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Benchmarking for a more balanced legislation: the example of copyright law

by Ana Ramalho

The powers of the EU to enact legislation in a given area are dependent upon a competence norm that grants it legitimacy to act. This flows from the principle of conferral, enshrined in Article 5(2) of the Treaty on European Union (TEU). In the field of copyright, law-making powers have been mostly derived from Article 114 of the Treaty on the Functioning of the European Union (TFEU), which ties law-making powers to the need to build an internal market. The trigger for EU action is the difference between EU Member States in many fundamental aspects of their copyright regimes (as, eg, the scope of the rights granted), which thus act as barriers to the cross-border trade of copyright goods and services. This justification for legislative intervention is often mentioned (and explained) in the legislative proposals drafted by the EU Commission.

So far, the internal-market based legislative intervention has resulted in a piecemeal harmonisation, since – supposedly – only the copyright aspects that have internal market relevance have been harmonised. What is more, Article 114 TFEU is a functional competence, in the sense that while it grants the EU powers to achieve a certain objective – the establishment and functioning of the internal market – it leaves the substantive content of the harmonising measure largely to the discretion of the EU legislator (S Weatherill, "Competence Creep and Competence Control", *Yearbook of European Law* 2004, 23(1), 1-55, 6-7). Thus, for example, differences in national laws concerning the duration of copyright were considered to hinder cross-border trade, and could fall under the competence of Article 114 TFEU; but the provision gives no indication as to how the legislator ought to define the optimal term of protection for purposes of harmonisation. This functionality can make harmonisation greatly dependent on the legislator discretion, which in turn might suggest a situation of "competence creep" (S Weatherill, "Why Object to the Harmonization of Private Law by the EC?", *European Review of Private Law* 2004, 5, pp 633-660, 639).

It is therefore necessary to assess whether the functional character of Article 114 TFEU has resulted in a normative gap in copyright law-making and if so, how the EU legislator ought to address that gap. As I have defended at length elsewhere (A Ramalho, *The Competence of the European Union in Copyright Lawmaking. A Normative Perspective of EU Powers for Copyright Harmonization* (Springer, 2016)), the answer to the first question is found by surveying the existing Directives and their legislative history to determine the underlying objectives of legislative activity in the field of copyright, since the substantive provisions of a legislative measure result from its goals. By mapping the goals of legislative activity, it is thus possible to examine whether a normative gap exists in the context of law-making. The map of legislative goals was made following a content analysis technique (about this technique, see B L Berg, *Qualitative Research Methods for the Social Sciences*, 6th ed, (Boston, Pearson, 2007, 303-04): it involved the systematic reading of the Directives, together with its proposals and amended proposals, which allowed for identifying certain patterns, ie, features that appeared recurrently throughout the legislative history. These patterns were then categorised inductively, that is, the same or similar features were aggregated conceptually to form a category. The result of this exercise is displayed in Table 1 below:

Table 1: Categories of objectives and specific objectives per Directive

CATEGORIES OF OBJECTIVES		1	DIRECTIVES								
			Computer programs (1991)	Rental & Lending (1992)	Satellite & Cable (1993)	Term of protection (1993)	Databases (1996)	Infosoc (2001)	Resale right (2001)	Orphan works (2012)	Collective Management (2014)
Treaty related goals	Establishment of an internal market	D	Recital 4, 5	Recital 1, 2, 3	Recital 1-3, 5, 14 ,33	Recital 2, 9 17, 18, 25	Recital 2, 3, 4	Recital 3, 6, 7, 31, 32, 47, 56	Recital 9, 10, 11, 12, 13, 14, 15, 23	Recital 8, 14, 25	Recital 4, 5, 7, 8, 11, 14, 18, 19, 38, 39, 40, 46
		AP									Recital 4, 5, 11, 14, 19, 40, 46
		P	Part 1:1.4, 2.10, 2.11, 5.4	Part 1:10, 39, 43, 45, 46	Part 1:5, 7	Part 1:26-28, 33, 38-41, 45, 56	Part 1:2.2.5 ;2.2.11 ; 7.1.2-7.1.5	Intro (1); Ch 2(2); Ch 3.I(13), II(7), III(5)	I.8; IV.A.2; IV.A.3; IV.A.18; IV.C.7	Recital 3	1.1.; 1.2.; 1.4.; 2.3.; 3.1.; 3.2.
	Fostering culture	D		Recital 5				Recital 4, 11, 12, 14, 22, 34, 40	Recital 7, 18	Recital 1, 3, 5, 9, 11, 15, 16, 20-23	Recital 3, 32, 38, 39, 44
		AP						Recital 10ter; 14 bis			Recital 3, 32
		P		Part 1:7, 8, 9, 39				Ch 2(2),(3)		1	1.1.; 1.2.; 3.1.; 3.2.; 3.4.
Protect a specific interest	Protect authors and/or performers	D	Recital 20, 24	Recital 4, 7, 8, 9, 11, 15, 18	Recital 5, 20, 24, 25	Recital 5, 10, 11	Recital 18, 26, 27, 30, 31, 33	Recital 9, 10, 11, 23, 35, 44, 47, 48, 59	Recital 3, 4, 22, 29, 30	Recital 11, 12, 13, 14, 15, 16-20	Recital 5, 7, 9, 11, 14, 15, 18-31, 34-36, 40-43, 45-47, 49, 50
		AP		Pg 2(d)	Pg 4 recital 19;pg 8-9, Art 3(2);pg 9 Art 4(1)			Recital 9bis, 26			Recital 5, 9, 11, 14, 15, 19-21, 23,25, 28-30, 35, 40-42, 46,50
		P		Part 1: 7, 8, 9, 10, 39, 43, 45. Part 2: 3.1.1	Part 1: 4, 33, 35, 36, 54, 57-60, 62, 64	Part 1: 49;60	Part 1: 3.1.11; 4.2.1.; 4.2.6. Part 2:11.3.	Intro (1); Ch 2(1)	I.2, I.3, I.4, V.3; V.8; V.15; V.17		1.1; 1.2; 1.4; 2.1; 2.3; 3.1; 3.2; 3.4.
	Protect content industries	D	Recital 2, 3, 6, 24	Recital 4, 7, 8, 9, 11, 19	Recital 5, 20, 24, 25, 26	Recital 10, 11	Recital 7, 11, 18, 26, 27, 30, 31, 33, 39-44, 48, 56, 57, 58, 49, 50	Recital 4, 9, 10, 35, 44, 47, 48, 59		Recital 11-20	Recital 5, 7, 9, 11, 14, 15, 18-31, 34-36, 40-43, 45-47, 49, 50, 52
		AP		Pg 2(c)	Pg 4 recital 19;pg 8-9, Art 3(2);pg 9 Art 4(1)			Recital 26			Recital 5, 9, 11, 14, 15, 19-21, 23, 25, 28-30, 35, 40-42, 46, 50
		P	Part 1:1.2, 1.3, 1.4, 3.6, 5.4	Part 1:1, 7, 8, 9, 10, 39, 43, 45	Part 1:4, 33, 35, 36, 54, 57-60, 62, 64	Part 1:29, 49, 60	Part 1:1.2, 1.4; 2.1.3; 2.1.6; 2.2.11, 3.2.8; 4.1.1; 4.2.1; 4.2.6; 4.2.10; 5.1.1; 7.1.5. Part 2: 11.3	Intro (1); Ch2 (1)			1.1; 1.2; 1.4; 2.1; 2.3; 3.1; 3.2; 3.4.
	Protect intermediaries	D			Recital 10, 28, 33			Recital 4, 26, 27, 33		Recital 1, 3, 9, 11, 15, 16, 20, 21, 22	
		AP						I.3.3			
		P			Part 1:33, 40, 42, 54, 58, 62, 64					1	

Protect a specific interest	Protect end users	D	Recital 17, 18, 21-23, 26				Recital 34, 35, 37, 49, 50	Recital 33, 38, 39, 51, 52, 57		Recital 1, 23	Recital 38, 43, 44, 52
		AP	Introduction of recitals pg 17-19				Pg 3 d) and e)				
		P	Part 1:3.3				Part 1:5.3.2; 5.3.7. Part 2: 6.1; 6.2; 7.2; 8.5				
Compliance with international framework	Compliance with international framework	D						Recital 15			
		AP									
		P						Intro (5); Ch 2(10); Ch 3.I(14), II (8), III(6), IV(5)			

D=Directive; AP=Amended Proposal; P=Proposal (Explanatory memorandum, references made to paragraphs unless otherwise indicated); Ch=Chapter; pg=Page

If these references are then grouped per objective, the conclusion is that industry-related objectives are quantitatively predominant, as Figure 1 below shows:

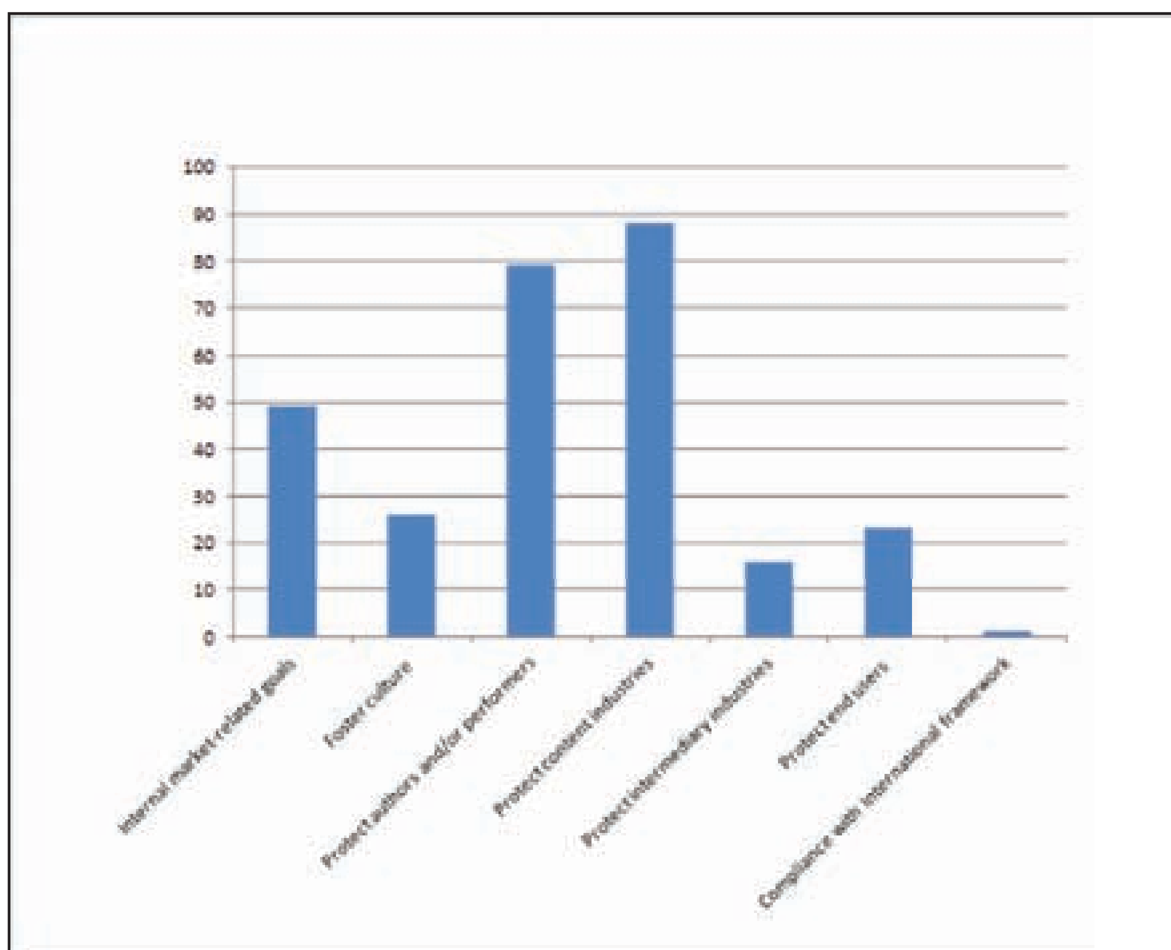

Figure 1: Number of references per specific objective

The total number of references in each category is of course only significant to a certain degree. Various factors may influence these results, namely the subject matter to be harmonised, or the existence of a decision from the Court of Justice of the EU (CJEU) on the lack of harmonization that dispenses the legislator from demonstrating at length internal market needs (Ramalho, *op cit*). Still, even though exact numbers may vary, it is apparent that certain private interests – industry, but also the protection of authors and performers – overweigh internal market goals and the fostering of culture, which are Treaty-related objectives. This provides an answer to the first question; there is indeed a normative gap in copyright law-making, given that the protection of specific interests, and the hierarchy between them, is fostered without a legal basis in the Treaties.

The question then becomes how the EU legislator ought to address that normative gap. The solution proposed is to establish benchmarks of legislative activity that can provided normative content to the main competence norm (Art 114 TFEU). The benchmarks of legislative activity should be derived from the highest possible source of law, following the principle of constitutional legality (on this principle, A von Bogdandy & J Bast, "The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform", *Common Market Law Review* 2002, 39(2), pp 227-68, 229 *et seq*). It is generally accepted that the Treaties (ie the TEU and the TFEU), fundamental rights, and general principles of law (including the ones developed by the CJEU) are at the top of that hierarchy (K Lenaerts & P van Nuffel, *European Union Law* (Oxford, Clarenden Press, 2011, 817-18)). But the case law of the CJEU is also an important source of law that is of relevance here; not only are the general principles developed by the CJEU part of EU primary law, the court also interprets and applies the other sources – which means that court has a central role in the determination of the meaning and scope of norms (K Lenaerts & P van Nuffel, *op cit*, 793-94).

The first benchmark that ought to be met by the EU legislator when harmonising copyright law is, unsurprisingly, the *harmonisation of national laws*, which is based on the EU objective of achieving an internal market (Article 3(3) TEU) and on the competence norm (Art 114 TFEU) itself. The harmonisation of national laws as a benchmark is moreover supported by the need to increase legal certainty, which is a general principle of EU law binding the EU legislature (T Tridimas, *The General Principles of EU Law*, 2nd ed (Oxford, Oxford University Press, 2006, 242 *et seq*)). This benchmark entails, first and foremost, an assessment of whether harmonisation is needed, which will be the case where differences in national laws hinder, or are likely to hinder, cross-border trade (on which see CJEU cases C-376/98 *Tobacco Advertising I*, case C-377/98 *Netherlands v Parliament and Council*, C-380/03 Tobacco Advertising II, joined cases C-465/00, C-138 and 139/01 Österreichischer Rundfunk, Case C-301/06 *Data Retention*, joined cases C-154 and C-155/04 *Alliance for National Health*). But in the context of this benchmark the *effect* of the harmonisation measure, ie whether the provisions of the legislative measure at stake can actually achieve de facto harmonisation, should also be taken into account. If the harmonisation measure does not target existing national laws and/or if divergences arising from different national laws are not addressed, the Directive will not be considered as approximating those laws, as prescribed by Article 114 TFEU. This will be the case, for example, where new rights, which did not previously exist at the national level, are introduced (Ramalho, *op cit*). Put it another way, where the (supposedly) harmonising measure does not replace or modify national laws, one cannot really talk about harmonisation (E J Lohse, "The Meaning of Harmonization in the Context of European Union Law – A Process in Need of Definition", in M Andenas & C B Andersen (eds.), *Theory and Practice of Harmonisation* (Cheltenham, Edward Elgar, 2011, 299 *et seq*)).

The second benchmark is the *respect for national cultures and traditions*, the main basis of which is the respect for cultural diversity as one of the objectives of the EU (Art 3(3) TEU). Among other things, this obliges the EU to take national cultures into account in the context of harmonization (Art 167(4) TFEU). "National cultures and traditions" should be understood to encompass both culture in the traditional sense of "cultural expression" but also national *legal* cultures and traditions. To some extent, legal traditions reflect the different visions of culture of the different Member States. These two aspects are often linked, namely in the field of copyright lawmaking, which touches upon cultural matters (Ramalho, *op cit*). One way to meet this benchmark is, for example, to accommodate national legal and cultural specificities, by way of recognition of certain exceptions close to national idiosyncrasies (*ibid*). Because of what it entails, this benchmark might seem at odds with the previous one. But fact is that both benchmarks correspond to two different objectives of the EU. It is therefore possible to reconcile the benchmarks, by taking the respect for national cultures and traditions as an aspect of European integration, in as much as it places side by side cultural and legal differences, making them interdependent in the harmonisation process (*ibid*).

A third benchmark to be considered ought to be the *protection of creators*. The protection of creators finds its main rationale in the Charter of Fundamental Rights of the European Union (Charter), which is part of EU's primary law via Article 6(1) TEU. Apart from certain rights and freedoms akin to creative activity in general, such as the freedom of the arts and sciences

(Article 13), the Charter has a specific provision on intellectual property, Article 17(2), which states that "intellectual property shall be protected." In case C-277/10 *Luksan*, the CJEU has highlighted the link between this provision and the protection of the author of a copyright work (in that case, the principal director of a cinematographic work), by ruling that not allocating exploitation rights to the principal director of a cinematographic work would amount to a breach of Article 17(2). The connection made by the court between the individual author and the fundamental principle of intellectual property protection seems thus to endorse Article 17 as a justification for protecting creators (Ramalho, *op cit*). Other decisions of the court (chiefly, joined cases C-92-326/92 *Phil Collins/EMI Electrola*) seem to emphasize that the protection of the rights of authors and performers is at the very core of the specific subject matter of copyright. The term "creator", for the purposes of constructing this benchmark, should be understood to refer to natural persons, ie, authors and performers. Legal persons (eg creative industries) do not therefore fall under this category. The European Parliament has recognised the importance of the social and economic role of both authors and performers, stressing that the future cultural heritage and the quality of society depend on their work (Resolution of the European Parliament on the situation and role of artists in the European Union (1999)). To comply with this benchmark, legislation should protect the interests of the individual creator, which can be done by affording them recognition and a financial reward – for example, through the grant of exclusive or remuneration rights to creators. But it is also in the creators' interest to be able to engage creatively with other works (through adaptation, sampling, etc) (M Kretschmer, "Digital Copyright: The End of an Era", EIPR 2003, 25(8), pp 333-41, 338-39). Another element in the protection of creators as a benchmark should thus be the facilitation of further creative uses, which can be achieved through provisions that favour future creators or future acts of creation.

The fourth benchmark proposed is the *protection of end users*. End users are consumers of copyright goods, at least to a certain extent (Ramalho, *op cit*). From this perspective, the need for this benchmark is rooted in imperatives of consumer protection found in primary law (Art 12 TFEU, Art 169(2)(a) TFEU, Art 114(3) TFEU, Art 38 Charter), which require the EU to embody consumer protection standards in its legislation. In other words, consumer protection clauses found in primary law can and should be used to give normative content to other norms of the Treaties. Moreover, the CJEU has also pursued the protection of end users in the specific realm of copyright. In cases C-70/10 *Scarlet Extended* and C-360/10 *SABAM v Netlog*, the court focused in particular on the right to protection of personal data and on the freedom to receive or impart information, both being part of the Charter of Fundamental Rights (Arts 8 and 11 of the Charter respectively). In short, the protection of the end user as a benchmark in copyright law-making should consequently be seen against the rationales of consumer protection and protection of fundamental rights. Both can be fostered by granting end users access to cultural goods and services in a way that ensures that their rights are respected (namely, their fundamental right to privacy).

The fifth and final benchmark is the *promotion of competitiveness of EU industries*, which finds its main justification in Article 173(1) TFEU ("The Union and the Member States shall ensure that the conditions for the competitiveness of the Union's industry exist") and Article 173(3) TFEU ("The Union shall contribute to the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties"). When harmonising EU copyright law, the legislator should thus contribute to the competitiveness of EU industries (namely, its creative and intermediary industries). Promoting competitiveness translates into a moderate protection of industry, in the sense that such protection, while being directed at competitiveness, should also be embedded with competition concerns. This flows from Article 173(3), which also mandates that the aim of competitiveness "shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition (...)" (R Barents & P J Slot, "Sectoral Policies", in P J G Kapteyn et al (eds), *The Law of the European Union and the European Communities (with reference to changes to be made by the Lisbon Treaty*, 4th ed (Alphen aan den Rijn, Kluwer Law International, 2008)). This implies a balance between competitiveness and competition, which can be achieved by limiting the rights granted to industry as a way to accommodate the interests of competitors (for example, by devising competition-related exceptions, that is, exceptions to the exclusive rights that favour competitors; or by granting limited rights, such as short-term neighbouring rights (Ramalho, *op cit*)). In the context of this benchmark, it is still necessary to ensure that one industry sector does not choke others – which means that for example the grant of rights to creative industries should not jeopardise the activity of intermediary industries and vice-versa.

From this brief overview, it becomes apparent that some benchmarks point in opposite directions, and probably where some are met others will barely be fulfilled – for instance, a harmonising measure that sets a high level of protection for creators will score high in the benchmark of protecting creators, but might score low in the protection of end users if their access to works is not ensured. However, both primary law and the case law of the CJEU deal with and accommodate

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the different public and private interests that the benchmarks represent by resorting to some sort of balancing exercise between them. For example, Article 52(1) Charter admits that the rights and freedoms it recognises might be limited, namely to protect the rights and freedoms of others. Likewise, the CJEU has often stated that copyright protection is not absolute, advocating the need to balance it with competing interests (see eg joined cases C-403-429/08 *Premier League*). The key is then for copyright legislation to achieve a balance between the different benchmarks as well, which might entail meeting all of them to a certain extent, rather than few of them to a large extent. This is no easy task, but it mirrors the compromise between the different interests that stems from the sources that gave rise to benchmarks in the first place.

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