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National and International Dimensions of Copyright Law in the Internet Age

Harmonizing Exemptions: The Case of Orphan Works

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Abstract: Despite international and European cooperation, copyright law remains a predominantly national affair dominated by national policy. The article examines if this framework is up to the challenges presented by the Internet. Two problems are found: the laws of all the receiving countries apply to an Internet publications and these laws often differ substantially. This is so because states wish to remain free to draft national copyright policy and apply it to their public sphere. As a consequence, exemptions from copyright protection are not harmonized. Using the example of digital libraries and the problem of copyright-protected works whose right holders are unknown or unlocatable (so-called orphan works), the article demonstrates how divergence of laws impairs Internet-related use of copyrighted materials. As these orphan works cannot legally be used, an exemption from copyright protection may be warranted. However, to facilitate online distribution, an international approach is required. This article discusses the possibilities of such an approach by means of choice-of-law and harmonization and unification of copyright law in the European Union.

Zusammenfassung: Trotz der internationalen und europäischen Zusammenarbeit verbleibt das Urheberrecht überwiegend eine nationale Angelegenheit, die durch nationale Grundsätze beherrscht wird. Dieser Beitrag untersucht, ob diese Grundstruktur den Herausforderungen, die das Internet mit sich bringt, gewachsen ist. Zwei Probleme können hier genannt werden: Die Gesetze aller Empfangsstaaten sind auf eine Veröffentlichung im Internet anwendbar, diese Gesetze aber unterscheiden sich oft erheblich voneinander. Der Grund hierfür liegt darin, dass die einzelnen Staaten die Freiheit haben möchten, um nationale Urheberrechtsgrundsätze zu konzipieren und in ihrer eigenen öffentlichen Bereich anzuwenden. Aus diesem Grund werden Ausnahmen von dem urheberrechtlichen Schutz nicht harmonisiert. Durch die Darstellung des Beispiels von digitalen Bibliotheken sowie des Problems von urheberrechtlich geschützten Werken, deren Rechtsinhaber unbekannt oder unauffindbar sind (sogenannte verwaiste werke, oder *orphan works*), soll in diesem Beitrag aufgezeigt werden, wie Unterschiede in den nationalen Rechtssystemen die mit dem Internet zusammenhängende Verwendung von urheberrechtlichen material beeinflussen. Da diese *orphan works* nicht legal verwendet werden können, könnte eine Ausnahme vom urheberrechtlichen Schutz in diesen Fällen berechtigt sein. Um allerdings die Online-Verbreitung zu fördern, ist eine internationale Vorgehensweise zwingend erforderlich. Dieser Beitrag erläutert die Möglichkeit einer solchen Vorgehensweise durch die Regelung der Rechtswahl sowie die Harmonisierung und die Vereinheitlichung des Urheberrechts in der Europäischen Union.

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1. Introduction

The imaginary country of Karaokia is renowned for its popularity of karaoke. This singing along popular songs is often done at public occasions, in bars, restaurants, and even on national festivals. The public performance of such songs is not without legal difficulties: the lyrics and music are protected by copyrights and neighbouring rights as much in Karaokia as in any real country. However, since karaoke is the national sport, Karaokian copyright law provides for an exemption: copyright does not cover the acts of using music for the purposes of karaoke. Karaoke can thus be practised publicly without needing to worry about copyrights. But to a growing extent, karaoke takes place online, via Websites. This has recently led to problems: a number of foreign courts have found karaoke singers guilty of infringing the rights in the music by publishing it online and making it available abroad. The singers relied on Karaokia's copyright law and its special exemption, but to no avail. The laws of the foreign countries, and not that of Karaokia, were found to apply. These rulings have brought a halt to online karaoke and, in fact, have threatened its role as a traditional element of Karaokian culture.

This article asks why problems as these occur and how they could be overcome. In what follows, I shall not use the fictitious case of Karaokia but the real and particularly urgent problem of orphan works and digital libraries. A library, such as the European digital library 'Europeana',[1] needs to obtain permission from copyright owners to digitize copyrighted works and disseminate it online. In the case of an orphan work, the copyright owner is unknown or cannot be located, so the work cannot legally be used.[2] Copyrights are no longer registered,[3] and their owners may therefore be exceedingly difficult to find. Some estimates claim that up to 40% of copyrighted material held by libraries is orphaned.[4] The unavailability of these materials is obviously detrimental to the public interest. In a recent study, Mirjam Elferink and I concluded that a legislative solution by means of an exemption from copyright protection seems to be required, but that given the global nature of digital libraries, an international rather than a national approach should be adopted.[5] The

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1 Europeana is already online, and available at <www.europeana.eu>.

2 There is a growing literature on the topic. Some of the significant general works are as follows: S. van Gompel, 'Unlocking the Potential of Pre-existing Content: How to Address the Issue of Orphan Works in Europe?', *International Review of Intellectual Property and Competition Law* 38 (2007): 669–702; G. Spindler & J. Heckmann, 'Retrodigitaliserung verwaister Printpublikationen; Die Nutzungsmöglichkeiten von "orphan works" de lege lata und ferenda', *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 57(2008), 271 et seq.

3 Article 5(2) of the Berne Convention (BC).

4 British Library, 'Intellectual Property: a balance', British Library Manifesto, September 2006, <www.bl.uk/news/pdf/ipmanifesto.pdf> (point 5).

5 M. Elferink & A. Ringnalda, *Digitale ontsluiting van historische archieven en verweesde werken* (Amsterdam: DeLex, 2009) (also available on <www.wodc.nl>) ['Digital dissemination of historical archives and orphan works', with a summary in English]).

purpose of this article is to discuss the possibilities and problems of designing such an international solution, with special emphasis on harmonizing European copyright law.

This article serves a second purpose, one of more general interest. The quest for international rules for digital libraries and orphan works shows a lack of harmonization and illustrates some particular obstacles faced by internationalization in the field of copyright law. The example of online digital libraries shows that it is exceedingly difficult to design an international or even European solution to facilitate the distribution of content over the Internet. The main problem here is that whoever uploads material to the Internet has to obey the copyright law of every country in which the material is accessible. A harmonized approach could, of course, ensure that all of these laws provide for an exemption for orphan works, but is full harmonization legally and politically feasible?

I shall first give a brief outline of both the problem of orphan works and the need for internationalization. Section 3 then explains the obstacles one faces in designing an international solution for the orphan works problem, while section 4 describes the challenges caused by the Internet. Having established the nature of these obstacles, section 5 discusses the feasibility of addressing them by means of private international law. Section 6 is devoted to a discussion of a harmonized or unified European solution to the orphan-works issue. I conclude in section 7 by voicing an opinion on the possibilities of internationalization and Europeanization of copyright exemptions in general and facilitating online digital libraries in particular.

2. Problem

2.1 Why an Orphan Work Cannot Be Used

We should first establish why orphan works pose a problem for online libraries and how this problem could be solved in general, before turning to an international solution. Orphan works, to put it briefly, are a problem because they cannot be used. A library cannot, without breaching copyright law, digitize orphan works and upload them to a publicly available Website. Copyright law requires permission from the author or copyright owner for such use, since a copyright is an exclusive and absolute right in the immaterial creation (the *corpus mysticum*), modelled on the right of property.[6] A copyright, in effect, grants its owner a monopoly on certain uses of the work, such as copying or digitizing it and publishing it or making it available on a Website. As a logical consequence, when the owner of the copyright is unknown or absent, the work cannot be used.

This monopoly is, however, not absolute. Copyright law tries to establish a famously delicate balance between the interests of the copyright owner and the general public. There are various ways to achieve this. The term of copyright protection,

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6 F.W. Grosheide, *Auteursrecht op Maat* (Deventer: Kluwer, 1986), 74–76.

for instance, is limited; after its expiration, works are said to fall into the public domain, and they can be used freely. Exemptions from copyright protection are an important tool for the balancing of interests during the protection term. Where copyright protection would be too great a burden on the public interest, the law can restrict it. This is done either by providing that certain uses do not fall within the ambit of the exclusive right – the exception of quotation, granting others the right to quote from a work, is a well-known example – or by providing for statutory or mandatory licenses. In both cases, the copyright owner looses his exclusive right to use the work, although he may retain his right to remuneration. I shall refer to these exceptions, limitations, and statutory or mandatory licenses collectively as 'exemptions'.

The problem of orphan works could be solved by an exemption to the benefit of digital libraries.[7] I will leave the details to the section dealing with European harmonized solutions. Suffice it to say, for now, that an exemption could allow libraries to include an orphan work in their online collections, provided that they have been unable to find the copyright owner despite a reasonable search.

2.2 International Dimension: Internet and Applicable Law

Finding a workable exemption for orphan works and online libraries is, however, not even half the story. As online libraries operate in more than one country, multiple laws may apply. To ensure full legality, each of these applicable laws would have to provide for an exemption for orphan works. A copyright owner could otherwise claim damages or prohibition of further use; infringement may also give rise to criminal liability.

This brings us to a broader problem of international copyright law; whoever uses copyrighted material in multiple countries has to obey the copyright laws of all the countries he operates in. That may not at first sight appear strange or even problematic, since being faced with multiple laws is almost inevitable in international dealings. We should, however, stress that copyright law is a special case. First, when material is uploaded online, the laws of all the countries in which the material is accessible (also referred to as 'receiving countries') apply.[8] Given the global nature of the Internet, the number of applicable laws may indeed be quite large. Second, these laws often differ substantially, despite various harmonization efforts. This is especially true for exemptions, which are, as mentioned, tools for achieving a balance of interests. Different countries can strike that balance differently. For example, Canadian copyright law allows a person or institution to request the Canadian Copyright Board for a license to use an orphan work.[9] As this license is based on an exemption in

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7 See van Gompel (2007), *supra* n. 2, for ways to address the problem at its roots. Such solutions would, however, only help to prevent orphan works from occurring in future.

8 This is explained and qualified in Sections 3 and 4 *infra*.

9 Section 78 of the Canadian Copyright Act.

Canadian law, its validity is limited to Canadian territory and the orphan work cannot be used abroad.[10] A Canadian library could not, therefore, legally upload an orphan work to its Website, since the work would then be made available in other countries, and their applicable laws may not provide for an exemption for orphan works.

3. International Copyright Law and the Roots of the Problem

We should answer two questions about international copyright law in order to understand the difficulties in coming to an international solution for online digital libraries and orphan works. First, why are so many laws simultaneously applicable to an Internet transmission? Is it not possible to devise a more straightforward international regime? Second, why did international harmonization not decrease the substantive differences between domestic copyright laws, at least regarding exemptions? Both questions are addressed in this section.

3.1 The Territorial Fragmentation of Copyrights

It is commonplace that copyrights are valid only within the territory of a state – the so-called principle of territoriality.[11] That is not to say that a work is not protected abroad, but it is so by a set of national, territorially confined, copyrights. A work that was created in the Netherlands is protected by a Dutch copyright there, by a German right in Germany, a French right in France, and so on. In this respect, copyrights differ from property rights; these are more universally recognized, for we are not inclined to think of territorially confined property rights that, patched together, make up the global protection of ownership. But that is precisely how international copyright works. This system of territorially fragmented rights dates back to the origins of copyrights as privileges, which were valid within a state's territory only.[12] A work could therefore be copied freely in foreign states – unless it was subjected to a new privilege there as well. The global protection of any given work of authorship is consequently made up of a patchwork of domestic copyrights. And each of these rights is in practice often governed by the law of the country in which it is granted.

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[10] This limitation is specified in the licenses issued by the Copyright Board, which are accessible at their website, <www.cb-cda.gc.ca>.

[11] For a discussion, see M. van Eechoud, *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis* (Amsterdam: s.n. 2003), 99–103 (discussing the distinction between copyrights as *droits indépendants* and property rights as *droits acquis*); see also H. Schack, *Urheber- und Urhebervertragsrecht* (Tübingen: Mohr Siebeck, 2007), 414–418 (including a proposal for a universal copyright more akin to the property right) and 462; P.B. Hugenholtz, 'Copyright without Frontiers: Territoriality in European Copyright Law', in E. Derclaye, *Research Handbook on the Future of EU Copyright* (Cheltenham: Edward Elgar, 2009), 12–26, 19.

[12] K-N. Peifer, 'Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der Technischen Entwicklungen', *Zeitschrift für Urheber- und Medienrecht* 50(2006): 1–8, at 1–2; Schack (2007), *supra* n. 11, 414.

Every national copyright law will thus establish for its own purposes and according to its own terms whether a work meets the criteria for copyright protection and, if so, who owns the copyrights. The same applies to the applicability of exemptions. To give an example of divergent protection criteria: the Dutch supreme court accepted that the smell of the perfume 'Tresor' can be protected by copyright, as smell is perceptible to human sense.[13] The same perfume was denied copyright protection by the French *Cour de cassation*, on the grounds that '*la frangrance d'un parfum, qui procède de la simple mise en oeuvre d'un savoir-faire, ne constitue pas la création d'une forme d'expression pouvant bénéficier de la protection des oeuvres de l'esprit*'.[14] The creator of the similar perfume could perhaps legally market it in France (although unfair competition may be an issue) but would violate copyright by distributing it in the Netherlands.

3.2 Did the Berne Convention Improve Things?

One may wonder if this territorial fragmentation of copyrights and the consequent multitude of applicable laws was not overcome by the international conventions in this field. The answer is a clear 'no'. In fact, the most significant treaty in the field of copyrights, the Berne Convention of 1886 (BC), can even be considered to have laid the groundwork for the territoriality of copyrights.[15]

Some historical context is in order. The BC was drafted at the initiative of a group of artists and writers who, led by Victor Hugo, established the *Association Littéraire et Artistique Internationale* (ALAI) in 1878. Their main goal was to establish a system of international copyright protection. Until the coming into force of the BC, most of the countries that granted copyright protection restricted protection to nationals. Very often, domestic copyright law did not therefore protect works of foreign origin and allowed for these to be exploited, resulting in piracy.[16] This obviously

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[13] Hoge Raad (Supreme Court), 16 Jun. 2006 (*Lancôme/Kecofa*), *EIPR (European Intellectual Property Review* 28) (2006): 629.

[14] Cour de cassation, 22 Jan. 2009, no. 08-11404 (*Lancôme/Argeville*), confirming its earlier decision of 12 Jun. 2006, no. 02-44.718, Bull. 2006, I, no. 307.

[15] The BC should probably be considered to be the first truly multilateral international treaty on copyright law. It was preceded by many bilateral copyright agreements (some of which are still relevant today): S. Ricketson & J. C. Ginsburg, *International Copyright and Neighbouring Rights : The Berne Convention and Beyond*, vol. 1 (2 vols) (Oxford: Oxford University Press, 2006). Even though some other copyright treaties have been concluded subsequently, the BC has certainly set the framework for international copyright cooperation, and it remains, in its amended form, the most important convention in copyright law to date.

[16] Ricketson & Ginsburg (2006), *supra* n. 15, vol. 1, 19–22. It should also be recalled that whereas piracy is a negative term, it may have been applied for 'good' causes; a country with low cultural productivity but increasing literacy may benefit from the cultural products and enlightenment of other countries as not respecting copyright laws allows cheap distribution of copies. This idea was gradually replaced by the conviction that the author had some sort of natural right in his intellectual creation.

led to unsatisfactory situations for authors and other copyright owners. For example, a French author would find his work protected by copyright against unauthorized use in France, meaning that he alone could permit its publication, printing (copying) or performance (in the case of a play), and draw revenue from such use. However, he might have had no copyrights under, say, German law, and consequently, his work could be translated, printed, performed, or published there without any legal obligation to obtain the author's permission or to pay him a fee. Anthony Trollope commented on the lack of copyright protection for foreigners in the United States:

> The argument of course is, that the American readers are the gainers, – that as they can get for nothing the use of certain property, they would be cutting their own throats were they to pass a law debarring themselves from the power of such appropriation. In this argument all idea of honesty is thrown to the winds. It is not that they do not approve of a system of copyright, – as many great men have disapproved, – for their own law of copyright is as stringent as is ours... [T]he argument, as far as I have been able to judge, comes not from the people, but from the bookselling leviathans, and from those politicians whom the leviathans are able to attach to their interests... Many thousand copies [of one of Trollope's books] must have been sold [in the United States]. But from these the author received not one shilling... I feel that an international copyright is very necessary for my protection.[17]

It was considered necessary by the members of the ALAI to combat this state of piracy by means of a treaty.[18] The result was the BC, which is based on the rule of national treatment. One of the cornerstones of the Convention, this rule forbids discrimination between domestic and foreign authors (or other copyright owners) by obliging contracting states to grant copyright protection to foreigners; there could therefore be no more pirating of foreign works. The rule of national treatment should be viewed against the backdrop of the earlier bilateral copyright treaties. These were often also based on national treatment but qualified it considerably by requirements of reciprocity, which made national protection conditional on protection in the country of origin. Article 5 of the BC, which embodies the rule of national treatment, intends to make plain that such requirements are no longer in place.[19]

The rule of national treatment is not in a strict sense a rule of choice of law, and one cannot conclude that the BC obliges states to apply their national law to the

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[17] A. Trollope, *An Autobiography* (London: Oxford University Press, 1961 [1883]), 266–269.

[18] Piracy was abundant in those days; e.g., E.W. Ploman & L.C. Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge, 1980), 18–19. Likewise: Ricketson & Ginsburg (2006), *supra* n. 15, vol. 1, 19–20. The piracy of foreign works was also detrimental to domestic authors, who had to compete with the cheaper cultural products of foreign origin.

[19] van Eechoud (2003), *supra* n. 11, 67 et seq.

domestically granted copyright.[20] It should rather be interpreted as a rule of non-discrimination that obliges states to apply the same conflict rules and a similar level of protection (but not necessarily the same substantive law) to copyright owners of both national and foreign origin.[21] However, it is often assumed that the international copyright system, at least for matters of infringement, prescribes the application of the *lex protectionis*.[22] A claim for infringement should thus be judged according to the copyright law of the country where the infringement allegedly took place. The outcome of applying the *lex protectionis* to Internet transmissions was described above; every receiving country will judge the copyright infringement according to its own law and exemptions.

3.3 The BC and the Demise of the Public Interest?

The application of *lex protectionis* would obviously not lead to great difficulties if the copyright laws had been substantially harmonized. Harmonization would ensure a certain level of copyright protection and a number of generally accepted exemptions. However, as the second cornerstone of the BC is the introduction of substantive minimum norms, such a level of harmonization was not achieved.[23] These minimum norms mainly aimed to improve the level of copyright protection throughout the

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[20] Most authors seem to agree that the BC is neutral on points of choice-of-law: Schack (2007), *supra* n. 11; J. Drexl, 'Europarecht und Urheberkollisionsrecht', in *Urheberrecht: Gestern – Heute – Morgen*, eds P. Ganea, C. Heath & G. Schricker (München: Verlag C.H. Beck, 2001), 461–479, at 463–470; P. Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford: Oxford University Press, 2001), 89–90; R. Fentiman, 'Choice of Law and Intellectual Property', in *Intellectual Property and Private International Law – Heading for the Future*, eds J. Drexl & A. Kur (Oxford: Hart Publishing, 2005), 129–148, 134; van Eechoud (2003), *supra* n. 11; Ricketson & Ginsburg (2006), *supra* n. 15, vol. 2, 1297 et seq.; P.E. Geller, 'International Copyright: An Introduction', in *International Copyright Law and Practice*, eds M.B. Nimmer & P.E. Geller (New York: Bender (looseleaf: 2008 update)), para. 3[1] (arguing that the BC contains choice of law rules), and for a similar account, P.E. Geller, 'Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues', *Journal of the Copyright Society of the U.S.A.* 51 (2004): 315–394.

[21] van Eechoud (2003), *supra* n. 11, 127; Schack (2007), *supra* n. 11, 411–416, 434 and 485 (para. 891); Ricketson & Ginsburg (2006), *supra* n. 15, vol. 1, 293; Drexl (2001), *supra* n. 20, 467–477; A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique* (Paris: LexisNexis, 2006), 935 et seq.

[22] This seems to trace back to E. Ulmer, *Die Immaterialgüterrechte im internationalen Privatrecht* (Köln: Carl Heymanns Verlag, 1975); on which see S. Strömholm, 'Alte Fragen in neuer Gestalt – das internationale Urheberrecht im IT-Zeitalter', in *Urheberrecht: Gestern – Heute – Morgen,* eds P. Ganea, C. Heath & G. Schricker (München: Verlag C.H. Beck, 2001), 533–547. For arguments, see van Eechoud (2003), *supra* n. 11, 106–110. It is of note that the *lex loci protectionis* need not coincide with the *lex fori*: G.B. Dinwoodie, 'Commitments to Territoriality in International Copyright Scholarship', in *ALAI: Copyright – Internet world*, ed. P. Brügger (Lausane/Berne, 2003) [report on the 2002 ALAI conference]; Geller (2004), *supra* n. 20.

[23] See, for the idea of national treatment and minimum norms as the two cornerstones of the BC: R. Mastroianni, *Diritto Internazionale e Diritto d'Autore* (Milano: Guiffrè, 1997), 89.

contracting states.[24] Even though they were originally not intended to apply to domestic authors (states were allowed to offer lower standards of protection, or even no protection at all, to nationals), the distinction between nationals and foreigners disappeared over time, for treating nationals worse than foreigners would have been difficult to justify.[25] In that way, the minimum norms attained some sort of harmonizing effect.[26] The minimum norms were not very exacting and codified generally accepted norms.[27] They are therefore not to be understood as norms of 'upward' harmonization, and even today they leave ample leeway for states to increase protection above the minimum level.

Unlike copyright protection, the regime of exemptions has hardly been addressed in the BC.[28] The BC obliges states to introduce only a very limited number of exemptions and gives them considerable discretion in implementing them.[29] Ricketson and Ginsburg argue that the right of quotation is the only truly mandatory exemption.[30] The Convention also introduces the three-step test, which determines the criteria under which a state can introduce an exemption from copyright protection.[31] But within these boundaries, states are free to pursue their preferred exemption policies, which means that they are free to adopt exemptions or not or to introduce new ones.[32] As a result, users of copyrighted material cannot be sure which exemptions are available abroad, and there is no true tradition of harmonization.

The lack of harmonization of exemptions makes international copyright law rather unbalanced towards protecting the author's rights without sufficiently addressing the interests of users and the general public. In other words, the balance of interests is addressed on the author's side only, and there is no guarantee that the

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[24] P. Torremans, 'Questioning the Principles of Territoriality: The Determination of Territorial Mechanisms of Commercialisation', in *Copyright Law: A Handbook of Contemporary Research*, ed. P. Torremans (Cheltenham: Edward Elgar, 2007), 460–482, at 462.

[25] van Eechoud (2003), *supra* n. 11, 60.

[26] A. Dietz, *Das Urheberrecht in der Europäischen Gemeinschaft* (Baden-Baden: Nomos Verlagsgesellschaft, 1978), 35–36.

[27] G. B. Dinwoodie, 'A New Copyright Order: Why National Courts Should Create Global Norms', *University of Pennsylvania Law Review* 149 (2000): 469–580, at 491 and 494–501.

[28] For example, Geller (2008), *supra* n. 20, para. 3[1][b][i][B].

[29] Ricketson & Ginsburg (2006), *supra* n. 15, vol. 1, 330.

[30] *Ibid.*, 783. The right of quotation is codified in Art. 10(1) BC.

[31] See M. Senftleben, *Copyright, Limitations and the Three-Step Test* (The Hague: Kluwer, 2004). The three-step test (e.g., Art. 9(2) BC) prescribes that exemptions can only be introduced in (1) certain special cases, (2) when there is no conflict with the normal exploitation of the work, and (3) if the legitimate interests of the copyright owner are not unreasonably prejudiced. This test limits the exemptions allowed.

[32] H. Cohen Jehoram, 'Some Principles of Exceptions to Copyright', in *Urheberrecht: Gestern – Heute – Morgen*, eds P. Ganea, C. Heath & G. Schricker (München: Verlag C.H. Beck, 2001), 381–388, at 386; M.-C. Janssens, 'The issue of exceptions', in *Research Handbook on the Future of EU Copyright Law*, ed. E. Derclaye (Cheltenham: Edward Elgar, 2009), 317–348, at 323.

desired equilibrium respecting the interests of users and the general public is preserved.[33] The general interest is left for national states to regulate, and consequentially, one can hardly speak of harmonization in this regard.

3.4 Internationalization and National Interests

We now begin to see the contours of the problem of designing an international solution to the orphan-works problem and online libraries; all applicable laws must adopt an exemption, but there is hardly any tradition on harmonizing exemptions internationally. In order to understand whether and how this situation can be remedied, this subsection first explores the reasons behind the adoption of the BC regime.

A first important reason behind national treatment and minimum harmonization is that legal sovereignty was a compelling principle in nineteenth-century international relations. Even though states were willing to give up some of that sovereignty, they were eager to retain the freedom to frame their own copyright policies. Discretion in drafting national policy, or the importance of 'domestic self-determination', is and has always been an important value in international copyright law.[34] The reasons may be cultural or economic. Protecting domestic markets requires different policies, depending on whether a country has a larger import or export of (cultural) goods.[35] Cultural policies, for instance regarding research, education, news, or entertainment, result in divergent copyright laws and exemption policies. The freedom in drafting copyright policy ensures that it can be made to fit the distinct national circumstances. We have already seen the example of copyrighted perfume as an illustration of different criteria for copyright protection. Rules on (initial) ownership are another case in point. US copyright law may assign ownership of a copyright to the employer under the 'works-for-hire' doctrine, whereas, for instance, French copyright law could assign it to the employee who actually created the work. This results in different territorial copyrights in one and the same work being owned by different parties *ab initio* (causing difficulties in the multi-territorial licensing of these rights).[36]

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[33] Cf. Hugenholtz (2009), *supra* n. 11, 26 (speaking in the context of the European Union).

[34] See, generally, G. Austin, 'Valuing "Domestic Self-Determination" in International Intellectual Property Jurisprudence', *Chicago-Kent Law Review* 77 (2002): 1155–1211; Dinwoodie (2000), *supra* n. 27, 491.

[35] For example, Strömholm (2001), *supra* n. 22, at 536.

[36] The problems for copyright owners have been widely described in literature. See, e.g., H. Ullrich, 'Harmony and Unity of European Intellectual Property Protection', in *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*, eds D. Vaver & L. Bently (Cambridge: Cambridge University Press, 2005), 20–46; M. van Eechoud, 'Alternatives to the *lex protectionis* as the Choice-of-Law Rule for Initial Ownership of Copyright', in Josef Drexl & Annette Kur (eds), *Intellectual Property and Private International Law – Heading for the Future* (Oxford: Hart Publishing, 2005), 289–306. On territorial licensing, see Torremans (2007), *supra* n. 24 and Hugenholtz (2009), *supra* n. 11.

The desire to retain self-determination in copyright law is also related to the existence of two legal traditions: that of copyright proper, which originated in England, and that of the *droit d'auteur* (or *Urheberrecht*) of continental Europe. Even though both systems have converged considerably, their differences cannot be ignored.[37] The main theoretical distinction lies in the rationale for copyright protection. The copyright tradition is founded on the notion that copyright is an economic tool geared at making investments exploitable (while serving the public interest) by monopolizing exploitation of the work. *Droit d'auteur*, by contrast, is based on the idea that copyright is a natural or human right pertaining to the author and protecting his creativity, which is considered to be of a very personal nature.[38] Many of the examples given in this paper are the result of the differences between both traditions; in a copyright tradition, compared to one of *droit d'auteur* origin, criteria for protection tend to be lower while the law is more lenient in assigning rights to parties other than the actual author. Concerning exemptions, *droit d'auteur* tends to stick to narrowly defined statutory definitions, while the copyright tradition uses broad notions of 'fair use', which involve balancing interests and policies on a case-to-case basis.[39] Such differences are not just technicalities; they are underpinned by theoretical and ideological differences, and these might form an obstacle to harmonization.[40]

On a more practical level, minimum harmonization and national treatment made it easier for countries to accede to the BC. Since the convention initially aimed to safeguard the economic interests of authors,[41] it is perfectly understandable that a wide reach of protection was thought to be of greater importance than a high degree of uniformity.[42] Discretion regarding exemptions in particular made it easier for contracting states to accept a strong copyright protection regime laid down in an international treaty, since states would be free to exempt a wide variety of uses and

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[37] On both traditions and their convergence, see A. Strowel, *Copyright et droit d'auteur* (Brussels: Bruylant, 1993).

[38] *Ibid.*, 19–22; for these reasons, the copyright approach traditionally required registration, while the *droit d'auteur* ideology in principle granted protection from the moment of creation (protection being conceived of as a natural right): *Ibid.*, 28. At present, any formalities are forbidden by Art. 5(2) of the BC. Cf. H. Desbois, 'Propriété littéraire et artistique', in *Encyclopédie Universalis*, vol. 15 (1985), 250 et seq., at 251 (quoted in Strowel (1993), 31), who speaks of a work of authorship as '*mirroir de la personalité*'.

[39] P.B. Hugenholtz et al., *The Recasting of Copyrights and Related Rights for the Knowledge Economy* (Amsterdam: IViR, 2006), <http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf>, 59.

[40] E.g., H. Schack, 'Europäisches Urheberrecht im Werden', *Zeitschrift für europäisches Privatrecht* (2000): 799–819, 815–816.

[41] F.W. Grosheide, 'Globalisation, Convergence and Divergence in International Copyright Law: A Question of Expediency or of Right?', in *New Directions in Copyright Law*, ed. F. Macmillan, vol. 2 (London: Edward Elgar, 2005), 37–60, at 44.

[42] For example, Dinwoodie (2000), *supra* n. 27, 491 (on the low standard of the minimum norms).

situations from protection.[43] Had the demands been higher, the BC would probably not have seen the success of 164 states joining it.[44]

Domestic exemption policies are consequently often very different.[45] For example, most copyright laws allow making copies of a work for private purposes; not so in the United Kingdom, where one could not even legally copy a purchased CD to an iPod or other portable player (the problem of format shifting).[46] Moreover, many laws contain exemptions that trace back to particular national traditions; Italian copyright law provides that certain bands or orchestras can publicly perform any (national or foreign) music without obtaining permission or having to pay a copyright fee.[47] Dutch law has a similar provision for certain music performed during (public) religious services.[48]

4. Internet: A Global Public Sphere?

It is in the interests of states to apply their national copyright laws to any works, regardless of their origin. This allows states to set, for internal purposes, the conditions for protection of works, assignment of ownership, and exemptions from copyright protection. Both foreign and domestic works fall under the same legal regime, which is best adapted to the particular social, cultural, legal, and economic circumstances in the country. This creates a national 'public sphere' in which information is used and that coincides with the territory of the state, allowing it to be regulated by the distinct national copyright law. On the Internet, however, a national delineation of the public sphere may no longer be possible.

4.1 The Decline of Territoriality

In the nineteenth century, and much of the twentieth, use of copyrighted material was always easily located in any given territory. Copyright-relevant uses, such as

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[43] Cf. Janssens (2009), *supra* n. 32, 321–323.

[44] See for the number of Member States: <www.wipo.org> (last verified 25 Apr. 2009). The BC is incorporated in the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs) by Art. 9.

[45] Some work is presently being done on the harmonization of specific exemptions, such as the WIPO treaty on limitations and exceptions for the visually impaired. See <www.ip-watch.org/weblog/2009/05/30/wipo-limitations-audiovisual-treaty-gets-new-life/>.

[46] *Gowers review of Intellectual Property*, London 2006 (available at <www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf>), recommendation 8, para. 4.72–4.76; L. Bently & B. Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2009), 240.

[47] A provision similar to the one used in the example with which we started, Art. 71 of the Italian Copyright Law (Legge 22 Apr. 1941, n. 633) provides: '*Le bande musicali e le fanfare dei corpi armati dello Stato possono eseguire in pubblico brani musicali o parti di opere in musica, senza pagamento di alcun compenso per diritti di autore, purché l'esecuzione sia effettuata senza scopo di lucro*'.

[48] Article 17c of the Dutch Copyright Law (Auteurswet 1912): '*Als inbreuk op het auteursrecht op een werk van letterkunde of kunst wordt niet beschouwd de gemeentezang en de instrumentale begeleiding daarvan tijdens een eredienst*.'

reproducing (printing) and distributing books or performing a play, are all just as neatly territorially confined as the copyrights themselves. Divergent national copyright policies and laws did not create great difficulties; users of copyrighted material could always know which law applied and whether that law provided for an exemption.[49] In addition, it was hardly possible that multiple (and perhaps conflicting) laws applied to one and the same act of use.[50]

The territorially confined nature of copyright-relevant use changed with the advent of the Internet.[51] With a view to the online distribution of copyrighted material, the World Intellectual Property Organization (WIPO) copyright treaty of 1996 introduced a new aspect to the exclusive right of communicating works to the public.[52] The treaty determines that the copyright owner has the exclusive right to 'make works available to the public', which includes putting copyrighted material on the Internet and allowing members of the public to consult it.

By emphasizing the act of the public consulting the work rather than the user uploading it, any online publication is localized in all the countries of reception. As *lex protectionis* applies, the act is governed by the copyright laws of all those countries. Accessibility is, however, largely outside the user's sphere of influence.[53] In fact, an online publication is almost automatically global, even if the user intended it for some national purpose only.

Consequently, the model of territorially fragmented rights and application of *lex protectionis* may no longer be viable. A user who uploads a work is at risk of

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[49] M.M. Walter (ed.), *Europäisches Urheberrecht: Kommentar* (Wien: Springer-Verlag, 2001), 1167; Geller (2008), *supra* n. 20, para. 3[1][b][i][A].

[50] For example, P.E. Geller, 'International Intellectual Property, Conflicts of Laws and Internet Remedies', EIPR 22(2000): 125–130, at 126.

[51] See Peifer (2006), *supra* n. 12, 2–5, arguing that similar problems resulted from earlier technologies such as broadcasts and satellite transmissions (although to a smaller degree than on Internet); Geller, *supra* n.50, Strömholm (2001), *supra* n. 22, 543. Compare, however, A. Lucas, 'Private International Law Aspects of the Protection of Works and of the Subject Matter of Related Rights Transmitted over Digital Networks', paper for the WIPO Forum on Private International Law and Intellectual Property, Geneva, 30 and 31 Jan. 2001; WIPO/PIL/01/1, 17 Dec. 2000; available at <www.wipo.org>, arguing that broadcasts and satellite transmissions were available only to very few, whereas the Internet allows for distribution of material by anyone with a computer. See also P.E. Geller, 'From Patchwork to Network: Strategies for International Intellectual Property in Flux', *Duke Journal of Comparative and International Law* 9 (1998): 69–90.

[52] Article 8 of the WIPO Copyright Treaty 1995, which reads: 'authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them'. For a detailed discussion, see J. Reinbothe & S. von Lewinski, *The WIPO Treaties 1996* (London: Butterworths, 2002); M. Ficsor, *The Law of Copyright, and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford: Oxford University Press, 2002).

[53] Ricketson & Ginsburg, vol. 2 (2006), *supra* n. 15, 1310.

infringing as many copyrights as there are countries with access to the Internet.[54] These are governed by many copyright laws, which, as we saw, may differ substantially. The owner of the copyright can bring suit against all of the infringements occurring worldwide, perhaps hoping that some of the foreign copyright laws involved will consider the use illegal.

We may illustrate our point briefly. If a library in the pre-Internet era wanted to use an orphan work, there would be no problem provided that an exemption for orphan works is available under national law. That exemption would allow the library to publish, for instance, a volume of collected works, some of which are orphaned. The acts of reproducing the works in print and publishing and distributing the volumes all take place in the territory of one state. Therefore, the use does not invoke the applicability of foreign copyright laws, not even if the volume is bought by foreigners and travels abroad. By contrast, if the (now digital) library publishes the orphan works on a Website, it makes them available in all countries with access to the site, thus affecting all territorial copyrights and invoking the copyright laws applicable to them. The national exemption no longer suffices.[55]

The harshness of this rule can be reduced slightly. It is technically possible to restrict access to a Website to members of the public from one or more selected countries only. Furthermore, national law may provide that a Website was not aimed at the audience of certain countries because of, for instance, language (but English is admittedly a problem), warnings, or a registration process that is open to selected nationalities only.[56] The result is that some laws determine themselves to be inapplicable. However, the ideal of worldwide access to cultural heritage is clearly not served by either approach.

Where such measures are not available, we are left with a serious problem. If the laws of all the receiving countries apply, what will in fact apply is the law of the country with the strictest regime, that is the law that provides least exemptions. One has, after all, to obey all the laws worldwide. More permissive regimes are rendered ineffective.[57]

4.2 Searching for Alternatives: Protectionism and Lack of Trust

It is important to ask why the laws of all the receiving countries apply to an Internet transmission. From a legal-technical point of view, it would certainly have been

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[54] F. Dessemontet, 'Conflict of Laws for Intellectual Property in Cyberspace', *Journal of International Arbitration* 18 (2000): 487–510, at 504.

[55] J. Ginsburg & P. Goldstein, 'Reply Comments on "Orphan Works" Inquiry', 9 May 2005, <www.copyright.gov/orphan/comments/reply/OWR0107-Ginsburg-Goldstein.pdf>.

[56] Torremans (2007), *supra* n. 24, 465–466; see further Section 5.

[57] For example, van Eechoud (2003), *supra* n. 11, 106 and 222.

possible to opt for an alternative.[58] In the drafting of the European Information Society Directive, which implemented the WIPO Copyright treaty and its making-available right, a so-called country-of-origin rule was considered.[59] This rule would have localized Internet transmissions in the country of uploading only, avoiding the application of all the copyright laws of the countries of reception (at least within the European Union). The country-of-origin rule is not in itself a rule of choice of law but localizes (by means of substantive copyright law) the act of publication in one country, assuming the application of *lex protectionis*.[60]

A similar rule has been adopted in the European Cable and Satellite Directive, which localizes the act of transmitting copyrighted material by satellite in the country of uploading only.[61] This was done with a view to the problem of user uncertainty; if the copyright laws of all the receiving countries had been relevant, it would have been exceedingly difficult for broadcasters to clear copyrights required for European-wide satellite broadcasts. In the field of certain contracts and torts, the E-commerce Directive applies a country-of-origin approach to online services, for the purpose of legal certainty.[62]

The application of the country-of-origin rule to Internet transmissions was rejected. A 'race to the bottom' was feared,[63] that is to say, it was thought that content providers would upload their materials from the country with the weakest

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[58] G.B. Dinwoodie, 'Conflicts and International Copyright Litigation: The Role of International Norms', in *Intellectual Property in the Conflict of Laws*, eds J. Basedow et al. (Tübingen: Mohr Siebeck, 2005), 195–210, at 203 (discussing the possibility of localizing an act in one country while respecting territoriality).

[59] For a discussion, see Ricketson & Ginsburg, vol. 2 (2006), *supra* n. 15, 1306–1309.

[60] See on for a discussion on the legal qualification of the rule in the Satellite and Cable Directive below n. 61, and in the e-Commerce Directive M. Hellner, 'The Country of Origin Principle in the E-Commerce Directive – A Conflict with Conflict of Laws?', ERPL 16(2004): 193–213.

[61] Council Directive 93/83/EEC of 27 Sep. 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. Whether the rule laid down in the Satellite and Cable Directive is in fact a rule of substantive law rather than a rule of choice-of-law is being discussed: Walter (2001), *supra* n. 49, 1169. Most authors seem to agree that the rule does not cover choice-of-law, e.g., Goldstein (2001), *supra* n. 20, 107; T. Dreier, 'The Cable and Satellite Analogy', in *The Future of Copyright in a Digital Environment,* ed. P.B. Hugenholtz (The Hague: Kluwer, 1996), 57–65. See also Fentiman (2005), *supra* n. 20, 145.

[62] Directive 2000/31/EC of the European Parliament and of the Council of 8 Jun. on certain legal aspects of information society services, in particular, electronic commerce, in the Internal Market. See, e.g., Hellner (2004), *supra* n. 60, 196 et seq.

[63] Schack (2000), *supra* n. 40, 814. The country-of-origin rule is not applied if the applicable law would not meet the international substantive minima; P. Torremans, 'Choice of Law in EU Copyright Directives', in *Research Handbook on the Future of EU Copyright*, ed. E. Derclaye (Cheltenham: Edward Elgar, 2009), 457–479, at 467.

copyright protection regime.[64] Other states may pursue more protective policies, but since the laws of the countries of reception would be irrelevant, such policies could easily be circumvented. In that manner, material that would be considered to be illegal, (that is, constituting a copyright infringement) in a given country can nonetheless be legally distributed within its public sphere. Or put differently, localizing a copyright-relevant act in one country causes its copyright policy to 'spill over' into the territories and public spheres of other countries where transmissions are received.[65] Copyrighted material can be distributed in receiving countries under the application of the law of the country of origin. Thus, as domestic law and policy is given extraterritorial effect, the laws and policies of receiving countries are interfered with; they no longer exclusively regulate the distribution of information within the country. The country-of-origin rule therefore requires international confidence.[66] Harmonization of substantive law can attribute to developing this trust by ensuring that all states abide by a generally accepted standard of copyright protection.

4.3 National Interests and the Global Public Sphere: The Internet Paradox

The reluctance of states to accept influence of foreign law shows that copyright law is more of a public affair than most other areas of private law.[67] Although some areas of copyright law deal with relationships between a limited number of parties, large parts of it, including exemptions, are closely related to public interests. Much of copyright law is concerned with stimulating and protecting creativity and with regulating the public's access to information. Applying foreign laws to the national public sphere could conflict with national policy on these matters. Especially in the Internet age, where the distribution of information is almost per definition global, states may fear that their national copyright policies are circumvented if works are distributed from other countries with more lenient copyright policies. The effect of applying foreign law is quite intrusive; on the Internet, any citizen from the receiving state can easily and readily download the material that is distributed under the laws of the country of origin. At the same time, the Internet makes it very easy for a company or person to upload material from any preferred country without there actually being any ties at all between the uploader and that country. For example, a Dutch content provider could upload copyrighted material from a foreign server under (more permissive) foreign copyright law with the sole intention of

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64 This need not be the legal regime; a lack of enforcement can also make a country attractive for content providers.

65 Geller (2004), *supra* n. 20, 389-391.

66 Strömholm (2001), *supra* n. 22, 542.

67 Cf. Fentiman (2005), *supra* n. 20, 131.

distributing the material in the Netherlands and without there being any ties with that foreign state.

The application of the traditional regime of international copyright law to Internet transmissions results in a paradox. We have seen that one of the reasons behind this regime is states wishing to retain discretion in framing copyright exemptions and to apply these to the use of all material within the national public sphere. But on the Internet, national borders have become fully porous. A publication on the Net will automatically seep to neighbouring countries and beyond, covering the globe in a matter of seconds. In fact, the boundaries of national public spheres, traditionally the domain for national copyright laws, have converged into a global public sphere. The international copyright regime allows states to pursue their own copyright policies within their national spheres, but as these disappear, national laws and their exemptions loose effect. By applying *lex protectionis*, the question of legality of an online publication is reduced to a question of legality under the most protective copyright law. A user can no longer rely on a national exemption for distributing content online. Thus, the desire to regulate by means of nationally determined exemptions, now causes these exemptions to loose effect.

The disappearance of national public spheres on the Internet and the concomitant decline of effectiveness of national exemptions seem to imply that the global public sphere requires global or at least international policy. The remainder of this article describes what is to be expected in this regard from private international law and European harmonization.

5. Private International Law

We have seen that the applicability of multiple laws to Internet publications is problematic. The application of *lex protectionis* is, however, a natural consequence of states wishing to apply national law to their public sphere. We may wonder if other harmonized choice-of-law rules might be adopted in order to apply one or few laws.[68] I will limit myself to a discussion of such alternatives for copyright infringements and applicable exemptions; matters of existence, ownership, and duration of protection are not of immediate concern here, and conclusions pertaining to these matters may be quite different.

Scholars have indeed taken the Internet as an incentive to suggest alternatives to *lex protectionis*. However, two limitations on possible alternatives are mentioned in literature: one is of law, the other is of logic.

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[68] See for proposals on harmonizing European private international law in copyright matters: Schack (2000), *supra* n. 40, 814 (but arguing that the emphasis should be on harmonization of substantive copyright law (815)); Drexl (2001), *supra* n. 20, 471 et seq. See also A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations* (Oxford: Oxford University Press, 2008), 451.

First the law. We have already noted that the rule of national treatment as laid down in the BC is not in itself a rule of choice of law. The BC remains silent on points of private international law.[69] Rather, it contains a rule of non-discrimination pertaining to the law of aliens.[70] In other words, it determines the scope of national law to include both nationals and foreigners.[71] But it does not describe when or why a particular law is applicable. Thus interpreted, some authors claim that the BC allows any choice-of-law rule as long as it is applied equally to foreigners and nationals. One might then choose to apply *lex originis* to the infringement, applying the exemptions available under the law of the country of origin.[72] Others hold that this would result in unequal protection between foreigners and nationals and that it therefore violates the non-discrimination principle of the BC (Article 5(1)), now interpreted as a rule of substantive non-discrimination.[73] On the same grounds, one could argue for or against the application of choice-of-law rules familiar from torts, such as the law of the forum, of the habitual residence of victim or tortfeasor or of the country in which damage occurred.[74] The Max-Planck group on Conflict of Laws in Intellectual Property (CLIP) has recently suggested a choice-of-law rule for what they call 'ubiquitous infringements' (that is, transmissions to which the laws of all the receiving countries apply) that seeks to apply the law or laws with the closest connection to the infringement, which is to be assessed by such criteria.[75]

Logic, however, may further limit the alternatives and demand application of *lex protectionis* to matters of infringement. Fentiman has argued that the territoriality of copyrights has a special meaning.[76] It means that national copyright law is

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[69] F.W. Grosheide, 'Experiences in the Field of Intellectual Property', in *Internet: Which Court Decides? Which Law Applies?*, eds K. Boele-Woelki & C. Kessedijan (The Hague: Kluwer, 1996), 35–46; van Eechoud (2003), *supra* n. 11, 126–127.

[70] See the literature referenced in n. 20, 21 and 22 *supra*. Similarly, ECJ 30 Jun. 2005, C-28/04 (*Tod's SpA v. Heyrauld SA*).

[71] Fentiman (2005), *supra* n. 20, 134.

[72] For example, Art. 67(3) of the Greek Copyright Law (2121/1993). It is not precisely clear what the country-of-origin should be. The BC stipulates that it is the country of first publication or, for unpublished works, the country of habitual residence of the author. van Eechoud (2003), *supra* n. 11, 123, argues that these definitions were not intended to apply to the choice-of-law process.

[73] Ricketson & Ginsburg (2006), *supra* n. 15, vol. 2, 1297–1299. See, however, van Eechoud (2003), *supra* n. 11, 67 et seq., arguing that Art. 5 was intended to make clear that requirements of reciprocity were no longer allowed; see also Section 3.2 *supra*.

[74] Various suggestions were made in drafting the Rome II regulation; see Dickinson (2008), *supra* n. 68, 451 (n. 24).

[75] European Max-Planck Group on CLIP, *Principles for Conflict of Laws in Intellectual Property*, first preliminary draft, 8 Apr. 2009, retrieved from <www.cl-ip.eu>, Art. 3: 603. For a general overview of possible choice-of-law solutions: A. Ohly, 'Choice of Law in the Digital Environment – Problems and Possible Solutions', in *Intellectual Property and Private International Law – Heading for the Future*, eds J. Drexl & A. Kur (Oxford: Hart Publishing, 2005), 241–256.

[76] Fentiman (2005), *supra* n. 20. His concept of territoriality seems to coincide with the *droit independants* mentioned by van Eechoud (2003), *supra* n. 11, 99–103.

intended to protect the national copyright only. In other words, national law is the only law with an interest in protecting the national copyright. If any other (foreign) law were to apply, the conclusion should be that it does not protect the copyright and that there has been no infringement.

One can then distinguish between a strong and a weak view of territoriality.[77] Scholars who adhere to the weak view accept that if foreign law is to apply, there can never be an infringement. They think this conclusion is warranted. The suggestion to apply the law of the country in which the transmission originated (the country of uploading)[78] is an example; logic demands that no infringement will be found to have taken place except in the country of uploading, as the applicable law simply never intended to protect copyrights abroad. One could, of course, argue that the foreign law should be applied as if it protects the national copyright, but that would – according to Fentiman – go against the nature of the choice-of-law process, as it confers upon a foreign law a meaning it was never intended to have.[79]

Under the strong view, one takes *lex protectionis* to be the applicable law; it is the law with the greatest interest in being applied, and no other law has in fact any interest in being applied. Therefore, the only law that can meaningfully apply is the law of the country for which protection is claimed (in other words, the country where the alleged infringement took place). But then the problem of multiple applicable laws is destined to remain.[80]

There may, however, be a solution. van Eechoud argues that the *lex protectionis* rule leaves unaddressed the question on which are the countries for which protection is sought.[81] National law may consequently determine that no infringement took place because an online publication was not aimed at the audience of that country, and it therefore does not qualify as a *locus protectionis*. The determination of the

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[77] *Ibid.*, 139–141.

[78] For example, J.C. Ginsburg, 'Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks (2000 Update)', paper for the WIPO Forum on Private International Law and Intellectual Property, Geneva, 30 and 31 Jan. 2001; WIPO/PIL/01/2, 18 Dec. 2000; available at <www.wipo.org>, with as subsidiary rules the law of the country of the ISP and the law of the country with the strongest relationship to the damage. See, for a discussion, Strömholm (2001), *supra* n. 22, 544 et seq.

[79] Fentiman (2005), *supra* n. 20, 143. Fentiman suggests (146) the alternative of applying the *lex fori* as if it is applicable to foreign copyrights; one can of course intend one's own law to apply extraterritorially. Other alternatives are localizing the act of making available in one country (discussed in Section 3.6 *supra*) by harmonizing substantive copyright law, or a flexible determination of applicable substantive rules, as discussed below in this section.

[80] *Ibid.*, 145.

[81] van Eechoud (2003), *supra* n. 11, 210–213, concludes that *lex protectionis* applies to infringements on the basis of the choice-of-law technique of functional allocation, which indicates that it is the law with the most interest in being applied. Another argument is that as copyright creates a monopoly, application of national law is a matter of *ordre public*: Torremans (2009), *supra* n. 63, 459.

intended audience can proceed by criteria such as the language of the Website, a certain registration process, or technical measures.[82] In that way, the number of *loci* can be reduced.

Still other alternatives are more radical and suggest that instead of applying a particular law, the judge should take the most appropriate substantive rules from all legal systems involved.[83] This approach, familiar to common law, would allow the judge to come up with one set of rules that serves justice best. Legal certainty, however, may be an issue here.[84]

This brief inquiry into choice of law confirms the conclusions reached before. *Lex protectionis* is applied because states have an overriding interest in regulating their national copyright and, accordingly, their national public sphere.[85] That reduces the possibilities of developing choice-of-law rules that could address the multiplicity of laws applicable to Internet transmissions.[86] One could, however, decrease the number of applicable laws by taking the intended audience into account and relate it to a *locus protectionis*. This allows a state exclusively to regulate publications that were intended for its audience, and hence, the effectiveness of national exemptions can be restored. A national digital library could then use orphan works legally if the national law provides for an exemption; no other laws would apply in substance.

However, what this approach in effect achieves is a restoration of national public spheres on the Internet that can be regulated exclusively by national law and policy. It is, in other words, an attempt to shoehorn the global Internet into the old model of national public spheres and territorial rights, law, and policy. Although some of its features are certainly attractive, it would only work if a publication is aimed at the audience of one or few countries. Globally intended transmissions, such as digital libraries ideally, remain a problem. We may need harmonization of

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[82] *Ibid.*, 172–178. A similar proposal was made by the CLIP Group, *supra* n. 75, in Art. 3:602, which lays down a *de minimis* rule that requires a court to find no infringement if the transmission does not have substantial effect within, or is directed to, the state for which protection is sought. See also Ricketson & Ginsburg (2006), *supra* n. 15, vol. 2, 1312–1314.

[83] G.B. Dinwoodie, 'Conflicts and International Copyright Litigation: The Role of International Norms', in *Intellectual Property in the Conflict of Laws*, eds J. Basedow et al. (Mohr Siebeck, 2005), 195–210; G.B. Dinwoodie, 'The International Intellectual Property System: Treaties, Norms, National Courts and Private Ordering', in *Intellectual Property, Trade and Development*, ed. D.J. Gervais (Oxford: Oxford University Press, 2007), 61–114. Cf. Also Geller (2000), *supra* n. 50; Fentiman (2005), *supra* n. 20, 147.

[84] See Dinwoodie (2000), *supra* n. 27, 571–572; Fentiman (2005), *supra* n. 20, 147.

[85] This argument is made by van Eechoud (2003), *supra* n. 11, 178.

[86] In similar vein (stressing the obstacle of territoriality to alternative private international law approaches), S. Strömholm, 'The Immovable *lex loci delicti* in International Copyright Law – Traditional or Rational?', in *Aufbruch nach Europa*, eds J. Basedow et al. (Tübingen: Mohr Siebeck, 2001), 517–527, at 526–527.

substantive copyright law to achieve a uniform exemption regime to govern the Internet as a global public sphere – but is that likely to succeed?

6. Does Europe Fare Any Better?

International copyright law operates by means of territorially fragmented rights and applies the laws of all the receiving countries to the online distribution of material, without there being any true harmonization of exemptions – thus leaving the protection of the interests of users and the general public unaddressed. But does this hold true for the European Union as well, since private law has been subject to harmonization for quite some years? Harmonization itself can solve the problems associated with the applicability of multiple laws.[87] Is European copyright law perhaps more harmonized, providing a better chance for the introduction of a European exemption for orphan works?

6.1 The Current State of Harmonization of Copyright Law

Copyright law has indeed been the subject of European harmonization, which aimed to improve the internal market, and addressed specific individual aspects of copyright law only.[88] The European Union lacks specific competence in the field of copyright,[89] but it is obvious that disparities between domestic copyright regimes can obstruct the proper functioning of the internal market for copyrighted material. The European internal market requires not only that copyright is protected to a sufficient degree throughout Europe[90] but also that the exploitation of copyright-protected works is dealt with in a similar way.

The harmonization of copyright law has resulted in seven Directives, many of which deal with specific aspects of copyrights.[91] The European copyright policy

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87 A. Dietz, 'A Common European Copyright – Is It an Illusion?', EIPR 7(1985): 215 (discussing unification rather than mere harmonization).

88 R.M. Hilty, 'Copyright in the Internal Market', IIC 35(2004): 760–775; Schack (2000), *supra* n. 40; Hugenholtz (2009), *supra* n. 11, 13–17. See, on EU copyright policy in general, Hugenholtz et al., (2006), *supra* n. 39, 5–18, terming it 'piecemeal approximation' (e.g., at 16 and 63). On the case law of the ECJ on copyrights and the internal market and free movement of goods: M.L. Montagnani & M. Borghi, 'Promises and Pitfalls of the European Copyright Law Harmonization Process', in *The European Union and the Culture Industries: Regulation and the Public Interest*, ed. D. Ward (Aldershot: Ashgate, 2008), 213–240; C. Seville, *EU Intellectual Property Law and Policy* (Cheltenham: Edward Elgar, 2009), 310–403.

89 For example, Schack (2000), *supra* n. 40, 799–800; see on the EU competence for IP law, including a discussion of EU membership to international IP treaties, J. Gundel, 'Die Europäische Gemeinschaft im Geflecht des internationalen Systems zum Schutz des geistigen Eigentums', ZUM 51(2007): 603–613.

90 The non-discrimination principle furthermore requires equal treatment of copyrights within the EU: ECJ 20 Oct. 1993, C-92/92 and C-326/92 (*Phil Collins*).

91 Besides these seven Directives (referenced below), the Commission issued a Directive on the enforcement of intellectual property protection: 2004/48/EC.

is developed in two green papers. The first of these dates from 1988 and aimed at strengthening copyrights with a view to new technological developments and challenges.[92] The Green Paper was also strongly influenced by economic policy; a single EC market for copyright, with healthy internal competition, would form a strong block in the world market for copyrighted goods and services, which was dominated mainly by the United States (where copyright is a federal matter) and Japan.[93]

The second Green Paper was published in 1995 and deals with copyrights and related rights in the information society.[94] Its twofold goal was the implementation of the WIPO Copyright treaty, on the one hand, and a horizontal instead of 'piecemeal' harmonization of copyright, on the other.[95] The result is the Copyrights and Neighbouring Rights in the Information Society Directive (hereinafter 'InfoSoc Directive') of 2001.

One should not expect much more of this harmonization than of the international attempts described above. The European harmonization is certainly more ambitious, but as a result of extensive lobbying efforts,[96] it, too, focuses predominantly on the protection of the interests of copyright owners – the main players of the information industry more so than actual authors.[97] For example, the InfoSoc Directive has harmonized the exclusive rights (including the making-available right) throughout the European Union and has increased the copyright protection term to seventy years *post mortem auctoris* (whereas the BC prescribes a term of fifty years).[98]

The InfoSoc Directive does address exemptions[99] but by minimum harmonization only. The Directive lists exhaustively the exceptions and limitations from which

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92 Green Paper on Copyright and the Challenges of Technology (COM (1988) 172 FIN), which led to the following Directives: the Rental Rights Directive (92/100/EEC); the Satellite and Cable Directive (93/83/EEC); the Copyright Term Directive (93/98/EEC, now replaced by 2006/116/EC); the Computer Programmes Directive (91/250/EEC, now replaced by 2009/24/EC), and the Database Directive (96/9/EC). The Resale Right Directive (2001/84/EC) is of later date.

93 Hugenholtz et al. (2006), *supra* n. 39, 3.

94 Green Paper on Copyright and Related Rights in the Information Society (COM (1995) 382 FIN).

95 See P.B. Hugenholtz, 'Why the Copyright Directive Is Unimportant, and Possibly Invalid', EIPR 22 (2000): 499–505.

96 See Janssens (2009), *supra* n. 32.

97 Hugenholtz (2000), *supra* n. 95, 501. See also Montagnani & Borghi, *supra* n. 88, 233 et seq., arguing that EC policy has shifted towards an economic-utilitarian approach to copyright, which has resulted in a stronger protection of copyright as property and empowerment of the copyright owner and his control over information; this has been, according to the authors, detrimental to market competition, cultural diversity, and the freedom of expressing and free flow of information.

98 Article 1(1) of the Copyright Term Directive 2006/116/EC and Art. 7(1) of the BC.

99 Which came as something of a surprise, since this issue was not mentioned in the Green Paper: Cohen Jehoram (2001), *supra* n. 32, 387.

Member States are free to choose.[100] Therefore, different regimes apply in the Member States. The exhaustive character of the list led to much controversy; whereas the Directive initially listed seven possible exceptions and limitations, twenty are currently sanctioned. In effect, the list has become an enumeration of all exemptions that existed throughout the European Union, and the harmonization efforts have therefore been considered a failure in this regard; legal certainty for the user has not been achieved.[101] Furthermore, the definitions of the exceptions and limitations are hardly precise, leaving Member States considerable discretion in their implementation.[102]

Worse still, the European harmonization efforts have not addressed the territorial fragmentation of copyrights and the application of *lex protectionis*. Territoriality of rights is left intact as only those disparities that directly affect the internal market are removed.[103] By no means does European harmonization purport to achieve extraterritorial application of copyright law or the establishment of a universal EU copyright code.[104] In fact, the European Court of Justice (ECJ) has accepted the principle of territoriality in its case law.[105] As to rules of private international law, the Rome II regulation prescribes the application of *lex protectionis* to (alleged) copyright infringements.[106] Rome II has for now brought a halt to developing alternative choice-of-law rules for intellectual property infringement disputes within Europe, but it remains possible to limit the scope of the *lex protectionis* rule by taking into account the audience to which the transmission was directed.

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100 An exception for temporary digital copies (Art. 5(1)) is mandatory. It is also of note that both the Database Directive and the Software Directive contain further exemptions in relation to the rights created under either Directive; see Janssens (2009), *supra* n. 32, 325.

101 Hilty (2004), *supra* n. 88, 765–766; Hugenholtz et al. (2006), *supra* n. 39, 60 and 67.

102 The IVIR has conducted an evaluation of the implementation of the InfoSoc Directive: L. Guibault et al., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society: Final Report* (Amsterdam, 2007) (available at <www.ivir.nl>); see 166 for their conclusions on exemptions. See also Hugenholtz et al. (2006), *supra* n. 39, 66. According to F. Gotzen, 'Copyright in Europe: Quo Vadis? Some Conclusions after the Implementation of the Information Society Harmonisation Directive', *Revue Internationale du Droit d'Auteur* (2007): 3–89, the Directive has been implemented in a disorderly manner.

103 For example, J. Gaster, 'Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts', ZUM 50(2006): 9–14; Hugenholtz (2009), *supra* n. 11.

104 Peifer (2006), *supra* n. 12, 4, speaking of a lack of 'supranationale Rechte' in the field of copyright law as compared to industrial property rights.

105 ECJ 14 Jul. 2005, case C-192/04 *(Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) and Others)*.

106 Article 8(1) of Regulation (EC) 864/2007. See Dickinson (2008), *supra* n. 68; D. van Engelen, 'Rome II and Intellectual Property Rights: Choice of Law Brought to a Standstill', *Nederlands Internationaal Privaatrecht* (2008): 440–448 (available at <www.dickvanengelen.nl>).

European copyright law is thus not very helpful to users who wish to distribute copyrighted material via the Internet. The copyright laws of all the Member States may apply to that distribution, and these laws provide for substantially divergent exemption regimes. A user can therefore not be certain which uses are exempted from copyright protection without verifying the copyright laws of all twenty-seven Member States. And again, national exemptions may loose their effectiveness as they cannot facilitate the online distribution of material, which is automatically made available in all Member States.

6.2 Possible Solutions for Orphan Works: Is Mutual Recognition Possible?

Notwithstanding the current state of copyright harmonization, the European Union may offer possibilities for a harmonized solution for orphan works and digital libraries. Research has shown that two types of solution to the problem of orphan works are conceivable.[107] The first is to introduce an exception that allows for the use of an orphan work under certain conditions.[108] The second solution introduces a statutory licensing scheme whereby a judge, tribunal, or other organization can issue a license for the use of an orphan work.[109] Both approaches share some features. The user is obliged to pay a remuneration for the copyright owner. Furthermore, the user has to prove that he has not been able to find the copyright owner despite reasonable efforts to that end.

A European High Level Expert Group has advised that the orphan-works problem should be addressed by minimum harmonization combined with mutual

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[107] See Elferink & Ringnalda (2009), *supra* n. 5; for slightly different categorizations: van Gompel (2007); Spindler & Heckmann (2008), *supra* n. 2. Another alternative is extended collective licensing, which would enable a collective management organization (CMO) to issue licenses on behalf of right owners who are not members of the CMO, thus eliminating the reasonable search criterium. Denmark has proposed this approach (of Art. 50(2) of the Danish Copyright Law (LBK nr. 587, Ophavsretsloven)) to orphan works and online digital libraries; see Denmark's Report on the Implementation of the Commission Recommendation on Digitization and Online Accessibility of Cultural Material and Digital Preservation, 2 (retrieved from <http://ec.europa.eu/information_society/activities/digital_libraries/experts/mseg/reports/index_en.htm>); see also the Green Paper (2008), *infra* n. 112, in fn. 23.

[108] Suggestions for exceptions have been made in the United States and the United Kingdom. In the United States, the Orphan Works Act 2008 is pending (H.R. 5889; s. 2913); see generally: The Register of Copyrights, *Report on Orphan Works, United States Copyright Office* (Washington, 2006); for the United Kingdom, see The British Screen Advisory Commission, *Copyright and Orphan Works – A Paper Prepared for the Gowers Review*, August 2006; see also the works referenced *supra* n. 2.

[109] A licensing system is found in Canada under s. 78 of the Copyright Act; similar suggestions have been made in France: Conseil supérieur de la propriété littèrarire et artistique, Commission sur les oeuvres orphelines, *Rapport*, 19 Mar. 2008, <www.culture.gouv.fr/culture/cspla/rapoeuvor08.pdf>. See also F-M. Piriou, 'Les "oeuvres orphelines": en quête de solutions juridiques', RIDA (2008).

recognition instruments.[110] According to the Group, this approach would leave Member States discretion in selecting their preferred solution while warranting interoperability. However, a rule of mutual recognition does not seem to fit with international or European copyright law. Minimum harmonization has always been the standard approach, leaving states discretion in developing national copyright policy. Mutual recognition would force states to enforce foreign copyright policy within their domestic public sphere, which is in conflict with the importance of national policy in this field and the traditional territorial approach. And why should the alien element of mutual recognition be introduced in copyright law in stead of a more straightforward full harmonization?

There may yet be another and more compelling reason why mutual recognition would not work. Article 5(1) BC prescribes a uniform protection of works. This seems to imply that works that have been transmitted from a foreign country would have to be protected by the same laws as works that are transmitted nationally. Applying different rules to foreign transmissions would result in discrepancies in protection of works based on where their transmission initiated. This might conflict with the system of national treatment.

The absence of rules of mutual recognition is another important difference to other areas of European private law, where minimum harmonization is combined with such rules in order to ensure interoperability of divergent national laws.[111] This difference accounts for the fact that in copyright law, minimum harmonization of exemptions is in fact hardly any harmonization at all.

6.3 Towards Fuller Harmonization?

In its 2008 Green Paper on copyright, the Commission pays attention to possible amendments to the InfoSoc Directive. The Green Paper mentions orphan works as an issue that is considered for harmonization due to its international character.[112] Full harmonization would prescribe one uniform European solution to the orphan-works issue but allows Member States to implement it from a Directive.

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[110] European Digital Library Initiative, High Level Expert Group – Copyright Subgroup, *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works*, 3 Jun. 2008, 14. It is currently up to the Member States to come up with solutions for the orphan-works problem: European Digital Library Initiative, High Level Expert Group (HLG) – Copyright Subgroup, *Interim Report*, 16 Oct. 2006, <http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/interim_report_16_10_06.pdf>, 4–5 (stressing the need for 'interoperability' of national solutions).

[111] J. Drexl, 'Continuing Contract Harmonisation under the 1985 White Paper?', in *An Academic Green Paper on European Contract Law*, eds S. Grundmann & J. Stuyck (The Hague: Kluwer Law International, 2002), 103–129, at 106–108.

[112] Green Paper on Copyright in the Knowledge Economy, COM (2008) 466/3, at 11.

An exception appears at first sight to be the most efficient solution. Under this approach, a user need not engage in any administrative procedures unless a copyright owner, in the event of his resurfacing, files a claim against him; only then will the user need to prove that he made reasonable efforts to trace the right owner. Licensing systems are comparatively inefficient, since they require the user to request a license for all orphan works and to prove his reasonable efforts beforehand.

Achieving a harmonized solution by means of exceptions may prove to be quite difficult. The main problem is that the orphan-works exception uses the vague criterion of 'reasonable efforts' in trying to locate the copyright owner. It is very likely that judges in different countries will give different interpretations to this concept. However, for the use to be legal, it has to fall under the exception in all twenty-seven Member States, and therefore, the definition of 'reasonable efforts' has to be identical.[113]

6.4 Why Not Unify?

Drafting a very precise solution to orphan works in order to ensure uniform implementation tends towards a unifying approach. This brings us to the question whether copyright law in general could and should be unified. Unification would have the important advantage of not just addressing the orphan-works problem by introducing an exemption but also of unifying many aspects of copyright related to it. Ownership in particular is relevant for the orphan-works issue, as it is the owner of the right who is unlocatable. Ownership, however, as we saw, is also determined by divergent national rules. A work could be orphaned in one country – perhaps because the rights belong to the actual creator – while the copyright owner under the law of another country is perfectly known – for instance, if he is not the creator but his employer. That possibility requires a library to investigate the status of the work under all the laws of the Member States, regardless of a national exemption. The same might apply, *mutatis mutandis*, to criteria for protection. The benefits of unification would of course not be limited to the issue of orphan works but would enhance dealing with copyrighted matter in the European Union in general.[114]

Unification of copyright law has a somewhat distinct meaning from unification in private law generally. First, the set of territorially confined subjective rights is replaced by one universal copyright within the European Union.[115] Second, that

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[113] It is said that Directives have lost their 'elasticity' that allows Member States to implement them in a preferred manner: T. Weir, 'Difficulties in Transposing Directives', ZEuP 12(2004): 595–615, 614. On problems in the implementation of copyright Directives: Schack (2000), *supra* n. 40, 805–807.

[114] For example, Hilty (2004), *supra* n. 88, 760–775, for an economic argument.

[115] Ullrich (2005), *supra* n. 36, 27.

newly established subjective right is governed by a European Copyright Code, set forth in a regulation.[116]

Community intellectual property regimes already exist in the field of certain registered rights such as trademarks and plant rights, with an EU patent system presently being suggested. The main difference between these communitarian regimes and a possible copyright code is that the latter cannot, also unlike a EU civil code for contracts, be made optional.[117] Copyrights are not registered rights; their existence is given once a work meets the criteria for protection. The author can thus not opt for a European regime as an alternative to the national copyright protection.

Of course, a uniform EU copyright code is not unthinkable. But it would require the replacement of all twenty-seven copyright laws and result in an exclusive legislative competence for the Community legislature. Member States would be required to give up a large portion of their copyright sovereignty that currently seems to be so dear to them.[118]

Unification of exemptions in particular could be grounded in a paradigmatic change that seems to be taking place presently. To a growing extent, exemptions are being viewed as representing interests that are equally important as the protection of copyright itself. Exemptions can be thought of as user rights that are grounded in fundamental freedoms such as the freedom of thought and expression and the freedom of information.[119] Such a universal foundation would provide a strong argument in favour of unified exemptions.

However, we should curb our enthusiasm for the unified approach slightly. First of all, given what has been said earlier about the importance of sovereignty and discretion in drafting national policy and bearing in mind the approach of minimum harmonization currently pursued in EU copyright law, it is perhaps not very likely that a European Copyright Code will see the light of day any time soon.[120] And EU competence in this field is problematic.[121] The Commission has nonetheless indicated in August 2009 that EU-wide copyright clearance for online distribution should be smoothened. The growth of the European digital library Europeana is, according to the commission, inhibited by difficulties in obtaining licences for all EU territories and by a want of solutions for the orphan works problem. It has

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116 Cf., e.g., Hugenholtz (2009), *supra* n. 11, 26. Academic work on such a code is currently being done by the 'Wittem group'. Unification was not considered in the Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC (2004), 995.

117 Schack (2000), *supra* n. 40, 818.

118 Ullrich (2005), *supra* n. 36, 37.

119 For example, C. Geiger, 'Copyright's Fundamental Rights Dimension at EU Level', in *Research Handbook on the Future of EU Copyright*, ed. E. Derclaye (Cheltenham: Edward Elgar, 2009), 27–48.

120 Cf. Schack (2000), *supra* n. 40, 817–819 (on plurality of culture as an obstacle).

121 See on the competence of unification of IP law in general: Ullrich (2005), *supra* n. 36. The treaty of Lisbon does provide for an explicite competence to set up community IP rights in Art. 97A.

unfortunately not indicated how it envisages a solution to these problems; whether territoriality should be overcome remains unaddressed.[122] Second, a European unified approach would only solve the problem within the territory of the European Union. Europeana could perhaps be programmed in such a way that only computers from within the European Union have access to it, but this would obviously be detrimental to the goal of disseminating European cultural heritage globally.

7. Conclusions

International copyright law allows states to draft their own exemption policies. Even within the European Union, there is no true harmonization of exemptions, which results in divergent regimes. There may have been good arguments in favour of such an approach. The lack of harmonization of exemptions allows states to retain full regulatory control over their national public spheres; national copyright law provides which uses are exempted from copyright protection and under which conditions, regardless of the origin of the work. The balance between the interests of copyright owners and the general public can thus be struck according to the particular cultural, social, and economic conditions of the country. Substantive international copyright law, however, focuses predominantly on the interests of copyright owners, by and large disregarding the public interest.

Thus, international copyright law relies heavily on the concept of a national public sphere. On the Internet, however, the system of international copyright law results in a paradox. An online publication is global, not national. National exemptions seem to lose their effect on the Internet. The aim of maintaining leeway in drafting national exemption policy – evident in international and European copyright law as well as private international law regarding copyright infringements – can no longer be fulfilled.

This is a consequence of borders becoming porous. The traditional model of international and European copyright law is based on copyright law that is limited to a territory that coincides with a national public sphere. But the Internet has made the boundaries of national public spheres so porous that they have converged into a global one. The national copyright exemptions, when applied to the Internet, try to regulate something that is no longer there. The example of orphan works is a case in point. The problem of orphan works calls for a legislative solution that allows libraries to publish works online. However, since the copyright laws of all countries in which the online publication is accessible may apply, a national exemption will not suffice.

One could say that under the current framework of international and European copyright law, the Internet age is in fact an Ice Age. International or European copyright law is hardly up to the challenges posed by the Net. Private international

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122 'Europeana – next steps forward', COM (2009) 400 FIN.

law brings us at a crossroads. We may use it to restore the national public sphere on the Internet. But we may also choose the perhaps more adventurous path of creating an online global sphere, taking the advantages of the Internet to the fullest. Neither the current framework of the BC nor private international law can help achieve this. Harmonization is required. Time has come for international and European copyright law to start paying more attention to the interests of users and the general public on a global rather than on a national scale. Harmonized exemptions are required to distribute copyrighted material online.

There is no need to harmonize any and all exemptions fully, leaving no legislative competence for individual states. Specific cultural exemptions, such as the Italian law on public performances by military bands, could remain. They would not and should not apply elsewhere. But the Internet does require a common core of unified exemptions that are relevant to the online distribution of information.[123] In this regard, the current European regime on exemptions – free choice from an exhaustive list – seems to be fundamentally flawed.[124] What is needed instead is a set of unified mandatory exemptions combined with freedom to introduce additional ones for cultural purposes. This would guarantee an exemption regime for the European public sphere, while the leeway to provide for specific national exemptions would make it easier for Member States to adapt the unified regime.

But is the situation truly so dire that unless we start unifying exemptions we should not expect a digital library, a successful Europeana, any time soon? Perhaps not. It is hypothesized that the use of orphan works in general will lead to very few claims, for the simple reason that the copyright owners are not very likely to turn up. Furthermore, Europeana is a non-profit organization trying to make culturally significant material widely available. Most authors will be very happy to find that their works are available in a global digital library. In any event, the damage incurred will often be limited, and even if a copyright owner were to sue for copyright infringements, a judge is likely to award a small compensation only. But we should recall that despite practical solutions, it will prove very difficult to devise a solution that allows for the fully legal dissemination of orphan works by libraries on the Internet. And that exemplifies the current Internet Ice Age of international and European copyright law.

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123 Janssens (2009), *supra* n. 32, 337–340.

124 Cf., e.g., Janssens (2009), *supra* n. 32, 332–333; Hugenholtz (2000), *supra* n. 95; Guibault et al. (2007), *supra* n. 102, 166.

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