

Sheldon W Halpern and Phillip Johnson, *Harmonising Copyright Law and Dealing with Dissonance: A Framework for Convergence of US and EU Law* (Edward Elgar, 2014), x and 195 pp.

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This slim but elegantly written and produced volume analyses the whys, wherefores, wherebys and downright difficulties of so harmonising US and EU copyright law that they come into a state of convergence adapted to what the authors describe as an “inherently transnational world contemplated by borderless commerce conducted via an intangible internet” (p. 1). Sheldon Halpern and Phillip Johnson argue that in both the USA and the EU an instrumentalist rather than an author-centric approach is taken to the development of copyright law, albeit that in the latter this must be set alongside the recognition within most of its Member States that copyright embraces personality or moral rights alongside property or economic ones (the UK of course providing some sort of recent, awkwardly constructed bridge between the two which might – or might not – be of use in a US/EU harmonisation). The authors are therefore with the majority in the US Supreme Court case of *Golan v Holder* 132 S.Ct. 873 (2012) in rejecting the dissenting opinion that “[The] utilitarian view of copyrights and patents, embraced by Jefferson and Madison, stands in contrast to the ‘natural rights’ view underlying much of continental European copyright law” [which] “sets us apart from continental Europe and inhibits us from harmonizing our copyright laws with those of countries in the civil-law tradition”. But this does not lead Halpern and Johnson to suppose that the process of harmonisation would in fact be plain sailing all the way. Much of the book is about the rocks and shallows through which the harmonising pilot would have to steer a careful course. For example, the authors make due acknowledgement of, and some interesting comments upon, perceptions of linkage between national identities, culture and law as a potential obstacle to progress. This certainly seems to me to have bedevilled the European contract law projects of the last twenty years, culminating in the abandonment at the end of 2014 of the EU’s proposed Common European Sales Law. There is however much food for thought in a quotation which Halpern and Johnson make from a 1992 article by Arthur Rosett which might still be the basis for at least an examination question if not full-blown PhD research: “There is a tendency for lawyers to behave as though they are the ones who decide whether law is unified, harmonious, or conflicting. To some extent they do, but harmonisation is primarily driven by business practice, not by the grand theoretical structures of legal scholars.”¹

The main thrust of what follows in this book, however, is indeed legal analysis of the legal difficulties standing in the way of the projected harmonisation of US and EU copyright. The second chapter reflects on the limitations of international minimum standards for copyright as set first by the Berne Convention and subsequently by TRIPS, the WCT and other international agreements. The authors argue that these leave “a great rolling space” between an uncertain floor of

¹ Arthur Rosett, “Unification, Harmonization, Restatement, Codification and Reform in International Commercial Law”, (1992) 40 *American Journal of Comparative Law* 683, 695.

protection and a wholly undefined ceiling. They also discuss the variability of approaches to treaties as sources of law in national systems and the lack of authoritative interpretations from international bodies. The conclusion is that a harmonisation process relying on international minimum standards is very unlikely to succeed within the existing general structures of national and international laws.

Chapter 3 turns to the well-known constitutional basis for copyright in the USA. Halpern and Johnson make the important point that the constitutional purpose of copyright was set at a point when the English understanding of copyright was based on the great case of *Donaldson v Becket* (1774) 4 Burr 2408, 2 Bro PC 129. This explains why, as Tomás Gómez-Arostegui has recently been showing in great detail, that decision retains greater significance in the USA than it now has in the jurisdiction of its handing down. For their part, Halpern and Johnson accept that the constitutional purpose does set meaningful limits on how far the USA can go in harmonisation processes, but go on to survey how the Supreme Court has interpreted these limits in a manner sufficiently broad and flexible as to enable copyright to meet new technology and new requirements, including harmonisation measures (the *Golan* case being one example of this). What remains non-eliminable, however, is the First Amendment and the accommodation that has been struck between copyright and freedom of speech by way of the idea/expression dichotomy and the generality of the fair use exception. Any harmonisation process will have to respect these core points.

This sets the scene for Chapter 4's treatment of the legislative competence of the EU in any such harmonisation process. Halpern and Johnson trace the history of the harmonisation process within the EU, seeing a move from a minimum-standard, partial basis to one of full harmonisation, with the possibility of a European Copyright Code or Title rising up the agenda of at least the EU institutions and the Court of Justice of the European Union interpreting the harmonising legislation ever more specifically. But this process has been driven by a policy emphasising high levels of author protection and economic rather than moral rights, while tending to minimise exceptions into narrowly defined and specific instances. While in general this makes harmonisation with the USA easier to contemplate, Chapter 5 goes on to deal with the problematic question of how to deal with exceptions, given the importance of fair use in the USA. Could an open-ended general exception be incorporated within the EU model? After all, the US Copyright Act has in addition to fair use a good number of specific exceptions. The European Convention on Human Rights also recognises in its Article 10 the elemental importance of freedom of expression, albeit not in as unqualified a fashion as the First Amendment. European copyright legislation must be read in a manner that encompasses the Article 10 ECHR right, even if it also specifically highlights the Berne Convention's so-called "three-step test" (certain special cases, no conflict with normal exploitation, no unreasonable prejudice to the right-holder's legitimate interests). Specific exceptions have anyway been interpreted flexibly by the courts, and the uncertainty with which the fair use exception is frequently charged therefore applies just as much in the relevant EU rules. Recognising this flexibility as a given is the keynote for the EU if exceptions are not to remain as a barrier to harmonisation with the USA. Conversely, US movement may be required in return in relation to questions of originality and fixation in relation to sound recordings, broadcasts and performers' rights. This, Halpern and Johnson suggest, might be achievable via the Commerce Clause and the Treaty

Power under the US Constitution. The ultimate goal which they propose is an EU/US treaty embodying a shared copyright code to be implemented further by enactments within the two territories. This would be enforceable in the respective domestic courts, with each system being required to take account of the other's decisions just as courts in the United Kingdom must take account of the decisions of the European Court of Human Rights.

The arguments put forward so persuasively in this book may seem to be about a matter which no-one else is at present contemplating seriously. Yet the possibility of such an EU/US dialogue in the near future is not so fanciful, given that not only is a European Copyright Code or Title on the table of policy possibilities but a full-scale revision of the US Copyright Act is being called for by the Register of Copyrights and investigated by Congress. It would be very strange if these two projects were developed in isolation from each other, or with any deliberate intent to preserve or indeed create difference for its own sake alone. (The same might be said of any replacement of the Copyright, Designs and Patents Act 1988 in the United Kingdom, whether or not still a Member State of the EU.) So trans-Atlantic dialogue about what form of copyright is needed as the twenty-first century moves towards its age of majority is certainly likely, and the case for greater harmonisation is certainly something that the copyright industries and other stakeholders will want to press. My own experience as a law reformer and would-be harmoniser within the EU suggests that the dialogue will tend to be shouted down by certain vested interests of a kind that has been dubbed "crypto-nationalist", while the world of e-commerce, at least so far as concerns consumers, is not quite so borderless as Halpern and Johnson suggest. But they succeed in showing what, in a rational world, the bounds of the discussion might be; and their lucid and persuasive style is the very model of how any future conversation on the subject should (but probably won't) be conducted.

