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BOOK REVIEW


Reviewed by MARSHALL LEAffER*

Ever since the passage of the Berne Convention of 1886, harmonization of copyright law has been a European dream. Until recently, however, copyright law had varied significantly, particularly between civil law “author’s rights” countries and the common law “copyright” world. This variance changed rapidly and comprehensively during the last twenty years in which copyright law in Europe has undergone realization of pan-European harmonization. Although the dream of a universal European copyright has yet to become a reality, no aspect of copyright has been left untouched by European law. In one decade, 1991–2001, the countries of Europe saw the inclusion of seven major copyright directives, covering fundamental issues such as computer programs, rental rights, satellite and cable communications, the copyright term, database rights, resale rights, and digital copyright (Information Society Directive). Other major issues have been tackled on the European level as well, such as the collective rights management and enforcement of intellectual property rights.

Why this explosion of activity of the last twenty years? The reasons are varied, but principal among them is that the need for harmonization is ever greater in a digital era, with the challenges brought about by the breakdown of physical barriers. But the call for harmonization is not just a European regional development. The necessity to see more uniformity in copyright law reflects developments that have occurred in the larger global context. The exigencies of world trade, particularly trade between Europe and U.S., are central to the economies of both entities requiring harmonization so that markets for informational goods can operate efficiently. Because of the economic interest of both trading blocks, Europe and the United States have moved toward ever greater harmonization and will continue to do so as time goes on. In fact a leading force shaping U.S. copyright law in recent decades has been the desire to conform U.S. law to the laws of other countries where many American companies and individuals in the copyright industries do business.

The influence of harmonization in Europe and elsewhere in reshaping U.S. copyright law has been evident for decades. Compliance with the

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Berne Convention was a driving force behind the passage of the 1976 Copyright Act. For another example of European influence, consider the 1998 Sony Bono Copyright Term Extension Act\(^1\) that extended the basic copyright term in the United States twenty years, to life of author plus seventy years. A principal rationale for the twenty year extension was that Europe had adopted the life-plus-seventy term, and that the EU countries, consistent with the Berne Convention, did not have to provide the longer term to countries whose works went into the public under a shorter life-plus-fifty-year term. In short, so that U.S. Copyright owners could benefit from the European term, the U.S. would have to extend its own term.\(^2\) This, of course this is what happened, much to the chagrin of academics and other “public domain” advocates who argued that we should not be taken in by the harmonization rationale at the expense of our own legal culture. European copyright law also has had a major influence worldwide. EU copyright directives have become the prototype for many for many other countries, particularly those of the soviet bloc, who wished to become (and now have become) member states of the European Union. Thus, any understanding of copyright law — to appreciate where we are and where we are headed — requires familiarity with developments in Europe.

*European Copyright Law: A Commentary*, edited by the noted copyright scholars Michel Walter and Silke von Lewinski, is a massive volume of 1,500 packed pages that covers in meticulous detail every aspect of European copyright law. This is not an entirely new volume, but one that is based on Michel Walter’s 2001 German edition, *Europäisches Ueberrecht*.\(^3\) The 2010 English version is an updated and greatly enlarged edition of the earlier path-breaking work. The appearance of this English edition is welcome news to those of dubious German language competence (such as me) who were largely excluded from making full use of the earlier book. I remember frustrating moments struggling over passages in the earlier edition, with dictionary in hand, desperately trying to decipher its detailed commentary on the Term Directive. Happily these days are over, and I am pleased to report that the translation reads well in idiomatic English. Like its earlier edition, this long awaited update is a group effort. The principal editors have put together a world class team that has written individual chapters. These include Walter Blocher, Felix Daum, Thomas Dreirer, Dominik Gobel, Lutz Riede, and Anke Schierholz. In addition to these editors of they have enlisted the aid of copyright experts in the coun-

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2 The “rule of the shorter term” is found in Berne Convention art. 7(8) (Paris text).
tries of the European Union to give information on the implementation of the directives in their respective nations.

*European Copyright* is a meticulously structured work divided into four basic parts. It begins with a forty-two page introduction by Silke Von Lewinski that covers law making and administration in the EU. This introduction should be read by all who are interested in learning the institutional fabric of EU law-making and legal interpretation. Other finely wrought introductory essays include the “Principal of Non-discrimination,” “Copyright, Competition and the Free Movement of Goods and Services,” and “Fundamental Rights” involving copyright. These introductory essays provide the backdrop for the comprehensive analysis of the directives.

The second and major part of the of the book covers the copyright directives. These chapters include well-known European directives such as the Computer Program Directive, Information Society Directive, and the Database Directive but also lesser known directives such as the Satellite and Cable Directive. In this part of the book, each directive is subject to an exhaustive treatment. It is hard to convey the elaborate coverage each author has given to every aspect of the directives without giving a concrete example. To illustrate, one should consider Chapter 11’s treatment of the Information Society Directive, a collaboration of Ms. von Lewinski and Michel Walter. This directive was promulgated to bring copyright up to date in a digital environment and to implement the 1996 WIPO Copyright Treaties, which incorporated norms for the digital world such as those that would protect against the circumvention of technological controls that govern access to copyright work.

This 220-page chapter on the Information Society Directive\(^4\) includes the text of the directive, detailed commentary, bibliography and the implementation of the directive in the countries of Europe. Standing alone it would easily constitute a book in itself and a major accomplishment on an important topic. As in all the other chapters on the directives, this chapter begins with a listing of legal instruments and bibliography — in this case, a bibliography that includes well over 300 entries! The commentary is organized in accord with logical breaks in the text of the directive. The text analysis was so extensive that I found it helpful to have a copy of the integrated text rather than flipping back in the pages of the book. This is not a criticism of the book’s structure but simply reflects the extensiveness of the commentary.

Unlike many works that purport to comment on legislative provisions, Ms. Lewinski’s and Mr. Walter’s commentary on the Information Society Directive, to say the least, does so much more than paraphrase the official words of a text with a few remarks added. Their analysis encompasses the full range of interpretive methods — historical, doctrinal, and linguistic — in shedding light on a particular word or concept in the text. In one sense all the directives on copyright are in many ways interconnected. I was impressed by the manner in which the editors never miss an opportunity to show how a concept in the Information Society Directive relates to other directives. For example, the concept of “originality” appears in the Information Society Directive and shows up as well in other directives such as the Computer Program Directive and the Database directive. In addition, the authors discuss how the courts have interpreted “original” in current European jurisprudence. I point this out because there is a significant overlap in concepts found throughout the directives, and a concept cannot fully be appreciated without understanding the context in which it appears in its various iterations in European case law.

Finally, as in all the others, the chapter on the Information Society Directive concludes with an analysis of its implementation in the member states. Implementation is an extraordinarily complicated subject given that membership in the European Union has expanded from six members in the 1950s to twenty-seven member states today. How is one to know how the directive has been implemented in France or Germany much less in Hungary or Estonia? Each country has its own challenges in implementing a directive by adapting its laws to encompass the norms set forth in the official text. The system is hardly perfect or its process transparent. Each country has its own legal culture with legislation pushed through the meat grinder of politics. From an editor’s standpoint, this important subject presents unique challenges. Here, the authors have enlisted the help of experts in the various countries to summarize the steps taken in each country to adapt that country’s laws to comply with the terms of the directive. You will not find an exhaustive analysis of each country’s effort at implementation. The editors, however, have provided information on every country to some extent, and in many instances have included specific detailed discussion of the implementation process in a particular national context.

The last three parts of the book are devoted to other important aspects of European copyright that are equally as complicated and important as the promulgation and implementation of the directives. Part III is entitled “Collective Rights Management in Europe – Practice and Legal Framework.” In this highly compact chapter, written by Anke Schierholz, the byzantine system of collective rights management is synthesized in the European context in a comprehensible manner. This Part is organized
similarly to the other chapters concerning the copyright directives, including materials, cases, bibliography, and analysis. Part IV rounds out the book with Mr. Walter’s and Gobel’s commentary on the Enforcement Directive and Mr. Walter’s chapters on the Product Piracy Regulation and Access Regulation. These directives and Regulation do not focus specifically on copyright but have important ramifications for the subject matter. A final Part V of the book, “Status of Harmonization and Outlook,” attempts to summarize the *acquis communautaire*\(^5\) in copyright and speculates on the future and the possible adoption of a European Copyright Code — a long-standing but not yet realized dream.

It is easy to conclude that *European Copyright Law* will be the standard reference work on EU copyright law for a long time to come, and anyone doing research on EU copyright law will have to make use of this volume. This new edition of the earlier German edition will be well received in the English speaking world, and provides almost a decade of new developments in the field such as final text of the Resale Rights Directive and full context of the Information Society Directive that were not available in the previous edition. The book reveals, in elaborate detail, the intricacy of EU harmonization in the field of copyright and at the same time is able to do so in an accessible way. *European Copyright Law: a Commentary* is a prodigious achievement and should be the model for other volumes on European patent and trademark law.

\(^5\) The *acquis communautaire*, often shortened to *acquis*, is the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law.