] Rehbinder (2010), p. 16.

[156] *See* discussion in A. Rahmatian, *Copyright and Creativity* (2011), pp. 240–243.

[157] Certain interpretations of the German author's rights law in the national-socialist spirit after 1933 give an eerie indication as to how that could be done, for example by Elster (1933), pp. 189–207, at 191, 193, 198–199.

[158] In the recent "Brexit" referendum in the UK a large number of people voted against EU membership of the UK without any knowledge about the EU at all. *See e.g.* Fung (2016).

[159] Southern (1970), pp. 64–67.

foreseeable future, and the probable departure of the main copyright jurisdiction of the UK from the EU may not necessarily make matters much easier. Some diversity may help retaining unity.

### 3.4 Exceptions and Limitations

The copyright exceptions and limitations also allow an analysis of the "Herderian paradox". The harmonisation of this area is Art. 5 of the Information Society Directive,[160] containing mandatory (Art. 5(1)) and facultative (Art. 5(2)–(3)) rules. This exhaustive list of exceptions[161] is founded on the principle of the "three-step test"[162] deriving from the Berne Convention,[163] the TRIPS Agreement[164] and the WIPO Copyright Treaty[165] providing exceptions and limitations only in special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[166]

Apart from the overarching general and international principle of the three-step test, the European Directive only attempts a light-touch harmonisation at best. Leaving the very specific exception of temporary copies within a technological process (computers) in Art. 5(1) aside, the other 20 exceptions, in relation to reproduction, communication and making available and distribution of authorial works, phonogram and film fixations, among other things, are optional.[167] The framework is an opt-in catalogue for the Member States who cannot otherwise introduce new exceptions beyond the conclusive list. However, this rule is slightly undermined by a proviso which allows the continued existence of national exceptions in "cases of minor importance" if the use is analogous only and does not conflict with the free movement of goods and services in the EU and the exceptions set out in the Directive.[168] This proviso is also subject to the tree-step test; another general principle similar to the US fair use concept does not exist beside the specific exceptions.[169]

Article 5 of the Information Society Directive seems to reflect a fear of the effects of the "Herderian paradox": a deep harmonisation and a too prescriptive list of the exceptions may drive the Member States apart and against any development towards unification or standardisation, hence such inflexible harmonisation has not been attempted in the first place. This is obviously an *ex post facto* analysis, not a description of the intentions in the making of the Directive: never has the idea of

[160] Directive 2001/29/EC.

[161] Directive 2001/29/EC, Recital (32).

[162] Directive 2001/29/EC, Art. 5(5).

[163] Berne Convention, Art. 9(2).

[164] TRIPS Agreement, Art. 13.

[165] WIPO Copyright Treaty, Art. 10(1).

[166] On the history of the three-step test, *see* Geiger, Gervais, Senftleben (2013), pp. 581–626, at 583.

[167] Helpful overview of the EU legislative scheme of copyright exceptions and limitations in: J. Pila, P. Torremans, *European Intellectual Property Law* (2016), p. 332.

[168] Directive 2001/29/EC, Art. 5(3)(o).

[169] Geiger and Schönherr (2014b), pp. 395, at 439–440.

what is called here the "Herderian paradox" entered the mind of the EU legislature, neither then, nor today. The optional nature of most of the exceptions in the Information Society Directive is rather a historical accident and seems to call for a more rigorous reformulation of some of the exceptions towards a more compulsory regime which achieves genuine harmonisation. The recently published Proposal for a Directive on Copyright in the Digital Single Market[170] reinforces this impression. For example, Art. 4 provides for a partial mandatory exception[171] to the right of reproduction, communication, making available to the public for the sole purpose of illustration for teaching including digital and online use which complements particularly the optional Art. 5(3)(a) of the Information Society Directive.[172] Thus an improvement of harmonisation against unintended diversity is sought. The "Herderian" unity in diversity is inadvertent, not intended, in case of the EU provisions on exceptions and limitations: it could not be otherwise, for the idea of "unity in diversity" runs counter to the general EU agenda of harmonising the national laws for further economic integration. As one would expect, the new Proposal restates the general principle of harmonisation for enhancing the functioning of the internal market.[173] Although Art. 5 of the Information Society Directive does not actually harmonise the exceptions and limitations in effect very much because of its facultative provisions, it is nevertheless officially regarded as doing exactly that.[174] The exceptions and limitations cannot be seen as a demonstration of any "Herderian" notion of diversity in EU law-making.

### 3.5 EU Law Pre-Emption in IP Law and International Treaties Bypassing EU Law as an Option for Legal Unification Measures

There are two methods of legal harmonisation in effect – by open or hidden imposition of separate rules or concepts – which can conceal the problems direct harmonisation by EU legislation may create. The first is EU pre-emption of national law-making by European legislators, the second the circumvention of EU law by intergovernmental treaties among EU Member States outside the EU legislative framework. These general issues of EU constitutional law can only be touched upon briefly.

The considered autonomous concepts of EU copyright law can be seen as applications of the doctrine of EU pre-emption. In case of conflicts between the national law of a Member State and supranational EU law, the doctrine of pre-emption determines if and to what extent the national law will be set aside by EU law.[175] Following US constitutional law doctrine, one can distinguish between field

[170] Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, 14 Sept. 2016, COM (2016) 593 final, 2016/0280 (COD).

[171] *See* Art. 4(1): "Member States *shall* provide …".

[172] *See also* Proposal on Copyright in the Digital Single Market, Recital (14).

[173] Proposal on Copyright in the Digital Single Market, Recitals (1) and (2).

[174] For example, the Proposal on Copyright in the Digital Single Market, Explanatory Memorandum, pt. 1 (p. 2), states simply: "Exceptions and limitations to copyright and neighbouring rights are harmonised at EU level."

[175] Schütze (2012), p. 364.

pre-emption (the EU has exhaustively legislated for the field, i.e. to the complete exclusion of national law), obstacle pre-emption (material conflict between European and national law, but not in relation to a specific European rule) and rule pre-emption (national legislation contradicts a specific European rule). These pre-emptions can be express or implied.[176] The EU pre-emption doctrine is also relevant to EU copyright law.[177] The basis for a comprehensive unifying copyright Regulation would be Art. 118 Treaty on the Functioning of the European Union (TFEU).[178] This statutory basis and the ensuing application of pre-emption leave the extent of the actual harmonisation to judicial interpretation by the national courts first and, finally and decisively, to the CJEU.[179] The actual statutory text of a Directive – here the most relevant one is the Information Society Directive – normally appears as not too *dirigiste* and obligatory in its harmonising thrust in that it allows for significant discretion or, put differently, legal uncertainty.[180]

The method of circumventing possible obstacles of EU supranational law or constitutional constraints by intergovernmental treaties between (most) EU Member States has not been used for copyright legislation, but became crucially important for financial regulation following the banking crisis of 2008. In particular, four international law treaties, including the Treaty establishing the European Stability Mechanism (ESM) and the Treaty of Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact), have been concluded "on the side" of the EU legal system between most, not all, EU Member States as sovereign states.[181] It is not impossible that this route of implementation could be taken for particularly contentious issues in copyright. A similar method has partly been applied already for the introduction of the EU unitary patent system: the "unified patent court" was introduced by separate international agreement,[182] and the relevant Regulations[183] by "enhanced cooperation". Spain's legal challenge of this legislative route was dismissed by the CJEU in 2013[184] and 2015.[185] Such a form of integration effectively undermines the EU itself as a supranational legislating entity and, because of its doubtful democratic legitimacy and transparency, may be constitutionally most problematic in many of the respective Member States. It is a

[176] Schütze, *European Constitutional Law*, p. 365–367 with examples from ECJ/CJEU case law.

[177] Rosati (2014), pp. 585–598, at 587–594.

[178] Cook and Derclaye (2011), pp. 259–269, at 263–264. Copyright Directives for the harmonisation of national laws are passed under Art. 114 TFEU; *see*, as to the relevant criteria (internal market considerations etc.), Ramalho (2014), pp. 178–220, at 181, 184–185.

[179] *E.g. Martin Luksan v. Petrus van der Let* (C-277/10), para. 64; *see also* the discussion by Rosati (2014), pp. 589–590.

[180] *See* Dreier (2015), pp. 138–146, at 141.

[181] De Witte (2015), pp. 434–457, at 438. De Witte stresses, probably somewhat controversially, that "there is no evidence of an overall intergovernmental plot against the integrity of the EU legal order".

[182] Agreement on a Unified Patent Court (2013) OJ 2013/C 175/01.

[183] Regulation 1257/2012 (enhanced cooperation regarding unitary patent protection) and Regulation 1260/2012 (translation arrangements).

[184] CJEU C-274/11 and C-295/11.

[185] CJEU C-146/13 (subject-matter was the annulment of Regulation (EU) 1257/2012). *See* extensive discussion of the legislative history by Plomer (2015), pp. 508–533, at 524–525.

form of integration that makes the EU appear redundant and is ultimately corrosive to the very fabric and the idea of the EU.

## 4 Conclusion

The European Union is under such high pressure as never before in its history: the banking crisis and ensuing sovereign debt crisis, especially in southern European Member States, combined with the refugee crisis, have contributed substantially to the present predicament of the EU. Further legal integration and harmonisation of laws at the EU level do not strengthen the EU, but only have an additional corrosive effect: the more one concentrates on legal unification at the EU level, the more the national Member States will drift apart, politically and legally. This "Herderian paradox", as one may call this causal connection, is a phenomenon EU officials and legal academics should soon take to heart if they do not wish to become an involuntary instrument in the disintegration of the EU as an idea and as a political and economic reality. Copyright may appear as a small area of law among the vast body of EU legislation and regulation. But copyright can obtain a "face": it is an area of the law relatively well known to the general public who encounter copyright (and infringement) through their computers, the Internet, the "consumption" of music and films, and photographs: things everybody uses or creates. Agitation by EU-hostile populist political parties is unlikely to work with abstract and technical banking regulation, but can be quite successful in relation to copyright, among other themes. For example, EU opponents do not discuss the possible constitutional shift towards intergovernmental institutions within the EU outside the supranational constitutional system of the EU in the wake of the euro crisis,[186] but they discuss immigration. In the future, it could also be moral rights or fair dealing.

Further harmonisation of copyright law is not only questionable on pragmatic political grounds, it is also unproductive on legal grounds. Fundamental concepts of copyright law, such as originality and moral rights, can either not be defined with sufficient precision at the EU level to achieve a true harmonisation among Member States (originality), or the ideological conceptual differences are so great that the Member States cannot achieve a compromise without unacceptable damage to the legal tradition of one or even both sides (moral rights). Purported harmonisation through ineffective tools (Directives which generously allow Member States to opt out[187]) or veiled harmonisation through judicial ingenuity, but not necessarily consistency by the CJEU, do not promote the European cause and give succour to the argument that the EU has a serious democratic deficit.[188]

The question remains: what will happen to the present copyright regime in the UK, which is preparing to leave the EU after the "Brexit" referendum? The question would be similar if the EU were to really disintegrate – a perspective which has become a possibility for the first time in history. The EU could be destabilised

[186] *See* discussion in De Witte (2015), pp. 434–457, at 440–444, 448–450.

[187] *E.g.* Information Society Directive 2001/29/EC, Art. 5(2) and (3).

[188] *See e.g.* discussion by Follesdal and Hix (2006), pp. 533–562, at 534–537.

further with the UK having decided to leave the EU. An end of the EU (and that would presumably occur in several phases) would probably have little fundamental effect on the copyright systems in the Member States for the time being. For Britain, apart from the international conventions (Berne Convention, TRIPS Agreement and WIPO Treaties in particular[189]), expediency will decide in favour of the continued existence of the copyright Directives, since they are implemented in the national laws. Law is characterised by inertia, and it is unwise to abolish useful EU legislation just because it comes from the EU. Gradually the respective national laws will deviate from one another by legal amendments and emergence of national case law, but the discrepancy is unlikely to become too great in a world of global trade and the Internet. It is rather possible that former EU Member States would conclude intergovernmental treaties on issues of copyright law which harmonise the law on the basis of classical public international law. The EU itself has gone down this route in other areas, especially in the regulations concerning the sovereign debt crisis,[190] and so has played inadvertently into the hands of critics who may argue that the EU demonstrates its own irrelevance as a supranational organisation. However, one should not blame the EU too much. It is the sole responsibility of the UK if a severe contraction of the markets occurs and if its territory may disintegrate as a result of the rather irrational decision in favour of a "Brexit" (constitutionally the implementation of "Brexit" may prove difficult). Furthermore, the UK has deprived itself of the opportunity to take part in necessary essential reforms of the EU for more pluralism. But even without the UK, it would be desirable to have a more flexible European Union which expands and contracts among its Member States during different historical epochs like a flexible universe based on the EU Treaties, rather than having a relentless gravitational force towards ever more legal and economic integration and unification: such a development would lead to a black hole. That also applies to the harmonisation of copyright in the EU. The European idea (especially, never a war between European countries ever again) is less attached to the institutions of the EU or the UK than these may think. The European idea is older and stronger, more intellectual and more human. Copyright is *the* area of law that can show that.

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[189] Whether Chapter 22, Art. 5 on copyright of CETA (Comprehensive Economic and Trade Agreement) between Canada and the EU (the equivalent to the currently negotiated TTIP with the USA), if adopted, could have a harmonising force, and what the legal status of CETA would be if the EU were to disappear, remains to be seen.

[190] Armstrong (2013), pp. 601–617, at 602–603, 605–606.

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