Contents

CH	APT	TER 1: HARMONY, POLICY AND POWER	1
	A.	THE TANGLED ENTICEMENT OF "HARMONISATION"	1
		1. The Reality of a Transnational Copyright World	1
		2. A Toolbox and Vocabulary for the New World	3
	B.	A CLOSER LOOK AT HARMONISATION AND	
		CULTURE	12
		1. Why?	12
		2. Why Not?	14
		3. Nationalism and Culture	16
		4. The "Sanctity" of Copyright as Part of National	
		Culture	20
	C.	THE PERCEIVED DIVIDE: OF NATURAL RIGHTS,	
	О.	AUTHORS' RIGHTS AND PROPERTY RIGHTS	25
		1. The United Kingdom and the United States	25
		2. The Authors' Rights States of the European Union	30
		3. The European Union	32
		4. A Bridge Too Far?	34
CH	APT	TER 2: MINIMUM STANDARDS AND	
		INTERNATIONAL CODES	36
	A.	WHEN IS A STANDARD NOT A STANDARD?	36
	В.	UNIFORM LAWS – IT WAS ALL TRIED BEFORE	38
	C.	THE INTERNATIONAL TREATIES AND THE	
	O.	MINIMUM STANDARDS THEY SET	41
		1. Subject Matter: Attempts at Uniformity of Definition	42
		2. Economic Rights: Attempts at Enumeration	42
		3. Exceptions and Limitations: The Law Giveth and	
		the Law Taketh Away	44
		4. Term	46
		5. Technical Protection Measures and Rights Management	46
		6. A Harmonisation Mirage	47

	D.	TREATY INTERPRETATION: WITHIN THE	
		INTERNATIONAL SPHERE	47
		1. Vienna Convention: Clear Rules?	47
		2. An Elusive Search for Interpretive "Uniformity"	48
		3. Authoritative Interpretation: WIPO Conventions	50
		4. Authoritative Interpretation: WTO TRIPS	51
	E	TREATY INTERPRETATION: WITHIN THE	51
	2.	DOMESTIC SPHERE	54
		1. Judicial Deference	55
		2. Legal Culture	58
		3. Language	59
	F	NATIONAL COURTS AND NATIONAL VIEWS	62
	1.	1. United States	62
		 United Kingdom France 	64
			67
	C	4. Netherlands	69
	G.	WHAT DOES THIS ALL MEAN?	70
CH	ΙΔΡΊ	TER 3: WHY WE DON'T PLAY WELL WITH OTHERS:	
CI	1711	US CONSTITUTIONAL CONSTRAINTS ON	
		HARMONISATION OF COPYRIGHT LAW	71
		HARMONISATION OF COPTRIGHT LAW	/1
	A	IN THE BEGINNING WAS THE WORD: AMERICAN	
		COPYRIGHT LAW AND THE US CONSTITUTION	71
		1. A Limited Power	71
		2. Down the Constitutional Rabbit Hole: "When is a	/ 1
		Raven a Writing ?"	73
		3. Down the Constitutional Rabbit Hole: Originality,	13
			77
		Theme and Variations	77
		4. Down the Constitutional Rabbit Hole: What is the	00
		Purpose of "Purpose"?	80
		5. Down the Constitutional Rabbit Hole: Freedom and	0.0
		Limits of Speech	83
		(i) Idea/expression: when is a dichotomy really a	0.4
		spectrum?	84
	ъ	(ii) Fair use and predictability	87
	В.	ATTEMPTS TO AVOID THE CONSTITUTIONAL	~-
		RABBIT HOLE: ALTERNATIVE SOURCES OF POWER	95
		1. The "Commerce Clause"	95
	0	2. The Treaty Power	96
	C.	THE ESSENTIALS	96

СНАРТ	TER 4: IF THERE IS A WILL, THERE IS A WAY: THE BROAD LEGISLATIVE COMPETENCE OF THE	
	EUROPEAN UNION	98
Α.	A HISTORY OF HARMONISATION IN THE	
	EUROPEAN UNION	98
	1. First Phase: An Attempt at Selective Uniformity	98
	2. Second Phase: More Specific Uniformity Directives	100
	3. Third Phase: The Unfulfilled Promise of the Lisbon	
	Agenda	101
	4. A Fourth Phase Emerges: The Hope of a Harmonised	
	Copyright Law	101
	5. The Role of the Court of Justice	102
B.	INTERNATIONAL LAW AND THE EU LEGAL ORDER	103
	1. Of Power and Policy: The European Union and the	
	International Conventions	103
	2. International Conventions and Internal Harmonisation	105
	3. International Conventions: Interpretative Aids	107
C.	THE GENERAL APPROACH OF THE EUROPEAN	NO 800056
	UNION TO HARMONISATION	109
	1. An Expansive View of Authors' Rights: The Mantra	WINDOWS -
	of a "High Level of Protection"	109
	2. European Instrumentalism and a "High Level of	
	Protection": Balance	111
D.	LEGISLATIVE POWERS OF THE EUROPEAN UNION	112
	1. The Many Diverse Forms of Legislation	113
	2. Conferral: Differences and Similarities	119
	3. Types of Competence and Pre-emption	120
	4. The Competences Used to Harmonise Copyright	121
	(i) A multitude of methods and powers	121
	(ii) Article 114	122
	(iii) Articles 52 and 63	125 127
E	(iv) Article 118 THE LIMITS OF EU POWER: RESTRICTIONS ON	12/
E.	COMPETENCE	128
	1. The "Culture Clause"	128
	2. The Principle of Subsidiarity	130
	3. The Principle of Proportionality	131
	4. The Rule on National Property	132
	5. The Protection of Fundamental Rights	133
F.	HOW FREE IS FREE?	138

CHAPTER 5: A FRAMEWORK FOR HARMONISATION					
A.	RECO	NCILING THE IRRECONCILABLE: BRIDGING			
	THE U	US/EU DIVIDE	139		
	1. Do	eflating the "Cultural" Obstacles	140		
	2. Of	f Fairness and Flexibility: The Role of Language and			
	th	e Conceptual Essence of "Fair Use"	141		
	(i)	Flexibility and free expression: the United States	142		
	(ii) Free expression and flexibility: the European			
		Union	144		
	(ii	i) Flexibility in the EU in general	147		
	3. Fl	exibility: The Three-Step Test	148		
	(i)	1	148		
	(ii	,	150		
	(ii	i) The drafting history of the three-step test	152		
	(iv	No exception is that "definite"	153		
	(v) Flexibility as an inherent part of copyright	154		
	(v:	i) Judicial interpretation: legal certainty is not			
		merely the role of legislators	155		
	(v:	ii) State practice	156		
	4. Av	voiding Fixating on "Originality"	159		
	(i)	The broadcast right: originality and fixation	160		
	(ii) Performance rights and performers' rights	162		
		ne Possible "Safe Harbours" of the Commerce			
	Cl	ause and Treaty Powers	164		
	(i)	The Commerce Clause	164		
	(ii	,	168		
		eighbouring Rights and Placeholders	170		
В.		CONCILED FRAMEWORK	170		
		n International Code – Starting With Some Harmony	171		
		ational Decisions Having International Effect	173		
		dicial Co-operation and Law Reporting	175		
		nis is Not the End But it Might be the End of			
	the	e Beginning	175		
Bibliography					
Index					
			191		