

Copyright Visby 2019  
Det XVII:e Nordiska Upphovsrättssymposiet  
Session IV – Finns det EU-rättsligt oreglerade områden?

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# Some examples of areas not yet harmonized

- Who can own copyright?
- Who can be credited as author?
  - Not defined in many jurisdictions. But implied as an individual
  - Differences between national legislations – also to consider differences between Europe and USA.
  - Can become very important in light of AI (Artificial Intelligence)
    - Computer generated works. Should we extend copyright to computer generated works?
    - Has been done to a certain extent in the UK – to persons who originate the process of creating an expression.
  - Related to the question of originality and creation and fixation of a work.
- EU has indicated further review of this area of law. Resolution by EP (in February 2017) with recommendations to the Commission to assess and develop the criteria for copyrightable works produced by computers and robots.
- Work for hire or work in employment relationship is another related area not yet harmonized.

# Some examples of areas not yet harmonized

- **Moral rights**
  - Certain harmonization brought by the Berne Convention as it requires member states to provide protection over moral rights.
    - **Article 6bis**  
(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation
  - The recital 19 to the Infosoc Directive expressly states that moral rights of rightholders should be exercised according to the legislation of the Member States... the Berne Convention... and ... Such moral rights remain outside the scope of this Directive.
  - Article 5(3)(k) of the Infosoc Directive – Member States may provide for exceptions or limitations including for the notion of parody.

# Some examples of areas not yet harmonized

- Moral rights continued
- In 1990 the Commission concluded the time was still not ripe for harmonization initiatives given the sensitivities of the issue of moral rights.
- In 2004 the Commission also responded in the negative in its working paper that there is no apparent need to harmonize moral rights protection in the Community at this stage.

# Some examples of areas not yet harmonized

- Moral rights continued
- The CJEU has concluded two cases dealing with the limitations of quotation (*Painer*) and parody (*Deckmyn*) in 2014.
- In both cases, national laws had stricter requirements than those envisioned in Art. 5(3)(d) and (k) in the Infosoc Directive.
- The Court expressly set aside the national laws and applied the harmonized scope of the limitations as designed in Art. 5, saying that the right holder has in principle a legitimate interest in ensuring that the work protected by copyright is not associated with a parody that conveys a discriminatory message.

# Some examples of areas not yet harmonized

- Moral rights continued
- In the *Deckmyn* case it was also stated that the notion of parody could not harm the original author, whether economically or morally.
- So, at least up to a point the CJEU has harmonized moral rights in the EU, irrespective of the view of the Commission.
- It is not only a question of what rights fall within the scope of moral rights. It is also a question of if these rights can be transferred, licensed or waived and they always remain with the author?
  - In the *Deckmyn* case the court referred to the right holder and not the author. Can we read anything into that?
- Then it is the question of whether or not those rights should be perpetual and can be exercised by the authors' heirs or if they should expire with the death of the author?