



Treehill – CC BY,SA 3.0

EU Copyright Law: Trust or Conflict Between National Courts and the CJEU?

Prof. Estelle Derclaye

University of Nottingham

ECS, 24 May 2024

Overview

- Gap and methodology
- Findings
- Reasons



Gap & methodology

- A lot written on CJEU case law but not on how Member States' courts apply it => fills this gap
- Hypothesis/RQ: is there is disharmony in national case law i.e. courts' decisions do not comply with the EU copyright acquis + why?
- Funded by ESRC Impact Accelerator Account, British Academy and Google: 50 most recent court decisions on copyright law's limits handed down by the civil courts at all levels in all Member States + UK

Methodology (cont'd)

- Cut off date 21/4/2021 (not beyond 2000 or beyond joining EU), mostly publicly accessible databases + Darts-IP, research assistants
- Compliant with the acquis (directives/regulation + CJEU case law) = national court neither contradicts the letter nor the spirit of the acquis (i.e. if it adds to the directives, CJEU's interpretation, it does not contradict it)
- Non-compliant decisions contradict letter or spirit of the acquis (so if it adds to it, it contradicts it) so those which, for instance, apply different (or not all) conditions or criteria etc than those set out by EU legislation or by CJEU

Methodology (cont'd) - Detailed RQ

- Main research question can be subdivided into three sub-questions: is it owed to
 - a. wrong implementation of directives in national acts?
 - b. inconsistent, unclear or imprecise CJEU case law in some areas?
 - c. lack of clarity in EU legislation in the areas where there is no CJEU case law?
 - d. resistance by some national courts on a specific topic?

Summary of findings

- A minority of national courts do not comply with CJEU case law, namely ca. 15%
- Highest non-compliant countries = NL (46%), LU (42%), SE (36%) and DK (22%).
- National courts' non-compliance with EU law is owed to a large extent to **resistance or simple misapplication from courts**. To a lesser extent it is owed to misimplementation in national laws. It is rarely owed to inconsistent CJEU case law or unclear EU legislation.
- Non-compliance is mostly in relation to **infringement, originality and exceptions, NOT** communication to the public nor the sui generis right although also a lot of litigation on these topics
 - Non-compliance on infringement test: SCT = 4%; CA = 11% and CFI = 12%
 - Non-compliance on originality: SCT= 8% ; CA = 7% and CFI = 8%
 - Non-compliance on exceptions: SCT = 0%; CA = 1% and CFI = 2.5%

Findings - Originality and infringement



- In 7 Member States which had artistic merit, 54% do not comply (sample = 13 decisions) = Resistance from courts to *Cofemel* esp. German and Italian courts (see E. Derclaye, “[The status of three-dimensional functional works post-Cofemel. An empirical analysis of the Member States’ case law](#)”, Reto Hilty’s Festschrift 2024)
- Many courts in 9 Member States (NL, DK, SE, LU, FI, I, LT, B, F) use overall impression or similarities and differences; others also grant lower scope of protection to lower originality work or find small reproductions are not infringing

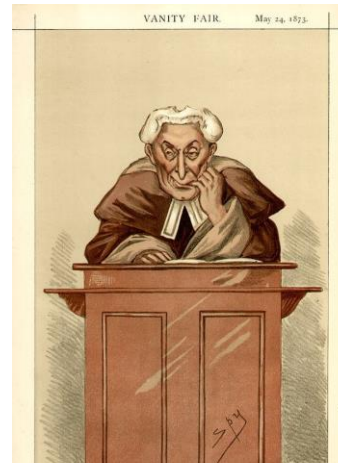
Reasons

- Refusal to apply EU law for fear of breaching national law – Austrian supreme court (Zuers.net)
- Application of national legislation because misimplementation and no attempt to double-check if national law complies with EU law
- Tradition?
- Lack of specialised judges and lawyers?
- Lack of trust, conflict



Trust or conflict?

- Communication to the public and sui generis right – new concepts, nothing (CTTP) or a lot of detail (SGR) in directives, national courts happy to follow = trust (especially for sui generis right as decisions are ‘reasonable’)
- Originality – *Cofemel* changed the law completely for some Member States; >< to art. 17 design directive; *Cofemel* hard to apply in practice, courts clearly do not like the watering down of copyright to mundane 3D objects, so resist = conflict; but dialogue: USM Haller and MIO
- Infringement – *Infopaq* overlooked? Tradition prevails? Or courts do not like *Infopaq*’s overbroad reach especially for works of applied art?



Publications

- Editorial, “Is copyright harmonisation in the EU achieved in practice, and if not what can we do about it?” (2024) GRUR Int.
- “To What Extent is the Parody Exception Truly Harmonised? An Empirical analysis of the Member States’ Case Law Post-Deckmyn” (2023) IPQ 59-81
- “The status of three-dimensional functional works post-Cofemel. An empirical analysis of the Member States’ case law”, Reto Hilty Festschrift, Springer, 2024, p. 121-138.
- Stats and discussion of the database sui generis right, ECS 2023: <https://www.law.kuleuven.be/citip/en/citip-conferences/ecs/ecs-2023/presentations/ecs-2023-estelle-derclaye.pdf>
- E. Derclaye & G. Stupfler, *EU copyright harmonization: An empirical analysis of the national case law*, Hart/Bloomsbury, 2025

Thank you for your attention - Questions



Photo: University of Nottingham School of Law

<https://www.nottingham.ac.uk/law/people/estelle.derclaye>
Estelle.Derclaye@nottingham.ac.uk