LIFTING THE (DOGMATIC) BARRIERS IN INTELLECTUAL PROPERTY LAW: FRAGMENTATION VS. INTEGRATION AND THE FUTURE OF EUROPEAN IP LAW

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Contents

I. Introduction.

This presentation is a prospective one. It deals with the future of Intellectual Property Law in Europe. It contains some thoughts about the structural paradigm that should be followed when adopting European legislation on that field. The incentive for exploring this issue has been given by the recent developments on copyright law at the European level, and more precisely, by the case for the adoption of a European Copyright Code.

Copyright law is a favourite child in Europe.[1] In fact, the European legislator has shown great interest in adopting legal instruments, such as Directives and Regulations, dealing with Copyright law. Recently, the European Institutions explored the possibility of "gifting" this child a new "toy", namely, a European Copyright Code. However, "gifting" such "toy" to copyright law is really a good idea?

In the analysis that follows, I will use the idea of a European Copyright Code as a case study, in order to express the need for lifting some barriers within the structure of future European Intellectual Property Law. To this end, I will focus on some concerns related with the negative impact of the (eventual) adoption of a European Copyright Code on the structure of Intellectual Property law as a whole. Indeed, beyond any other concerns related with the feasibility of a European Copyright Code, as well as controversies related with its content and substantial law solutions, the (eventual) adoption of such Code will put some new and more significant barriers which basically rely on obsolete dogmatic considerations about Intellectual property law and which will hinder the ease application of intellectual property law in Europe. At the same time, such Code will promote the unsuitable paradigm of fragmentation for the development of EU IP law in the future.

I will start my analysis by describing the epistemological background of a (European) Copyright Code, namely, the traditional divide between Copyright Law and Industrial Property Law (II). Moreover, I will briefly overview of the current state of the project of the creation of a European Copyright Law and I will examine the possible functions of the latter (III). Next, I will try to express a fundamental concern related to the opportunity of a European Copyright Code, after having made a balanced critical appreciation of the project (IV). Finally, I will conclude my presentation by making some *de lege ferenda* final remarks, in view to plea for the adoption of the paradigm of integration for the future development of European Intellectual Property Law (V).

II. (Epistemological) starting point: codification and the traditional divide between Copyright Law and Industrial Property Law.

It is known that "intellectual property" is a term that refers to a class of several different legal regimes that generally concern creations of the human mind. These regimes usually give the creator an exclusive right over the use of his/her creation for a certain period of time.
Intellectual property is usually divided into two branches, namely, copyright and industrial property. On the one hand, *copyright* or *author's right* relates mainly to literary and artistic creations, such as ~~a~~—books, music, paintings, sculptures,

photographs, or motion pictures. On the other hand, industrial property takes a range of forms. These include mainly *patents* to protect inventions, *industrial designs*, which are aesthetic creations determining the appearance of industrial products as well as *trademarks*.

The *summa divisio* of intellectual property between copyright and industrial property is not new at all. In fact, this divide is reflected in the two foundational International Treaties of Intellectual Property administered by the WIPO: the Paris Convention of 1883 was related to the Protection of Industrial Property while the Berne Convention of 1886 refers to the Protection of Literary and Artistic Works.

According to this *summa divisio,* copyright and industrial property are two different legal fields which are characterized by sufficient autonomy and several particularities. Indeed, several differences between copyright and industrial property can be noted. First, the division line between the two branches of intellectual property arises from the different nature of protected objects and exclusive rights recognized thereto. *Grosso modo,* copyright refers to *artistic* creations while industrial property protects *technical* creations and *commercial* signs. Moreover, some, especially in continental Europe attribute different function to the exclusive rights conferred by copyright and industrial property rights, by highlighting the personal and moral dimension of the protection attributed by copyright law to the creator. Besides, another significant difference between the two branches of intellectual property is the mode of acquisition of rights: while copyright is automatically acquired by the creator of an original work, industrial property rights are subject to prior registration before a public authority.

On the grounds of the traditional divide between copyright and industrial property and the respective systematic autonomy of each branch, some Codes covering only one branch of intellectual property have been adopted at the national level. We could mention the Portuguese copyright and related rights Code[2] or the Italian Industrial Property Code[3].

III. A (relatively) new hype: The case for the creation of a European Copyright Code.

In the same vein, recently appeared the case for the creation of a European Copyright Code.[4] The idea of the creation of a European Copyright Code has, at least implicitly, as epistemological foundation the divide between the branches of copyright and industrial property and the subsequent systematic autonomy of each one of them. It seems useful to outline the evolution of the project so far (A) before describing the possible functions of such Code (B).

A. The project for the creation of a EU Copyright Code.

The idea of the elaboration of a Code in the field of copyright law appeared and became popular over the last few years both in political (1) and academic level (2).

1. The political project.

The political dimension of the project for the creation of a European Copyright Code has been developed within several episodes which may be presented in chronological order.

First, the EC Commission launched the idea for the creation of a European Copyright Code back in 2007 in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *on a European agenda for culture in a globalizing world* (COM(2007) 242 final). According to this Communication "a more far-reaching overhaul of copyright at European level could be the creation of a European Copyright Code. This could encompass a comprehensive codification of the present body of EU copyright directives in order to harmonise and consolidate the entitlements provided by copyright and related rights at EU level. This would also provide an opportunity to examine whether the current exceptions and limitations to copyright granted under the 2001/29/EC Directive need to be updated or harmonised at EU level. A Code could therefore help to clarify the relationship between the various exclusive rights enjoyed by rights holders and the scope of the exceptions and limitations to those rights."

Moreover, the creation of a European Copyright Code has been reiterated within the Commission's IPR Strategy of the 24th May 2011 titled "*a Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe"*.[5] More precisely, according to the terms of this communication[6] "[a]nother approach for a more far-reaching overhaul of copyright at European level could be the creation of a European Copyright Code. This could encompass a comprehensive codification of the present body of EU copyright directives in order to harmonise and consolidate the entitlements provided by copyright and related rights at EU level. This would also provide an opportunity to examine whether the current exceptions and limitations to copyright granted under the 2001/29/EC Directive need to be updated or harmonised at EU level. A Code could therefore help to clarify the relationship between the various exclusive rights enjoyed by rights holders and the scope of the exceptions and limitations to those rights".

Finally, the Commission referred to the project for the creation of a European Copyright Code within the Green Paper *on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market* of the 13 July 2011.[7] More precisely, according to the terms of this Green Paper, "[t]he Commission undertook in the "IPR Strategy" to examine the more far-reaching approach of the creation of a comprehensive unitary European Copyright Code. Such a unitary European Copyright Code could be based on a codification of the existing EU copyright directives where the need to go beyond the current harmonisation will be examined. It could also provide the opportunity to examine whether the exceptions and limitations to copyright allowed under the Information Society Directive need to be updated."[8] On these grounds, the Commission asked all interested stakeholders within the framework of a public consultation about their opinion on the advantages and drawbacks of the harmonization of copyright law within the EU through the elaboration of a global European Copyright Code.[9]

Until today, no further steps have been made towards the preparation and the adoption of a binding legal instrument containing a European Copyright Code[10], notwithstanding the lively discussion related with such Code within preparatory legal instruments prepared by the European Commission, as shown before.

2. The Academic Project: the Wittem Project

The idea of a European Copyright Code has found a more concrete expression in an academic initiative. More precisely, in 2002 a group of copyright scholars across the European Union established an academic research project called "the Wittem Project"[11] and proposed a European Copyright Code (thereafter "The Wittem Code"). The Wittem Code is drafted in the form of a legislative instrument and is accompanied by a preamble and footnotes on certain articles, explaining the approach and the choices of the drafters. Concerning its scope, the Wittem Code is not comprehensive. On the contrary, it focuses on some main elements of copyright law, namely, subject matter of copyright (Chapter 1), authorship and ownership (Chapter 2), moral rights (Chapter 3), economic rights (Chapter 4), and limitations (Chapter 5)[12]. For the drafting of its rules, the members of the group tried to keep a balanced approach between the different cultural approaches of copyright law within the EU[13] and took note both of the norms of the main international treaties in the field of copyright that have been signed and ratified by the EU and its Member States (Berne Convention, TRIPs Agreement and the WIPO Copyright Treaty) and the *acquis communautaire* in the form of seven Directives that the European legislature has produced in this field since 1991.[14]
The Wittem Code, as an academic proposal[15], it may only be considered as a soft law instrument which, according to their drafters, "a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level»[16]. Even if it has not been always warmly welcomed by the academic community[17], it constitutes undoubtedly a tangible contribution to the discussion for the creation of a European Copyright Code.[18]

B. The (possible) Function of a European Copyright Code.

The idea of a European Copyright Code, just like the idea of codification of law in general (1), may receive different readings (2) and thus aim to serve different functions. These readings need to be first explored before assessing the opportunity of such Code.

1. The codification of the law in general.

The traditional dimension of codification: Codification of the law at the National level. Technically speaking and beyond any symbolic connotation[19], codification at the national level is seen as a means to expose the law, so as to present the existing or desired law in a *comprehensive, consistent, rational and systematic way*.[20] Codes, thus, promote the *internal coherence* of an area of law and make it more easily *accessible*.[21] Moreover, codification projects are inspired by the ideal of *completeness*. The ideal of completeness has three dimensions: a codification should not contain gaps, it constitutes the new 'epicentre' of the system of sources of law and

it should gather[22] all the relevant legal rules in one place in order to exclude coexistence with specific statutes within one and the same area of the law[23].

Codification at the European level. In general terms, the codification at the European level serves the same aims and objectives of national codifications and intent to achieve *completeness, consistency, accessibility and rationality of European legislation.*[24] To that extent, the codification initiatives at the European level make part of the EU strategy for simplification and better law making policy and more specifically for the reduction of volume and complexity of the European *acquis.*[25] According to the legislative policy and practice of European Institutions and given the fragmentary character of European legislation, European law codification takes the form of the incorporation of an official collection of fragmentary texts within a codified instrument. This codified instrument incorporates and repeals the instruments being consolidated (basic instrument + amending instrument(s)) without altering their substance.[26] The production of such codified instrument is based on (unofficial) legislative consolidation[27], which corresponds to the combination in a single declaratory and unofficial text of the provisions of a basic instrument and all subsequent amendments.[28]

2. The "readings" of a European Copyright Code.

The contours of a European Copyright Code are not precisely defined by the European Commission in the preparatory documents mentioned above. This leaves leeway for different readings of the concept of European Copyright Code.

According to a "minimalist" reading, a European Copyright Code would correspond to a formal (horizontal) consolidation of European Copyright law, namely, to an official collection of fragmentary texts within a codified instrument, incorporating and repealing the instruments being consolidated without altering their substance.[29] Such initiative would lead to the deletion of obsolete and overlapping provisions, to the harmonization of terms and definitions and to the correction of errors without substantive change of the original texts.[30]

Moreover, the Commission leaves open the possibility for an "updated" codification of the existing European Copyright law legislation. More precisely, according to the official preparatory texts, it is possible that the "Code" *may* be a good occasion for updating and reviewing the provisions of the Information Society (Copyright) Directive on exceptions and limitations.[31] Consequently, according the European Commission, it is possible that, copyright codification would not correspond simply to a codification of the law as it stands (*codification à droit constant*) since, apart from the consolidation of the existing Directives, it would lead possibly to the update of the existing *acquis*.[32]

In addition, in the most recent official mention of the European Commission on the European Copyright Code, it is stated that the Code "may go beyond the current harmonization where it is found necessary".[33] This sybillic wording allows for a 'maximalist' reading of the European Copyright Code, according to which the codification of the existing directive would be only a starting point and the Code could thus cover any issue of copyright law and not only exceptions and limitations. Under that meaning, the European Copyright Code would combine both formal consolidation of the current acquis as well as further Europeanization in the field of copyright law.[34] At the same time, the adoption of a Code could lead beyond mere harmonization, and could be combined with the institution of uniform European

copyright law rules and even the institution of a uniform EU copyright title.[35] Besides, the Wittem Code, which, as we have seen it, might serve as a model or reference tool for future harmonization or unification of copyright at the European level, is more close to a *de maximis* European Copyright Code, given that it does not simply restates the existent *acquis* but it touches issues of copyright law that are not covered by European legislation, so far.
In sum, a European Copyright Code is a manifold concept. Its contours vary according to the aims and functions one desires[36] to attribute thereto and may refer from a mere formal consolidation of the existing *acquis* to a complete European legislation on copyright law.

IV. Critical Appreciation of the EU Copyright Code Project: the opportunity of the Code and a fundamental concern.

The elaboration and adoption of a European Copyright Code, either in its minimal or its maximal form, deserves thorough prior reflection and assessment of possible advantages and disadvantages, in order to diminish any doubt about its opportunity.[37]
It is certain that the creation of a European Copyright Code presents certain positive aspects (A). However, it is also true that beyond more technical concerns related with the feasibility of the project (such as, the competence of the European Union, the choice of adequate legal instrument and form of Europeanization or even the scope and substance of a European Copyright Code, which will not be analyzed here), there are some inherent shortcomings in a EU Copyright Code, (B) and which raise a fundamental concern related to the opportunity of such project.[38]

A. The positive aspects of a European Copyright Code.

The elaboration and adoption of a European copyright Code, either in its minimal or its maximal form, according to what has been said above, presents certainly some advantages.[39]
First, a formal consolidation of the current *acquis*, through the adoption of a *de minimis* European Copyright Code would enhance the coherence and consistency of the existing *acquis*.[40] In fact, the *acquis communautaire* in copyright law is certainly a fertile ground for formal consolidation of the existing *acquis*, given the fragmentary approach adopted by the European legislator on that field.[41] It is true that several Directives have been adopted during the last decades without an overall reflection of copyright law at the European level. A formal consolidation of copyright law through the adoption of a European Copyright Code would certainly have beneficial effects since it would enhance the systemic interpretation of the actual fragmentary European legislation on copyright law and would allow for the establishment of common and transversal definitions and concepts for European copyright law that would receive the authentic interpretation of the ECJ.[42] In addition, the existence of a common European Copyright law integrated within a single European Copyright Code would certainly increase the simplicity and transparency of the existing fragmentary legal framework and would be in conformity with the "principle of coherence" of *acquis*, as put forward by the Court of Justice of the EU.[43]

Moreover, the choice of a European Copyright Code aiming not only to consolidate the existing *acquis* but also to update and review the provisions of the Information Society (Copyright) Directive on exceptions and limitations would additionally enhance legal security on that field at the European level. In fact, the choice of minimal harmonization made by the European legislator when adopting the Directive 2001/29 has not been proven satisfactory, due to the optional character of exceptions and limitations contained therein, which leaded to important diversity in the pattern of implementation of the Directive into the MS. This unsatisfactory result has been pointed out, among others, by the European Court of Justice.[44] On these grounds, an update and review of exceptions and limitations through the adoption of a European Copyright Code which would implement maximal harmonization in that field would definitely enhance the efficiency of the applicable legal framework on exceptions and limitations throughout the EU.

Finally, a 'maximalist' European Copyright Code, aiming towards not only mere consolidation or update of the existing *acquis* but also to further Europeanization in new fields of copyright law might also present some additional advantages, such as legal security, legal innovation and internal market efficiency, especially when the diversity of national laws obstructs the smooth functioning of the internal market[45], or where national solutions need to be reviewed or improved.[46]

B. The inherent shortcomings of an EU copyright Code.

As shown before, the creation of a European Copyright, independently of its minimal or maximal form, presents certainly some advantages. However, we will see below that a European Copyright Code presents some essential inherent theoretical and practical shortcomings, which undermine its opportunity. These shortcomings derive essentially from the limited scope of the codification process only in (European) copyright law. This approach seems unsatisfactory for at least two main reasons: from a theoretical point of view, it reiterates an obsolete dogmatic division between copyright and industrial property (1). From a practical point of view, a Code limited to copyright law fails to achieve the desired systematic nature and completeness of the product of a codification project (2).

1. Theoretical Shortcomings: Reiteration of an obsolete dogmatic division between copyright and industrial property law.

The creation of a European Copyright Code takes as both epistemological and technical starting point the division between copyright law and industrial property. More importantly, a (European) copyright Code will correspond to an official legislative confirmation of the divide between these two branches of intellectual property law. Practically, the codification of copyright law will highlight the systematic autonomy of copyright law and, consequently will reinforce the barrier and divide between the latter and industrial property. However, the divide between the said branches is less obvious than in the past. Thus, it is legitimate to doubt about the opportunity of such choice at the European level.

Traditionally, the distinctive regulation of copyright and industrial property has been based on the acceptance of division between, on the one hand, artistic and, on the other hand, technical and commercial aspect of human intellectual activity and

creation. Nowadays, the divide between the different categories of intellectual property rights and their objects has been importantly relativized. Thus, the categorization of regulatory frameworks based on the previous distinctions on human creative activity seems simplistic, largely unrealistic and obsolete.[47] In the same vein, the categories of intellectual property rights are not watertight anymore.[48] For instance, copyright law is not dealing exclusively with artistic creations. On the contrary it extends also in technical creations which fit better into industrial property law, such as software and industrial art. In addition, trademark law expands its scope on the protection of sounds and 3D objects, in other words, objects that traditionally belong to other IP law branches. Moreover, the interaction between various intellectual property rights is closer than in the past. In fact, the overlaps of protection of the same object by various rights are very frequent.[49] In addition, all intellectual property rights share a common commercial character, which allows for common management under the umbrella of IP portfolios.[50] It should also be stressed that, during the last decades, there is an increasing tendency both at academic and political level, in favour of the integrated approach of various immaterial goods, such as artistic creations, inventions or distinctive signs,[51] through the recognition of a unitary legal field, namely, intellectual property law or law of immaterial goods.[52] In the light of these findings, the division between copyright law and industrial property seems nowadays more dogmatic and less pragmatic. What is more, the reiteration of such division by introducing a copyright Code at the European level strengthens and solidifies a dogmatic barrier between the two branches of intellectual property law deprived of solid legitimacy.

Moreover, from an epistemological point of view, the adoption of a Copyright Code highlights the autonomous character of the codified legal rules for the field of copyright law. In other words, a Copyright Code leads to systematic isolation of copyright law from other legal fields and, among others industrial property law. However, such isolation is at odds with the current perception according to which Intellectual Property Law, which is analyzed in the branches of Copyright law and Industrial Property Law, is considered as unitary and autonomous legal field. In fact, the *de facto* approximation of different categories of Intellectual Property rights is reflected, among others, at the legislation of the European Union. More precisely, beyond the constant use of the term "intellectual property" both at primary[53] and secondary[54] European law, the systematic unity of intellectual property law is officially recognized by the adoption of horizontal (transversal) legal instruments that apply equally to intellectual property law as a whole, such as the Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, the Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, or the Regulation 864/2007, of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). In the same vein, the EU Court of Justice encourages the unitary approach of Intellectual Property law, by developing concepts and institutions which concern all IP rights, such as the concepts of specific object and essential function of IP rights.[55]

Following these observations, copyright law is considered as a 'subsystem' of a broader system of rules dealing with intellectual property law as a whole, which shares rules, institutions and concepts with the other 'subsystems', namely, among others, patent and trademark law. Within this context, a Copyright Code will put a new barrier against the dully established unitary approach of Intellectual Property law.

Last but not least, the adoption of a European Copyright Code will promote the fragmentary approach of European Intellectual Property Law. This may have severe consequences on the future of European Intellectual Property Law, given that it will canalize the future development of European legislation on that field towards the paradigm of fragmentation. Indeed, in the existence of a European copyright Code it will be difficult or technically complex to adopt transversal regulation of IP law. Therefore, a European Copyright Code will constitute a barrier for the integrated regulation of some IP law issues.

2. Practical Shortcomings: The inefficiency of a European Copyright Code.

As we have seen it before, the codification at the European level aims to achieve *completeness, consistency, accessibility and rationality for the European legislation.* It is however questionable whether a European Copyright Code would fulfil these functions.

A European Copyright Code would fail to fulfil the ideal of completeness of a Code, according to which a codification "should gather all the relevant legal rules in one place, i.e. not coexist with specific statutes within one and the same area of the law".[56] Indeed, even in its minimal form, a European copyright Code that aims to be comprehensive and complete, should not abstain from gathering all legal texts dealing with copyright law in one place. According to the dully recognized unity of intellectual property law at the European level, a codification limited only on copyright law will necessarily coexist with other specific statutes within the area of the intellectual property law. However, this poses the problem of the inclusion of the horizontal rules of the existing *acquis* which apply also to copyright. Given that the option of exclusion of these rules seems out of question from the outset, only one option remains: the option of "cutting" these horizontal rules from the original horizontal instrument and introducing them into the Code, in an adapted form which would only refer to copyright law. Yet, such option is problematic since it is at odds with the general effort of European Institutions for simplification and consistency of European (Intellectual Property) law, as highlighted by various better law-making initiatives. Indeed, such option would lead to opposite result, namely, the multiplication of texts and volume of European legislation. At the same time, the acceptance of this option practically puts into question the opportunity of the initial choice of the European legislator for horizontal and transversal rules in a given issue within Intellectual property law, without, however, obvious justification.

Likewise, a European Copyright Code would fail to fulfil the function of consistency, accessibility and rationality of the law. In fact, a 'maximalist' European Copyright Code which goes beyond the consolidation and review of the existing *acquis* will probably contain concepts, definitions and legal rules which are of common interest of all intellectual property rights, such as, for instance, contracts, exceptions and limitations and other. In this case, a European Copyright Code will not simplify or ease the application of the European legislation, given that Intellectual Property Law, especially in the not so rare case of simultaneous exploitation and protection of multiple Intellectual Property rights, since multiple and fragmented legal instruments dealing with each of these rights will still apply. In addition, the introduction of a new "epicentre" of the system of sources of law[57] in the form of an EU Copyright Code will lead to an impractical two-gear European IP law, composed by a codified legal framework on copyright law, on the one hand, and disparate legal texts on Industrial

Property law on the other. This situation will certainly not improve legal security to the desired extent, given the interaction between various IP rights.
In sum, the idea of codification in the field of Copyright law may undoubtedly be considered as a *prima facie* good initiative, at least as far as its purposes for rationality, clarity, consistence and further development of the *acquis* in the field of copyright law is concerned. However, any Code should be adopted not for its own the sake but because of the advantages it presents.[58] The previous analysis has showed that, a European copyright Code, beyond some positive aspects, presents serious theoretical and practical shortcomings. These are due to its limited scope of copyright law which definitely creates a fundamental concern about the efficiency and, therefore, the opportunity of a European copyright Code, especially from a structural point of view.

V. Final Remarks: Lifting dogmatic barriers in EU IP law: Towards a European Intellectual Property Law Code?

In conclusion, we can make the following assumptions.
1. If it is accepted that codification and update of the European *acquis* is a necessary and useful endeavour, it seems indispensable that the contours of the latter should be carefully defined. To this end, any codification initiative in that field at the European level should take into account the theoretical background and the practical needs that characterize the actual legal landscape. This includes, among others, the approximation of different IP rights and the recognition of the systematic unity of Intellectual Property Law, as well as the need for a simple, accessible and comprehensive legal framework for European Intellectual property law as a whole.
2. The current theoretical background and practical needs in intellectual property law should be reflected on the choice of structural paradigm for codification projects in the field of intellectual property. On these grounds, if a European Code is to come in the future in this field, a shift in its scope should be made, in order to encompass IP law as a whole.[59] A European Intellectual Property Code[60] would reflect the *de facto* and *de lege* approximation of different IP rights. Moreover, such Code could promote the simplicity, accessibility and consistency of the legal framework within Intellectual Property law, by creating a new "epicentre" of the system of sources of law and gathering all the relevant legal rules of the European legislation on Intellectual Property rights in one place. Furthermore, an IP Code would allow for a transversal regulation of Intellectual Property law at the European level, where this would be found as desired and appropriate[61], after taking into account the common and specific needs of each IP right and carefully respecting the true and substantial diversities between the branches of intellectual property. On that basis, a European Copyright Code, gathering all copyright specific texts would fit better as a "book" within a comprehensive *European Intellectual Property Code*.
3. It seems important that the European Legislator adopts from the outset the most appropriate structural paradigm for the construction of European Intellectual Property law in the future. To our view, codification and Europeanization process should lead to integration and not to fragmentation of European IP law in the future. It is, therefore, suggested that the case for a European Copyright Code should be transformed into a case for a European Intellectual Property Code. While the adoption of a European Copyright Code promotes decisively the fragmentation of Intellectual Property Law, the introduction of a European Intellectual Property Code follows the

paradigm of integration for the development of European (and even national, if we consider the spin-off effect of such Code) Intellectual Property Law in the future.

4. More generally, the future development of European Intellectual Property Law should not have as starting point obsolete and dogmatic considerations of the past, such as the dogmatic division between copyright law and industrial property law. What is more, efforts should be made in order to lift the dogmatic barriers of the past, when constructing European IP Law. The role of European Academics to this direction is certainly crucial.

[1] Hilty R. M. (2004), Intellectual property and the European Community's Internal Market Legislation-Copyright in the Internal Market, IIC, 760 ff.
[2] Lei n.° 45/85 de 17 de Setembro 1985. Alteração do Decreto-Lei n.° 63/85 de 14 Março, e do Código de Direito de Autor e dos Direitos Conexos.
[3] Codice della proprietà industriale (decreto legislativo 10 febbraio 2005, n. 30).
[4] *Cf.* the proposal for international codification of copyright law, Sterling J.-A.-L. (2002), International Codification of Copyright Law: Possibilities and Imperatives, Part one, IIC, 270 ff.
[5] Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, *A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, Brussels, 24.5.2011, COM(2011) 287 final.
[6] *Ibid.* p. 11. See also Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 76 ff.
[7] Brussels, 13.7.2011 COM (2011) 427 final.
[8] *Ibid.* p. 13.
[9] Green Paper *on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market* of the 13 July 2011, Brussels, 13.7.2011 COM(2011) 427 final, 16, question n° 13: "What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code?"
[10] Besides, the choice of the EC to initiate public consultations on the issue of European Copyright Code incidentally, ie. within preparatory instruments that deal with other, substantially different issues has been dully criticized. See for instance Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at : < ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 82: "Quelle que soit la position retenue un consensus s'opère sur le fait qu'une telle question apparaît beaucoup trop importante pour être traitée à l'occasion d'un livre vert au domaine, certes important, mais néanmoins circonscrit à la seule diffusion en ligne des œuvres audiovisuelles. Ce n'est pas le lieu de s'interroger sur une question d'une telle envergure. Et la démarche contraire pourrait même paraître suspecte , elle pourrait laisser à penser que la Commission entend procéder « en catimini » alors pourtant que, comme elle le souligne à juste titre, il s'agit là d'une telle réforme d'envergure ; sauf à considérer que le Livre vert est l'occasion dont la Commission se saisit pour « prendre la température » sur cette question, s'agissant de la première consultation ouverte lancée depuis que l'idée du Code a été évoquée dans la stratégie de mai 2011. Quoi qu'il en soit, l'importance d'une telle réforme – tant sur le plan juridique que politique – nécessiterait au minimum un livre vert spécifique et une concertation officielle et directe sur ce sujet."
[11] "International Network Project on a European Copyright Code". For further information about the project see: <www.copyrightCode.eu> [accessed 30.04.2014].
[12] For a critical approach on the (limited) scope of the Wittem Code, see Ficsor M. (2012), An Imaginary "European Copyright Code" and EU copyright policy, 20th Annual Intellectual Property Law & Policy Conference, Fordham University School of Law, 12-13 avril 2012, online at: <http://fordhamipconference.com/wp-content/uploads/2010/08/Ficsor.EUCopyCode.pdf>, *passim*.
[13] On that issue see e.g. Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at : <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 76.
[14] See The Wittem Project, European Copyright Code (2010), online at: www.copyrightcode.eu/Wittem_European_copyright_code_21 april 2010.pdf [accessed 30.04.2014], 6 and 8. It should be noted that the Wittem Code cannot be considered a mere restatement or consolidation of the norms of the directives since, on occasion, it deviates from the acquis, The Wittem Project, European Copyright Code (2010), online at: www.copyrightcode.eu/Wittem_European_copyright_code_21 april 2010.pdf [accessed 30.04.2014], 6. *Cf.* Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final,

online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 76: "Partant de l'acquis, ses auteurs ont élaboré un instrument – bâti selon l'architecture d'un Code – qui comporte certaines innovations".

[15] See Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 76 : "Une codification du droit d'auteur pourrait matériellement être envisagée, ainsi que l'ont démontré les rédacteurs (des universitaires européens) du « Projet Wittem », qui a abouti à une proposition doctrinale de Code européen du Copyright.

[16] See The Wittem Project, European Copyright Code (2010), online at: www.copyrightcode.eu/Wittem_European_copyright_code_21 april 2010.pdf [accessed 30.04.2014], 5. *Adde ibid.* p. 8: "Believing that the design of a European Copyright Code might serve as an important reference tool for future legislatures at the European and national levels".

[17] See for instance Ficsor M. (2012), An Imaginary "European Copyright Code" and EU copyright policy, 20th Annual Intellectual Property Law & Policy Conference, Fordham University School of Law, 12-13 avril 2012, online at: <http://fordhamipconference.com/wp-content/uploads/2010/08/Ficsor.EUCopyCode.pdf> [accessed 30.04.2014]; Ginsburg J. C. (2011), European Copyright Code-Back to first principles (with some additional detail), Auteurs&Media, 1, 5 ff.

[18] See among other the collective book Synodinou T. E. (Ed) (2012), Codification of European Copyright Law, Challenges and Perspectives, Wolters Kluwer Law & Business, *passim* and the several contributions thereto.

[19] On the symbolic significance of a Codification at the European level issue see Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff, 390: "A Codification of European private law can be seen as part of a process of state formation, just as Union citizenship or symbols such as a hymn or a flag." *Cf*. Binctin N. (2010) Pour un Code communautaire de la propriété intellectuelle *in Droits de propriété intellectuelle, Liber amicorum Georges Bonet*, Coll. IRPI, n° 36, Litec, 51 ff. and esp. 64: "Un Code Communautaire de la propriété intellectuelle serait un instrument de l'intégration tangible de l'Union dans l'économie du savoir et un symbole de l'intégration des créateurs communautaires."

[20] Smits J. (2013), Of the vocation of our age against Codification: on civil Codes in the Information society, Faculty of Law, Maastricht University, online at: <http://www.ssrn.com>, [accessed 30.04.2014], 4.

On the rational and systematic nature of a codification see e.g. Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff, 372 ff.: "Moreover [codification] […] is based on the belief that the legal rules can be reduced to a rational system. A codification, therefore, aims at presenting its subject matter as a logically consistent entity of legal rules and institutions. It thus promotes the internal coherence of the law and makes it more easily comprehensible. And it supplies both the conceptual tools and the intellectual matrix for the further development of the law. The third characteristic of a codification therefore is its systematic nature."

[21] *Cf.* Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff, 372 ff.

[22] It should be noted that for some commentators, codification should not be considered a mere official collection of laws or cases, or the compilation of fragments, from earlier legal literature but the drafting of a new text specifically for the occasion. See on that issue Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff., 373-374: "A related point is made when it is stated that a codification is a new text specifically drafted for the occasion rather than the official collection of laws or cases, or the compilation of fragments, from earlier legal literature." *Cf.* the developments on the 'maximalist' reading of a European Copyright Code *infra* at III.B.2

[23] See Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff, 372 ff. See also from another point of view, Smits J. (2013), Of the vocation of our age against Codification: on civil Codes in the Information society, Faculty of Law, Maastricht University, online at: <http://www.ssrn.com>, [accessed 30.04.2014], 7, referring to the codification as a "means to *manage* information."

[24] See for instance Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 11 February 2003 –

"Updating and simplifying the Community acquis", COM(2003) 71 final - Not published in the Official Journal, p. 12: "Codification seeks to clarify the law by bringing together, in a new legal act, all the provisions of an act together with any subsequent amendments. This process renders the law simpler by establishing a single authoritative text, notably by deleting obsolete and overlapping provisions ; by harmonising terms and definitions; and by correcting errors without substantive change. Codification brings major benefits by providing legally secure texts that are far more readily understood by users."

[25] See for instance Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 11 February 2003 - "Updating and simplifying the Community acquis", COM(2003) 71 final - Not published in the Official Journal: "This Communication follows on from the Action Plan "Simplifying and improving the regulatory environment". Since the Community was established, the Community acquis has never undergone a full examination. The Commission proposes a Framework for Action aimed at simplifying the Community acquis and sets the following six objectives: simplify the acquis; consolidation of the acquis must be completed and kept rigorously up to date; codification; reviewing the organisation and presentation of the acquis; ensure transparency and effective monitoring at political and technical level; establish an effective implementation strategy."; *ibid.* p. 12: "[Codification] cuts back on the volume of the secondary Community legislation (by an estimated 35,000 OJ pages compared with the 22,500 pages that represent the 25% objective for reduction set in the Commission's Communication to the Laeken European Council in December 2001)".
For a presentation of the various initiatives in the field of the amelioration of the regulatory environment in general from the European Commission see Voermans W., Moll Ch., Florijn N., Van Lochem P. (2008), Codification and consolidation in Europe as means to untie red tape, online at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113755> [accessed 30.04.2014]; for an overview of EU initiatives see http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10108_en.htm.
Cf. Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff, 389: "A forceful argument of codification has usually been the reduction of the complexity of legal sources. […] This also takes care of the closely related argument of legal certainty to be established or at least advanced by way of codification.

[26] This type of codification of European law is also known as formal or official legislative consolidation. The official consolidation may be either vertical or horizontal. In the first case, the new instrument incorporates the basic instrument and instruments amending it into a single instrument. In the second, the new instrument incorporates several parallel basic instruments - and amendments thereto - relating to the same matter into a single instrument. On that issue see the official glossary of the EU at the website: <europa.eu/legislation_summaries/glossary/legislation_codification_en.htm> [accessed 30.04.2014]. Examples of codified instruments may be found also in the field of European Intellectual property law and more precisely in Trademark law.

[27] See on that issue http://ec.europa.eu/dgs/legal_service/consolida_en.htm [accessed 30.04.2014]: "An example is the Council Directive of 15 July 1975 on waste, which has been amended several times and was consolidated on 20 November 2003, this consolidation then being used as a basis for the codified instrument."

[28] See http://ec.europa.eu/dgs/legal_service/consolida_en.htm [accessed 30.04.2014].

[29] See Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at : <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 78 : "Codification *a minima*. Tout d'abord, dans une perspective minimaliste, l'entreprise de codification consisterait à regrouper dans un même instrumentum les textes existants. Ceci ne serait alors au mieux qu'une amélioration de pure forme."

[30] See the Communication "Updating and simplifying the Community acquis", COM(2003) 71 final, p. 12.

[31] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world" (COM(2007) 242 final): "This could encompass a comprehensive codification of the present body of EU copyright directives in order to harmonise and consolidate the entitlements provided by copyright and related rights at EU level. This would also provide an opportunity to examine whether the current exceptions and limitations to copyright granted under the 2001/29/EC Directive need to be updated or harmonised at EU level."; Communication From The Commission To

The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, *A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, Brussels, 24.5.2011, COM(2011) 287 final; Green Paper *on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market* of the 13 July 2011, Brussels, 13.7.2011 COM(2011) 427 final, 13: "It could also provide the opportunity to examine whether the exceptions and limitations to copyright allowed under the Information Society Directive need to be updated."

[32] Ficsor M. (2012), An Imaginary "European Copyright Code" and EU copyright policy, 20th Annual Intellectual Property Law & Policy Conference, Fordham University School of Law, 12-13 avril 2012, online at: <http://fordhamipconference.com/wp-content/uploads/2010/08/Ficsor.EUCopyCode.pdf>, 7; explicitly, Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at : <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 77 : "2. 2. 1.1. – La méthode de codification. A minima, le Code évoqué par le Livre vert consisterait à regrouper dans un même instrumentum les textes existants. En réalité, la Commission ne paraît pas s'en tenir à l'idée d'une codification « à droit constant » puisque, dans la communication précitée, elle suggère la création d'un Code européen du droit d'auteur qui reprendrait le corpus existant afin d'en assurer la cohérence et permettrait d' «actualiser» et d'«harmoniser» les exceptions prévues par la directive 2001/29/CE. »

[33] Green Paper *on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market* of the 13 July 2011, Brussels, 13.7.2011 COM(2011) 427 final, 13: "The Commission undertook in the "IPR Strategy" to examine the more far-reaching approach of the creation of a comprehensive unitary European Copyright Code. Such a unitary European Copyright Code could be based on a codification of the existing EU copyright directives where the need to go beyond the current harmonisation will be examined."

[34] Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at : <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 78: "Codification a maxima. Dans une perspective maximalise, ensuite, l'entreprise de codification consisterait à réfléchir à une législation communautaire complète. L'intérêt d'un Code est justement qu'il constitue un instrument complet."

[35] Notwithstanding, it is not clear whether the proposed optional uniform EU copyright title would make part of such European Copyright Code. See Ficsor M. (2012), An Imaginary "European Copyright Code" and EU copyright policy, 20th Annual Intellectual Property Law & Policy Conference, Fordham University School of Law, 12-13 avril 2012, online at: <http://fordhamipconference.com/wp-content/uploads/2010/08/Ficsor.EUCopyCode.pdf>, 7: "It does not seem sufficiently clear what the European Commission meant by the term European Copyright Code, and it cannot be seen clearly either whether or not there would be a necessary link between the adoption of European Copyright Code and an optional "unitary" copyright title."

[36] Of course, the question of feasibility of a European Copyright Code and the choice of legal instrument are issues that are related with the competence of the EU for the adoption of such Code.

[37] See again the question n° 13 of the Green Paper *on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market* of the 13 July 2011, Brussels, 13.7.2011 COM(2011) 427 final, 16: "What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code?"

[38] The question of feasibility of a European Copyright Code go beyond the framework of the present study.

[39] Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 79 ff .

[40] Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 79.

[41] See on that issue, Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM

(2011) 427 final, online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 76 ff. : "La question d'une codification est née du constat selon lequel la construction communautaire du droit d'auteur et des droits voisins s'est réalisée par strates successives : l'accumulation de directives, adoptées sans réelle cohérence d'ensemble, semblerait désormais devoir laisser place à un système plus cohérent."
Cf. Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff, 386, referring to the European Contract law: "[T]he approach adopted by the European legislature has been fragmentary and incoherent. That has been criticized again and again. The question of a codification was thus bound to arise also on a European level."; Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 76 ff.: "On retrouve ici encore la réflexion menée en droit européen des contrats, à la suite du livre vert du 1er juillet 2010 ; l'idée serait pour ainsi dire « dans l'air du temps ». Il s'agirait bien d'encourager une approche plus cohérente du droit de l'UE, par ailleurs promue par la Cour de justice."

[42] On the role of the Court of Justice on a European Copyright Code *à droit constant* see Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at : < ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 79 and 80.

[43] On that principle see Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at : < ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 79.

[44]Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 80 : La jurisprudence récente illustre en effet combien la directive 2001/29 suscite de importantes difficultés sur ce point (v. supra, sur le cloud computing).

[45] See for instance Trans Europe Experts, Pole de droit de la propriété intellectuelle (2011), Réponse au Livre Vert sur La distribution en ligne d'œuvres audiovisuelles dans l'Union européenne, COM (2011) 427 final, online at: <ec.europa.eu/internal_market/consultations/2011/audiovisual/non-registered-organisations/trans-europe-experts_en.pdf> [accessed 30.04.2014], 81, using the example of ownership of copyright: "Sécurité juridique. Harmonisation de la titularité. L'entreprise de codification permettrait également de conduire à des solutions claires en termes de titularité des droits. En effet, des divergences subsistent entre les États membres sur la détermination de la qualité primaire d'auteur, notamment dans le cadre des œuvres plurales. Par ailleurs, l'harmonisation des conditions légales de dévolution des droits pourrait également éviter les conflits de qualification. »

[46] See for instance Chiou Th. (2013), On royalties and transfers without (monetary) consideration: Looking for the 'magic formula' for assessing the validity of remuneration clauses of copyright transfers under French Copyright law", (Remarks under the light of the decision of the French Supreme Court, 1st Civil Chamber, 1 December 2011, case No. 09-15779), IIC, 585-598 and esp. 598, on the issue of transfer of copyright without consideration, where it is argued that it seems preferable to improve insufficiencies of national copyright laws from the outset at the European level.

[47] Liakopoulos Th. (2001), *Industrial Property*, Sakkoulas, 7· Antonopoulos V. (2005), *Industrial Property*, 2nd ed. Sakkoulas, n° 160, 171.

[48] Liakopoulos Th. (2001), *Industrial Property*, Sakkoulas, 7.

[49] See Liakopoulos Th. (2001), *Industrial Property*, Sakkoulas, 17. *Cf.* Christodoulou K. (2007), Remarks on general theory of immaterial goods, DiMEE, 2, 180, footnote 2, referring to the decision of the Single Member First Instance Court of Athens, 275/2007, DiMEE 2/2007, 237.

[50] Liakopoulos Th. (1996), Issues of Commercial Law, t. III, Sakkoulas, 1.

[51] Liakopoulos Th. (1996), Issues of Commercial Law, t. III, Sakkoulas, 2.

[52] *Cf.* Liakopoulos Th. (1995), Towards the law of immaterial goods, NomEpith., t. 21, 5.

[53] See article 118 and 262 of the Treaty on the functioning of the European Union, referring to "European intellectual property rights". Moreover, article 207 par. 1 and 4 refers to "commercial aspects of intellectual property". In addition, according to article 17 par. 2 of the Charter of Fundamental Rights of the European Union "Intellectual property shall be protected."

[54] Many secondary European legislative instruments recognize the unitary character of intellectual property. See for instance art. 1 par. 2 b. of the Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

[55] Βλ. Stamatoudi E. (2006), *European Competition law and Intellectual Property*, Nomiki Viviliothiki; Binctin N. (2012), Droit de la propriété intellectuelle, 2nd ed., Lexis-Nexis, n° 1, 20· J. Schovsbo J. (2012), The exhaustion of Rights and Common Principles of European Intellectual Property Law, *in* Ohly A. (Ed) (2012), Common Principles of European Intellectual Property Law, Mohr Siebeck, 169 ff.

[56] Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff, 372.

[57] Zimmermann R. (2012), Codification. The Civilian Experience Reconsidered on the Eve of a Common European Sales Law, ERCL, 367 ff, 372.

[58] *Cf.* Derclaye E. (2010), An EU Copyright Code : what and how ? », communication à BLACA/IPI Seminar, London, 14 October 2010, online at: <www.blaca.org/An%20EU%20copyright%20code-blaca%20derclaye.ppt.>, [accessed 30.04.2014]: "Not a Code for the sake of a Code but because of advantages, namely more legal certainty, ease of application, reduction of costs – otherwise simple academic exercise."

[59] *Cf.* the French Intellectual Property Code, which is an example of a 'minimal' codification in intellectual property law, in the sense that it is only a codification *a droit constant*. On this codification see, among others, Benabou V.–L., Varet V. (sous dir. de A. Françon) (1998), La codification de la propriété intellectuelle: étude critique et prospective. Mission de recherche droit et justice, Institut de recherche en propriété intellectuelle Henri-Desbois, La Documentation française.

[60] See Binctin N. (2010) Pour un Code communautaire de la propriété intellectuelle » in Droits de propriété intellectuelle, Liber amicorum Georges Bonet, Coll. IRPI, n° 36, Litec, 51 ff.

[61] See Binctin N. (2010) Pour un Code communautaire de la propriété intellectuelle » *in Droits de propriété intellectuelle, Liber amicorum Georges Bonet,* Coll. IRPI, n° 36, 51 ff and esp. 64, according to whom a European IP Code could contain a unified regulatory system of civil and criminal remedies against IP infringement for intellectual property law as a whole.