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INTERNATIONAL HARMONIZATION OF COPYRIGHT LAWS

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Abstract

We must understand that legal diversity by itself is not the enemy. The intention behind the exercise and the extent of deviance from established practices determine the level of threat. In other words, it is not the difference in the legislative drafting style but the inherent incompatibility that we need to target. Minute changes to suit the local needs and circumstances are acceptable. But there should be no standoff between the laws. When the term harmonized is used in modern copyright literature, it does not mean that there has to be an identity of law among the countries, rather the essential task is to keep the national laws in utmost compatibility or harmony with one another. We must understand that all copyright principles do not have equal economic relevance. Rights of communication and distribution, for example, play the defining role in the economic exploitation of copyrighted work. Nonetheless, we have areas such as moral rights which hardly have any economic relevance. Here arises the dilemma. If we take the EU approach to harmonization and apply it to achieving international standardization, it will lead to divisions within the system based on the respective economic and cultural potentials of copyright principles. The other option is to make an outright rejection of the economic approach to harmonization but if we do so, we will be losing on the experience gained over a long period in the EU. So we need to more cautious in taking a stance towards the developments we have witnessed so far.

I. INTRODUCTION

Common Cultures, traditions, religions, and socio-political backgrounds have been the grounds for uniting people for ages. But with the rise of modern nation-states, the importance of these grounds has been emphasized more to claim separate existence and independence from others. The latest trend has been to make one's community more and more exclusive to restrict any alien intervention. By ignoring all-natural factors which make all human beings members of one grand family, modern political thought places special emphasis on divisive politics on lines such as ethnicity or religion.[1] Modern nations are organized on these parochial lines and it is readily justified by present-day politicians and administrators in the name of convenience.

These evolutions have had an influence on growth of the legal industry. In the initial decades of the twentieth century, a big part of the world population was under British Colonialism and hence, the legal and political structures of these colonies were dominated by British traditions. But when these colonies attained independence in the 1940s and 1950s, they

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[1] J.M. Kelly, *A Short History of Western Legal Theory* pp 392-409 (OUP, Great Clarendon Street Oxford, 1992).

started designing their law around their own peculiar needs.[2] India, for example, adopted its Constitution[3] on January 26, 1950, which was far more progressive and catered to local needs than any of the previous British acts enacted for India. Further, the division of countries on economic grounds into developed, developing, and under-developed, provided additional impetus to diverse in-laws around the globe. Soon diversions from established legal principles were being made not out of any genuine need, but to satisfy the egoistic and pseudo nationalistic sentiments of the citizens.

This was not happy news for the growth of essentially international laws. One such example is copyright law. The categories of works with which the copyright law essentially deals have traditionally been circulated across national borders and the digital revolution of the late twentieth century has further pushed the exercise. In the absence of international standardization, nation-states have been enacting copyright legislation that protects the peculiar interests of their citizens.[4] The result is that the foreign authors have been facing discrimination at the hands of national laws of foreign states where their works are circulated and exploited. Therefore, there is a great need for a truly harmonized system of copyright laws, based on mutual recognition of authors' rights around the globe.

However, we must understand that legal diversity by itself is not the enemy. The intention behind the exercise and the extent of deviance from established practices determine the level of threat. In other words, it is not the difference in the legislative drafting style but the inherent incompatibility that we need to target. Minute changes to suit the local needs and circumstances are acceptable but there should be no standoff between the laws. When the term harmonized is used in modern copyright literature, it does not mean that there has to be an identity of law among the countries, rather the essential task is to keep the national laws in utmost compatibility or harmony with one another.[5]

II. THE NATURAL RIGHTS AND UTILITARIAN THEORIES OF COPYRIGHT LAW

If we are to understand the present-day codes on copyright law existing in different countries and the essential differences that exist among them, we need to go back to the history of copyright principles and how they came to be adopted in domestic laws. From the very start, there was no dispute regarding the need for copyright laws. The difference of opinion was essential regarding the justifications for it. Broadly, the opinions were divided into two theories, *i.e.*, the one based on natural rights and the other on utilitarian, which were providing their justifications for controlling the flow of copyrighted works and rewarding

[2] Elizabeth Kolsky, "The Colonial Rule of Law and the Legal Regime of Exception: Frontier "Fanaticism" and State Violence in British India" 120 *The American Historical Review* 1218-1246 (2015).
[3] The Constitution of India.
[4] Ruth L. Okediji, "Reframing International Copyright Limitations and Exceptions as Development Policy" in Ruth L. Okediji, *Copyright Law in an Age of Limitations and exceptions* 429-433 (Cambridge University Press, Cambridge, 2017).
[5] Ewa Laskowska-Litak, "Between Scylla and Charybdis: a comparative look at copyright's protected subject matter and the (CJ)EU harmonization" 14 *JIPLP* 766-768 (2019).

their creators. The natural rights theory was further divided into two lines of thought, the labor theory[6] propounded by John Locke and the personality theory[7] propounded by Immanuel Kant and further elaborated by Hegel. The first claimed that as a particular work is the result of the labor of its creators, it is quite natural that it should belong to them. While the second gave more importance to the nature of the work itself and provided that when an individual takes on the task of creating a work, it becomes an essential part of his personality and must belong to him.

On the other hand, the proponents of the utilitarian theory[8] were Jeremy Bentham and John Stuart Mill. The utilitarian theory did not concern itself either with the nature of the work or with its creator. The sole determining factor was the utility of the work in the market, which made the author or creator deserving of any incentive or reward from society.

Though the aim of both the theories was to ensure economic benefits for the authors, the way they propose to do that is very different. For the natural rights theorists, the return to the authors is their reward and a prize for their artistic skills. The utilitarian theorists take the benefits occurring to the authors to be an incentive for their contribution to society. They consider it to be more of a give and take exercise where the society as a whole incentivizes the authors for their creations which are of utility for its members.

III. DROIT D' AUTEUR AND COMMON LAW TRADITIONS

The natural rights and utilitarian theories that provided different justifications for the existence of copyright laws divided the world into two blocs. On the one hand, some countries pay allegiance to the natural rights theory argues that the reason for the emergence and existence can only be deciphered by relying either on the product of labour or extension of personality principle as put forward by John Locke and Immanuel Kant respectively. These countries together are popularly referred to as *Droit d' auteur* nations because they pay more heed to the relation between the authors and their works than any economic viability of the works in the society. France, Germany, and Austria can be said to be the forerunners of this tradition. Though there are wide differences in the domestic laws of these countries, the way they generally perceive copyright laws makes them part of a common tradition. Germany for example has designed its copyright law keeping the extension of the personality argument of Kant and Hegel in mind and hence for Germany copyright is vested in the authors because their creations are nothing but a way to depict their personalities. France has been equally influenced by the labor and personality arguments for the reasons that in the initial years, the copyright laws in France were developed mainly with the help of case laws

[6] Peter Laslett (ed.), *Locke: Two Treatises of Government* 265-428 (Cambridge University Press, Cambridge, 1988).
[7] Immanuel Kant, *The Science of Right* (A & D Publishing, Cheshire, 2018).
[8] George Sher (ed.), *Utilitarianism* (Hackett Publishing, Indianapolis, 2002).

where judges got the opportunities to elaborate on the laws in bits and pieces. They used every possible argument which supported their judgments.[9]

On the other hand, countries like the UK, the USA, and Australia, which can be said to belong to the rival bloc of the common law tradition. For the countries belonging to this tradition, copyright is nothing but a way to economic prosperity for the copyright holders, and like any other activity in the market, the sole aim is profit-making.[10] How much money a particular product is going to fetch in the market is determined by its utility for the consumers in the society and hence the utilitarian principle holds good for these nations as justification for vesting of copyright in authors. The authors are vested with these rights to ensure free and fair exploitation of their works in the market as a result of which the authors individually and the entire economy in totality is benefitted. The relation between the authors and their works is that of the owner and the object of ownership and the principles depicting the work as being part of the personality of its author does not have much relevance here.

IV. THE BERNE EXPERIENCE

To generate an international consensus on copyright principles and devise a common path, the Berne Convention[11] was established in the year 1886 to establish and implement copyright principles that were acceptable to all the member countries to ensure the free flow of copyrighted works across the globe. It established three fundamental principles-

Minimum Standards Principle

The first thing that we need to take notice of under Berne, is the principle of minimum standards. It only specifies the minimum level of protection that members are bound to provide to authors and it is of no concern for the Berne Convention as to how authors' friendly approach a particular member has adopted as long as it is successful in satisfying the terms of the convention. The principle of minimum standards, therefore, ensures the availability of these basic rights to authors around the globe and at the same time providing sufficient breathing space to the peculiarity of national laws of Berne members.

The National Treatment Principle[12]

This principle is codified under article 5.1 of the convention enacted to protect the literary works(Berne), which ensures that the domestic laws of the signatory states do not discriminate between the same categories of work in providing the legal rights and remedies only based on their origin. It is not just for the protection of foreign works in member states

[9] Isabella Alexander and H. Tomás Gómez-Arostegui (eds.), *Research Handbook on the History of Copyright Law* 288-292 (Edward Elgar Publishing, Inc., Massachusetts, 2016).
[10] *Ibid.*
[11] Berne Convention for the Protection of Literary and Artistic Works, 1886, 1161 U.N.T.S. 3, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (last visited April 19, 2020).
[12] *Id.*, art. 5 para 1.

against discriminatory policies, but it also prohibits favorable treatment of foreign works against the interests of local authors. Hence, it ensures singularity or identity of law concerning the treatment of similar categories of works within member states.

Term of Protection[13]

The Berne Convention requires all members to protect copyrighted works at least till the death of the author with additional 50 years except for photographic and audio-visual works. This has been one of the biggest achievements of the convention as by providing the minimum term of protection that all members must secure to its authors, it aligned the copyright laws of the members to a great extent.

Automatic Protection[14]

The Berne Convention also established that to fall within the umbrella of copyright protection, the authors were not required to go through any formalities. The creation of work deserving of protection was a sufficient trigger for the application of the copyright laws.

Moral Rights Principles[15]

Moral Rights is another area where the efforts at Berne brought fruitful results. The provision on moral rights was not introduced in the original convention of 1886 and even 1896, 1908, and 1914 revisions failed to bring them on board because of the unfounded fears of the common law countries. However, by the time of the Rome revision held in 1928, the Berne union was able to generate consensus on making moral rights a part of the international copyright regime. The result was Article 6bis of the Berne convention which marked the first-ever acknowledgement at international level of the *doctrine of moral rights*. The contribution of Berne rests in the phenomenon that it garnered the general acceptability of moral rights principles around the globe.

The contribution of Berne towards internationalizing the copyright law can in no case be denied. However, it only established broad standards as noted above and there was a lack of specific copyright rules binding on all the members equally with no exceptions. Moreover, it did not provide for effective enforcement mechanisms. This position has partially changed with the coming of TRIPS and its dispute resolution mechanism, which can force WTO members to comply with the convention.

The European Union

The European Union presents one of the best possibilities of having a truly harmonized copyright system at least for the current member states. However, it is necessary to note that

[13] *Id*., art. 7.
[14] *Supra* note 11, art. 5 para 2.
[15] *Id*. art. 6*bis*.

the purpose of the establishment and continuance of the EU system is more economic than legal. All the activities of the EU are encircled with the goal of attaining a unified market around Europe. There is a treaty named Treaty on the Functioning of the European Union (TFEU) which in its article 114 clarifies that the sole objective of the EU is to estimate the domestic laws and regulations of the signatory countries to set up a unified internal market.[16] There may arise some temporary concerns such as removing diversity in copyright or business-related laws, but all this is only a means to an end i.e. a unified internal market. Therefore, the EU harmonization process is concerned more with the unification of the internal market than a harmonized copyright system.

Because of this market-driven outlook of the EU, not all principles or propositions of copyright law receive equal consideration. The features of copyright law which incorporate the replication or reproduction rights and transmission or communication to public rights which may threaten the uninterrupted flow of copyrighted works circulated in the market are always in priority. On the other hand, the areas which have little relevance to the economic exploitation of the work such as moral rights principles hardly garner any attention. This is the reason that the copyright laws of signatory countries still differ fundamentally on the category of rights granted and their respective scope. Great diversity can also be observed regarding the duration of these rights. This is not a very satisfying position if we are aiming for a truly harmonized system of copyright.

Now we will consider a few aspects of EU Law which have a bearing on the harmonization process-

Limited Competence of the EU

As per article 5 para 2 of the Treaty on European Union (TEU), the European Parliament and European Council (EC) do not have any vested power with them to take tasks *suo moto*, rather they are bound to act within the limits of competence specifically or impliedly conferred upon them by the treaties among member states to attain the specified objectives.[17] Hence, the EU also failed to save itself from the unfounded suspicion with which vesting of any real power in a supranational authority is seen. European Parliament like every other regional or international law-making authority, ends up being nothing more than a puppet at the hands of its member states who are always driven by their pecuniary and political interests. As a result, when we consider the facts of the EU being established only for achieving an integrated market along with its reliance on agreement among the members, we are left with much less than what we had expected.

Moreover, para 3 and 4 of article 5 of TFEU provides for two additional limitations on EU competence to make effective laws. The former requires the EU to first satisfy that the actions it wants to take are such that they cannot suitably be provided by the domestic laws of

[16] Treaty on the Functioning of the European Union, 2008, art. 114.
[17] The Treaty on European Union, 2008, art. 5 para 2.

signatory states and better results are expected of Pan-European law. However, it has no application to areas that comes under the domain of exclusive jurisdiction of the EU. On the other hand, the latter provides for a three-tier test with which all EU legislations have to be tested and it makes no difference here whether the area concerned is falling under the exclusive jurisdiction of the EU or not. It is equally applicable to all actions at the EU level. First, the action will be tested on the grounds of suitability for the objectives to be achieved. Then the question of the necessity of the action arises. Finally, if both the above tests are satisfied, the action is measured on the scale proportionality to ensure that it does not become unduly restrictive for member states.[18]

Article 118

Article 118 of TFEU brings much relief by specifically making a provision for intellectual property. It states that European Parliament and European Council shall take required steps for establishing a Pan-European intellectual property system that guarantees uniform protection in the discipline of Intellectual or intangible property throughout Union.[19] So far nine directives have come in this direction. But everything boils down to a singular fact that all policy decisions are taken at the European Parliament and EC with the single aim of achieving a truly integrated European market. Therefore, it is not the principles of creativity and rewards for the authors rather the considerations of the free flow of copyrighted products in the market that dominate the discussion.

One clear stance could be mentioned here. After detailed discussions, Green Paper on Copyright and Related Rights in the Information Society[20] was taken in the year 1995. This document aimed to look for areas where the harmonization process at the EU level should target. It suggested that areas related to replication or reproduction rights, transmission to the audience rights, digital broadcast rights, moral rights, and the applicable law principles are in immediate need of harmonization. However, the entire exercise soon fell prey to self-serving diplomacy of the member states, and by the time the Information Society directive[21] was adopted in 2001 only replication, dissemination, and transmission to the audience remained to be the areas where members were required to take legislative and legal actions to integrate the national laws.

Even though nine directives have been adopted so far covering most of the crucial areas such as computer programs,[22] rental and lending rights,[23] database[24] but as noted in the instance of

[18] *Supra* note 17, art. 5 paras. 3 and 4.
[19] *Supra* note 16, art. 118.
[20] Commission, *Green Paper on Copyright and Related Rights in the Information Society,* COM (95) 382 final (August 19, 1995).
[21] Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p.no. 10–19.

[22] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 5.5.2009, p.no. 16–22.
[23] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental rights and lending rights and certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, p.no. 28–35.

directive available in the Information Society, each directive has been drafted in a very restrictive manner to take all members on board to reach unanimity among members on IP issues. The result has been that no directive in itself is comprehensive enough to tackle all crucial aspects of the respective target areas. The point that the author is trying to make here is that just because a directive exists covering a particular area does not necessarily mean that the law in that area has become harmonized. It is still an unfinished task that will require regular updates into these directives to achieve a truly harmonized structure of law at the EU level.

Culture vis-a-vis Common Market

Though the main theme of EU law as discussed so far has been to establish a common European market. However, it does not mean that European art and culture have no place under the scheme. The detailed memorandum to the Orphan Works,[25] the rules and regulations provide that there will be no general bar against the presence of orphan works over the worldwide web if the same is to promote the cultural and educational interests of the Union. The same directive also creates a broad exception to exclusive rights in favor of public libraries, archives, and museums which allows these institutions or organizations to replicate an orphan work and make it attainable or accessible to the general public. The aim is to ensure the availability of works to a wide population to make Europe culturally homogenized. The cultural concerns also find mention in other copyright directives such as resale rights[26] and rental rights directives[27]. Culture has a direct relation to the economy because of its influence over the consumption habits of the population, hence it becomes crucial that not only the market practices but the consumers' preferences and behavior in that market are also uniform. This has been very well understood by the EC as depicted from all the emphasis in the above-mentioned directives on the cultural integration of the union. However, these cultural considerations in the directives can only be complementary to the need for market integration and as of now, they do not have any standalone relevance.

The Exhaustion Principle

One of the most prominent rights that domestic laws of all member states recognize has been the distribution right. It is considered to be the natural right of all creators so that they can regulate and control how their works are distributed and made available in society. However, this right has great potentialities of dividing the market and can thus prove to be a real challenge for the harmonization process.

[24] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p.no. 20–28.
[25] Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM/2011/0289 final - COD 2011/0136.
[26] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p.no. 32-36.
[27] *Supra* note 23, art. 6.

In the endeavor of exploiting the copyrighted work to the best of its capabilities and to gain maximum profits, the right holders design such a strategy in which the distribution right is exercised in such a manner that it results in the division of the internal market. They adopt different pricing for different member states depending on the purchasing capacity of the population and to counter the influx of the copyrighted goods from other sources, they also pressurize their respective governments to impose limitations on parallel imports. The consequence is that the uninterrupted circulation of copyrighted works is hampered.[28] To tackle the situation, the CJEU came forward, and in *Deutsche Grammophone*,[29] the case held the exhaustion principle to be a well-established part of EU law. The court observed that once the holders of copyrights put their copyrighted works in the domestic market of any signatory state with their assent, the distribution right is exhausted then and there. There remains no further right with the author to control or manipulate the flow of work in the internal market.

The distribution right is thus protected only to the extent of its first exercise in any part of the internal market. However, to implement the exhaustion doctrine, it is necessary that the application of the dissemination right has to be either by the copyright possessor or with their assent. Moreover, the sale transaction is completely different from other types of commercial exploitation of the copyrighted works. A sale transaction is the one where the ownership rights over the copyrighted product are transferred to the buyer. This has to be clearly distinguished from the application of rental rights and public performances performed by the owner of copyrights. In such cases, there is no transfer of ownership. These acts are more like services provided to society which is repetitive and limited in duration and extent.[30] If the exhaustion principle is applied in such cases and it is held that the rights of the copyright owner will be extinguished in such cases, the very purpose of granting these rights such as the rental right will be frustrated for the reason that their essence lies in the recurring commercial exploitation of the copyrighted work.

The National Treatment Principle

To achieve singularity of law at least within the political boundaries of member states, the principle of national treatment has been recognized and made part of EU law under article 18[31] of the TFEU. It provides that "within the domain of implementation of the treaties and without prejudice to any provision constituted therein, any discrimination or unfairness based on nationality shall be forbidden." Hence, no discriminatory treatment can be meted out to authors and their works based on their country of origin. Moreover, it is not essential for the accomplishment of article 18 that the discriminatory domestic law must also amount to a limitation on trade among signatories.

[28] Peter Mezei, *Copyright Exhaustion: Law and Policy in the United States and The European Union* 26-31 (Cambridge University Press, Cambridge, 2018).
[29] Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. (1971) Case 78-70 European Court reports 1971 p.no. 00487.
[30] *Supra* note 28 at 8-10.
[31] *Supra* note 16, art .18.

All signatory nations of the union have been bound to treat foreign works at par with domestically created ones. All benefits whatever be their nature and extent have to be shared equally between them. But the question that occasionally arises is whether article 18 is only protecting the foreign works against discriminatory policies of member states or it also prohibits any preferential treatment in favor of such works? To explain the answer to this question, there is a need to understand first that the main aim of the doctrine of national treatment is to ensure the identity of laws within the domestic system of members. So whatever be the nature of discrimination, whether it is negative discrimination against the foreign works or positive discrimination in their favor, both equally violate the national treatment principle.[32]

However, we must also take notice of the fact that article 18 is a watered-down version of the national treatment principle as it provides ample opportunities for future treaties to create exceptions to it. The use of the words "without prejudice to the provisions contained therein" in article 18 depicts that it can be made subject to explicit provisions of the treaties which are prejudicial to the national treatment principle.[33]

CJEU's Contribution

Framing of regulations or adoption of directives is not the only way in which the EU is moving in the direction of a harmonized law. The Court of Justice of the European Union (CJEU) has played a noteworthy part in the evolution of a harmonized law. CJEU has been at the forefront of all efforts to integrate the laws of copyright of the signatory nation in the EU. CJEU's role has never been limited to decide individual disputes among members, its decisions have long been guiding as to the areas where codification is needed and in some cases such as *Infopaq International*,[34]it has gone further also to suggest the direction in which the law should develop. Even before the adoption of the inception of first directive in the area of copyright i.e. the Computer Program Directive,[35] the CJEU had already provided guidelines and framed rules and regulations concerning a variety of copyright issues.

However, CJEU is essentially a judicial authority with the primary role of adjudicating the disputes and it can only contribute when it has the right opportunity in the form of a case raising crucial questions. This does not mean that CJEU always sits as a passive recipient. CJEU's opinion in *EMI Electrola* v. *Patricia*[36] can be cited as a leading example where the court was very vocal about the inequities in EU law and questioned the half-hearted approach of the European Community towards harmonization specifically concerning the duration of copyrights. The court opined that it was high time that a comprehensive directive on the

[32] *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) European Court Reports 2001 I-06193, Case C-184/99, para. 35-36.
[33] *Supra* note 31.
[34] *Infopaq International A/S v Danske Dagblades Forening* (2009) European Court Reports 2009 I-06569, Case C-5/08.
[35] *Supra* note 22.
[36] *EMI Electrola GmbH v Patricia I'm- und Export and others* (1989) European Court Reports 1989 -00079, Case 341/87.

duration of copyrights be brought forth, as variance in this area of law has great potentials of causing harm to the fabric of European law.[37]

Moreover, CJEU has been very well aware of the threats that uneven development of the copyright laws among member states may pose to the uninterrupted circulation of copyright works in the internal EU market. Price discrimination policies and protection against parallel imports provided within the national laws of signatory states have been at the radar of CJEU for a very long time. But in the absence of explicit directives, the CJEU is dependent on general protections provided by article 34[38] and 35[39] of the TFEU to disallow discriminatory laws and practices of the members. It is not a very handy approach for the reason that in every case the CJEU is required to predict the consequences of a particular domestic law under consideration, to see whether it will amount to an export barrier or a prohibition to parallel imports and thus impeding cross-border trade.

To improve the situation, CJEU in *Costa* v. *Enel*[40] recognized and settled the doctrine of the hegemony of EU law over domestic legislation. The court made it clear to all domestic legislators that the laws that came from the treaty can never be overruled by the domestic laws except for the cases where the treaty itself has allowed its subjugation.[41] Article 36[42] of TFEU provides for a scenario in which the domestic laws of the signatory states can impose restrictions on free trade if it is to protect industrial and commercial property. The use of the words "industrial and commercial property" has been intentional with the motive of broadening the purview of the exception so that more and more leeway is given to the domestic laws. The domestic copyright laws may also come under its purview as far as the commercial (money oriented) exploitation or misuse of the copyrighted works is concerned. This point has been clarified by the CJEU in *Musik-Vertrieb,*[43] where the court observed in the context of article 36 of Treaty Establishing the European Economic Community[44] (EEC Treaty), that it is not possible to distinguish between economic aspects of the copyrights and other industrial and commercial property rights.

V. HARMONIZING CONFLICTING INTERESTS

The biggest challenges to the harmonization process come not from the pessimist stance of member states, rather from the conflicting interests of the various shareholder intricated in the creation and consumption of copyright products. The case of authors/performers *vis-à-vis* producers/investors is worth considering. The author is the main mind behind the creation of

[37] *Id*., para. 10-13.
[38] *Supra* note 16, art. 34. It provides that all quantitative restrictions and other equivalent measures shall be prohibited between member states.
[39] *Id*., art. 35. It prohibits all quantitative and equivalent restrictions on exports between member states.
[40] *Flaminio Costa v E.N.E.L.* (1964), English special edition 1964 0058, Case 6-64.
[41] *Id*. at 594.
[42] *Supra* note 39, art. 36.
[43] *Musik-Vertrieb membran GmbH and K-tel International v GEMA- Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (1981) European Court Reports 1981 -0014, Joined cases 55/80 and 57/80.
[44] Treaty Establishing the European Economic Community, 1958, art. 36.

a work and a performer is generally the first interpreter of the work of authorship. They are the initiators of the creative process. They are the backbone of the entire copyright system. The economic returns and other benefits that are vested in the author are the rewards for their efforts and creative activity, which has, in turn, benefitted the entire society. As far as, the benefits in terms of money are concerned they are sufficiently protected in the EU by some directives such as the Rental and Lending Rights directive[45] which secures the right of remuneration to authors, performers, and creators, and the Resale Right directive[46] which ensures that the author gets a share on every successive sale of original graphic and plastic art.

However, when it comes to securing the non-economic interests of the authors and performers, the discrepancies in the European Union copyright directives come to the fore. The moral rights of the authors and performers have been specifically left out of the harmonization process as if it is possible to achieve a truly integrated EU-wide copyright system in their absence. The term of protection directive[47] and the Database directive[48] are the explicit example of this inequality of treatment of moral rights. Both of these directives have explicitly provided that moral rights fall outside of their scope.

Even if we forget for the time being the moral rights set-back and come back to the system of economic rewards to the authors and performers, there is not much to be happy about. Considering the essential economic nature of the EU copyright system and its central theme which revolves around market integration, anyone would be led to believe that it must at least be protecting the economic interests of the authors to a satisfactory level. Unfortunately, it is not so and it is essentially because of the general acceptability of the doctrine of assignment of rights. There are a few directives such as the information society directive[49] which have expressly recognized the power of assignment at the hands of the authors and performers, and in others where any such explicit rules and regulations are absent allowing the assignment, the same power has been implied with the help of the general theory of freedom of contract.

It is a misnomer to call it a power of assignment because when a particular author or performer faces the realities of the art industry, this power soon turns into an obligation on them to assign their rights to the production company or other investors as a matter of general practice. Given the unequal position of the author/performer in the market, the aspect of choice and discretion in exercising this so-called power of assignment soon fades away. Therefore, it becomes very essential that we go beyond the game of drafting style and accept the reality that these assignment clauses were created and they continue to exist only to benefit the production companies or independent investors. So in the end after discussing all the rights and benefits that EU copyright law has to offer to the authors/performers, we find

[45] *Supra* note 23, art. 5.
[46] *Supra* note 26, art. 1.
[47] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p.no. 1-5, art. 9.
[48] *Supra* note 24, preamble pt. 28.
[49] *Supra* note 21, preamble pt. 30.

that all of it essentially depends on the negotiation of the power of the respective parties involved in the contract. Except in very few cases where the author/performer is very well known, the author/performers are always at the receiving end.

Moreover, some directives also contain explicit provisions providing an additional net of protection to protect the economic interests of the investors. The database directive[50], for example, recognizes a *sui generis* or unique right to protect who has taken the initiative and risk of investing. It is essential to secure substantial investment or devotion in the creation of databases that are of utility for the entire community. There is nothing wrong with it. The sources of infusion of money in the industry must always be protected. But we must ensure that in its endeavor of protecting the interests of investors, the law does not turn into a tool at the hands of few for the exploitation of the creators of the work. Both creativity and money are important and none should have an upper hand over the other. The law needs to be more neutralized otherwise the standard form of contracts containing broad assignment clauses, renders the whole exercise of granting rights to the authors/performers and efforts for their EU-wide harmonization completely illogical.

VI. FINAL REMARKS

The EU harmonization process has a much greater potential for developing a truly universal standard for the protection of copyright principles if we compare it to the Berne regime.[51] The most powerful members of the EU such as the UK, France, and Germany, have been the heartland of many established copyright principles. However, as we witnessed in this paper, the main drivers of the harmonization process at the EU level have been the economic and cultural interests of the community. Except for article 118, copyright concerns hardly find mention in the newly established system.

We must understand that all copyright principles do not have equal economic relevance. Rights of communication and distribution, for example, play the defining role in the economic exploitation of copyrighted work. Nonetheless, we have areas such as moral rights which hardly have any economic relevance. Here, arises the dilemma. If we take the EU approach to harmonization and apply it to achieving international standardization, it will lead to divisions within the system based on the respective economic and cultural potentials of copyright principles. The other option is to make an outright rejection of the economic approach to harmonization but if we do so, we will be losing on the experience gained over a long period in the EU. So we need to more cautious in taking a stance towards the developments we have witnessed so far.

Harmonization is a long process and we need to take small steps towards our aim. Instead of providing for elaborate rules and regulations, the initial objective should be to achieve a baseline standard as was the case with Berne. Once it is achieved, we need to slowly and

[50] *Supra* note 48, preamble pt. 40-41.
[51] *Supra* note 11.

steadily push for upward harmonization. But it has to be ensured that there is no unequal treatment between the copyright principles and all are given equal impetus.