Contents

Introduction

A "*Révérence*" is a concept with two interlinked facets.

On the one hand, it refers to "reverence": a profound form of respect, admiration, esteem, veneration, honour, awe even.

On the other hand, a "reverence" is a choreographic instrument. It is a type of curtsy: a movement that is done either by way of a bow, or through a bending of the knees, which constitutes a gesture of greeting and, again, respect.

Together, these dimensions show what this book seeks to achieve: a string of "curtsies" in all shapes and sizes, of all lengths and forms. A very diverse set of contributions, with a common goal.

In particular, this book seeks to honour Prof. Dr. Marie-Christine Janssens at the occasion of her retirement, by way of a small but telling reflection of the impact that she has had throughout her career at KU Leuven, both within and outside the university "walls".

Indeed, being far from a stern ivory-tower academic, Marie-Christine has made it her professional life's work to contribute to all aspects of the wondrous world of intellectual property law—both on an academic level and in the practical as well as legislative and policy sphere.

Hence, this book assembles a diverse group of contributors who seamlessly incorporate a varied array of perspectives. Its variety mirrors the diversity of Marie-Christine's professional life.

As may be expected in a book that honours a member of the proverbial intellectual property "hall of fame", this book includes a number of quotations. For this purpose, the right to quote is invoked, reiterating the intended purpose of this book and its ensuing non-commercial nature.

We take a bow before you, Marie-Christine, but today, it is you who deserves the applause.

Your retirement is the start of something new, with the time that is required for you to set your own agenda, in complete freedom and unencumbered by unnecessary academic and other deadlines. While we applaud you now, we sincerely hope that your retirement does not mark the end of your "performance". As we have already seen in the past year, the curtain is very far from closing. We are all fortunate enough to keep on welcoming you to the intellectual property law stage. In other words, we are all continuously vying for an encore. But first, we invite you to take a bow—and accept the applause that you so utterly deserve.

Frank Gotzen

Dank u Marie-Christine

We stonden klaar om eraan te beginnen. Een huldeboek vol wetenschappelijke bijdragen, want zo gaat dat veelal bij een overgang van "gewoon" naar "emeritus" hoogleraar.

Maar al snel liet je weten dat dit niet hoefde. Een "Festschrift" Duitse stijl wou je niet wegens te veel werk voor iedereen. Een echt "liber amicorum" wel, als het vooral zou bestaan uit korte persoonlijke bijdragen.

Nu, een persoonlijke bijdrage schrijven is niet per se makkelijker dan een neutraal wetenschappelijk artikel produceren, waarin alleen de inleiding en de slotzin een persoonlijke toets moeten vertonen.

De bedoeling was dat wie een bijdrage leverde, vooral zou focussen op kenmerkende herinneringen. Nu, zeker voor wie je heel goed kent, is het niet makkelijk kiezen tussen de vele gemeenschappelijke herinneringen, met al die conferenties die we samen hebben bijgewoond of samen georganiseerd en met al die teksten die we samen hebben geschreven.

Best kan ik me beperken tot twee dingen. Het prille begin en het jonge verleden.

Aan het begin stond een persoon. Dat was Rector Roger Dillemans die, in de sfeer van de jaren '80 in Vlaanderen, de toenmalige "Flanders Technology"- beweging

aan zijn universiteit wilde stimuleren met de creatie van een onderzoekscel voor de bescherming van nieuwe technologie. Dus dropte hij een klein briefje in mijn bus, schrijvende dat het toch wel goed zou zijn als aan de Faculteit Rechtsgeleerdheid een centrum zou worden opgericht voor de nadere studie van de rechten rond de bescherming van innovatie en creatie. Deze boodschap kwam bij mij terecht, omdat ik in Leuven de vakken industriële eigendom en auteursrecht doceerde. Wat nu gedaan? Mijn statuut was daar toen deeltijds, wat wilde zeggen dat ik niet zoveel in de facultaire pap te brokken had. Dan maar met dat briefje naar de Decaan getrokken. Dat was toen Prof. Dr. Jan Broekman. Alhoewel rechtsfilosoof en rechtstheoreticus was dit de man van de directe praktische actie. Hij besloot terstond dat de rectorale wens best kon worden verwezenlijkt met twee maatregelen. Vooreerst kreeg ik een bescheiden budgetje, voldoende om een aantal folders te kunnen drukken en versturen die aan de buitenwereld bekend zouden maken dat er in Leuven voortaan zoiets ging bestaan als een "Centrum voor Intellectuele Rechten" (CIR). Nog belangrijker, hij ging ervoor zorgen dat ik een halftijds assistent kreeg zodat dit centrum het stadium van een éénmansinitiatief zou kunnen overstijgen. Na vacature ben jij op dit mandaat gekomen. Tot mijn grote vreugde en opluchting want ik kende je als de studente die voor mijn vak "Auteursrecht" het beste examen ooit had afgelegd. En zo was het prille Centrum plots verdubbeld in aantal medewerkers, klaar voor verdere uitbreiding en nieuwe initiatieven. In de vele latere jaren, waarin het Centrum na enige omzwervingen een "Eygen Heerd" had gevonden in de Minderbroedersstraat heb jij daar altijd een stevige hand in gehad.

Het jongere verleden heeft dan de fusie zien ontstaan van CIR met het bijna even oude ICRI van Jos Dumortier. Hierdoor ontstond een veel grotere onderzoeksgroep die in staat was om succesvol mee te dingen in de talloze nationale, Europese en internationale onderzoeksprojecten die mee de financiële positie van de universiteit bepalen. Dit nieuwe en grotere CiTiP nam ook het roer over voor het onderwijs in een druk bijgewoond en drietalig advanced masterprogramma over "Intellectual Property and ICT Law".

Aan jou werd gevraagd om dit grote geheel te leiden. Je hebt dit met enthousiasme aanvaard. Met veel moed en energie heb je eraan gewerkt, alle dagen, om er een succesverhaal van te maken. Je bent ploegend en zwoegend overeind gebleven tussen de niet aflatende stromen van nieuwe of lopende onderzoeks-

projecten die moesten worden aangevraagd, gestroomlijnd, gecontroleerd en gerapporteerd. Velen zullen je hiervoor "Dank u" zeggen, wetende dat je dit deed ondanks een niet aflatende eigen wetenschappelijke activiteit met vele publicaties en doctoraten.

Maar nu kwam plots die tijd om een fakkel door te geven. Wil dit zeggen dat je ons vakgebied ook vaarwel gaat zeggen? Waarschijnlijk niet helemaal en zal je, zoals ik, gebeten door de microbe, er niet aan weerstaan om het nieuwe geheel vanop de zijlijn verder te blijven ondersteunen.

Met 65 begint het leven. Vol dans en muziek, met Rachmaninov en met, eindelijk, weer die viool.

Het ga je goed, Chris!

Frank Gotzen is professor emeritus aan CiTiP, KU Leuven en voorzitter van de internationale auteursrechtvereniging ALAI.

Lectrr

Séverine Dusollier

Marie-Christine seems to always have been part of my copyright research trajectory, to the point that I cannot remember our first meeting or conversation. She does, as she reminded me recently how I approached her, as a young researcher, shy and impressed, to ask her about a point she developed in a recent article on copyright exceptions (then already one of her favourite topics). Maybe my early shyness erased this first encounter for me, but other memories come to my mind, professional and amical alike, and it is difficult to select the most relevant or dear ones.

One particular collaboration might convey what doing IP research in a country as Belgium would mean. Marie-Christine and myself, through our two research centres, CIR for her (before it was transformed into the current CiTiP and CRIDS for me, had gotten a research contract from the Federal Government to revise the webpages of the Ministry of Economy on intellectual property. For the sake of a comprehensive and bilingual coverage of IP, we decided to share the work based on the different IP rights and then to translate into the other national language what was first drafted in French or Dutch. For instance, I and the researcher dedicated to that project would write pages on copyright in French, and Marie-Christine would revise them and translate them into Dutch (while being indulgent on my poor level in that language). It stays as a nice memory of a sound intellectual effort to render a complex legal topic into a mundane and accessible explanation for citizens and companies, and mostly of regular (and long) phone calls and exchanges around our insights and descriptions of intellectual property. Such dialectic conversations really marked our professional relationship, that continued in the Belgian IP Council, that she skilfully chaired for many years, and

in the European Copyright Society. I have found back an opinion we co-wrote together at the same time and published in the major newspapers in Belgium to protest against the then-discussed directive extending the duration of related rights in phonograms. In a country where the two linguistic communities have increasingly drifted apart in the last 30 years, such bridging research, helped with the fact that copyright is still a federal competence, has become rare.

Leaving Belgian Academia for France meant reducing the opportunities to meet Marie-Christine at conferences, in research projects or in governmental advisory boards. Though I see her still in more European contexts or sometimes at Belgian conferences or PhD defences, I miss our laughs and conversations that were so dear to me. She certainly was one of the academic Belgian authors who opened and eased the path of my own scientific career, as well as a friend all along the way.

En nu dat je een emeritus bent, Marie-Christine, hoop ik dat we elkaar soms zullen ontmoeten voor wijn, discussies over onze dochters (en jouw kleinkinderen) en … uitzonderingen op het auteursrecht!

Séverine Dusollier is professor of intellectual property law at Sciences Po Law School in Paris.

Martin Senftleben

"Festschrift" for Marie-Christine Janssens

Dear Marie-Christine,

Congratulations on all your enormous achievements! Honestly speaking, I do not know where to start. The European Copyright Society and the iconic Leuven Conference that took place under your presidency? The Trademark Law Institute and our analysis of the latest developments in trademark law and related fields? All the events on intellectual property and information law across the Benelux borders?

Thank you so much for many, many highly inspiring and, at the same time, very happy meetings and discussions! Whether it was about copyright law, trademark law, the impact of the internet and new technologies, legal-doctrinal overlap questions, the latest case law developments… you always offered food for thought and new perspectives! And whatever you decide to do next, the influence of your work will remain.

Just one little example: in "De impact van het internet op de sector van het auteursrecht (of is het omgekeerd?) – een analyse aan de hand van de rechtspraak van het Hof van Justitie", *SEW, Tijdschrift voor Europees en economisch recht* 2014, 165, you rightly predicted – 10 years ago! – important developments in copyright law and made comments which have remained valid to this day. With regard to the impact of fundamental rights, you described a climate change:

"Een laatste belangrijke beoordelingsregel die het Hof in het auteursrecht binnenloodst, is de noodzaak tot afweging van de belangen van rechthebbenden met andere fundamentele rechten. Het auteursrecht wordt nu voorgoed van zijn comfortabel eiland weggehaald. Het Hof past hier weliswaar vaststaande proportionaliteitsbeginselen van Europees recht toe, maar in de sector van het auteursrecht waren die nog niet helemaal doorgesijpeld."

As so often, you presented the main parameters of change in a nutshell: the principle of proportionality, coming along with fundamental rights balancing, could have a deep impact on copyright law. And you pose the right question: is the "comfortable island" (or should we say: the "well-protected fortress"?) of EU copyright law in danger of being inundated by competing rights and interests with a fundamental rights status, such as freedom of expression and information, freedom of the arts and sciences, etc.?

I have discussed this quotation from your article with my students many times. Over the years, an aspect of the title of your article also became a central element of the reflection… "Of is het omgekeerd?" Is it just the other way round? Should we speak about the impact of impermeable copyright protection on other fundamental rights? Will copyright reign supreme in the end?

Despite an increasing number of references to fundamental rights, it seems that the CJEU has not managed to arrive at a productive, meaningful application of the right to freedom of expression and information, freedom of the arts and sciences … To strike a proper balance between the right to property of copyright owners and these other rights and values, an approach would be necessary that renders competing fundamental rights capable of constituting real counterbalances to the protection paradigm in copyright law: counterbalances that have the potential to break the rule/exception configuration of EU copyright law that is strongly in favour of right holders. Considering the equal status of fundamental rights in the Charter, it seems wrong to assume that protection must be the rule and freedom of use without prior authorization must be regarded as an exception that requires a strong justification and thorough scrutiny in each individual case.

From an information law perspective, it is clear that the change of course you predicted in your 2014 article should be implemented in practice. *Taking infor-*

mation law seriously means taking competing fundamental rights seriously. Intellectual property regimes, such as copyright law, must create legal certainty not only for right holders but also for users invoking competing fundamental rights. The right holder perspective is not decisive. When competing fundamental rights are at stake, information law broadens the reference frame and seeks to establish legal certainty and a robust legal position for both right holders and users alike.

The fundamental rights rhetoric of the Court of Justice in copyright cases, however, is hardly capable of changing the equation. The current copyright framework simply does not offer users the chance of meeting right holders as equals – irrespective of the weight their fundamental rights may have in comparison with the protection interests of right holders. Adding fundamental rights cosmetics to the system without changing the equation, the CJEU cements and further stabilizes the existing rule/exception edifice that is strongly in favour of copyright holders.

In particular, it is highly problematic that the Court keeps repeating the mantra of internal balancing: the necessity to reconcile copyright protection with competing fundamental rights *within* the existing system of exclusive rights and limitations in EU copyright law (CJEU, 29 July 2019, case C-476/17, Pelham). As a result of this focus on internal balancing, overarching requirements for invoking exceptions and limitations – the assessment criteria following from the three-step test in EU copyright law – obtain a quasi-constitutional status. Although the three-step test is an element of secondary copyright legislation, it prevails over primary fundamental rights recognized in the Charter.

Following the approach adopted by the Court, breathing space for primary fundamental rights can only be created within the confines of the secondary copyright system of exceptions and limitations and, thus, within the confines of the three-step test. Evidently, this configuration of the copyright system neglects the norm hierarchy in EU law. The EU manifestations of the three-step test cannot be invoked to broaden use privileges that support competing fundamental rights. Article 5(5) of the Information Society Directive only serves the purpose of further restricting limitations of exclusive rights. Instead of allowing users with a valid fundamental rights argument to be on equal footing with copyright owners, the three-step test only confirms the bias of the system in favour of protection

interests. It enhances legal certainty for copyright holders and reduces legal certainty for users who invoke competing fundamental rights.

At the core of this copyright-centric approach lies the harmonization objective. The Court of Justice insists on human rights balancing within the system of exclusive rights and limitations in secondary copyright legislation because it fears a destabilization of the harmonizing effect of the EU acquis in the field of intellectual property law. Systematically eroding more flexible national doctrines that offer room for recalibrating the rule/exception architecture of copyright law, the Court sacrifices fundamental rights on the altar of the EU harmonization agenda. This is highly problematic. Declaring secondary EU copyright law flexible enough to give sufficient weight to competing fundamental rights, the Court rubberstamps copyright's imbalanced rule/exception architecture, including the three-step test that offers additional safeguards for right holders and imposes an extra burden on users invoking fundamental rights.

At the same time, the Court conceals human rights deficits in the overall architecture of the EU copyright regime. Instead of sending clear signals and identifying problem areas that require legislative changes, the Court fails to provide impulses for the improvement of the harmonized legal framework.

But let me turn to the second field of intellectual property protection that we share: hasn't the Court introduced the same mantra of internal balancing in EU trademark law? Didn't this happen in *Martin Y Paz* (CJEU, 19 September 2013, case C-661/11, Martin Y Paz Diffusion, para. 54-55)? And, if so, does that mean that the Court is willing to give the proviso of honest practices in industrial or commercial matters – restricting limitations of trademark protection – a quasi-constitutional status as well?

Well, I guess it won't be difficult for you to decipher what I'm trying to do here. It's about keeping you interested in the intellectual property debate! There is so much more to explore and so much more to say. I have no doubt that we will need your strong and clear voice! How about just cherry-picking the issues that you find really interesting and devoting attention to these issues?