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EU Copyright Law II

Intellectual Property Rights

(35E00800)

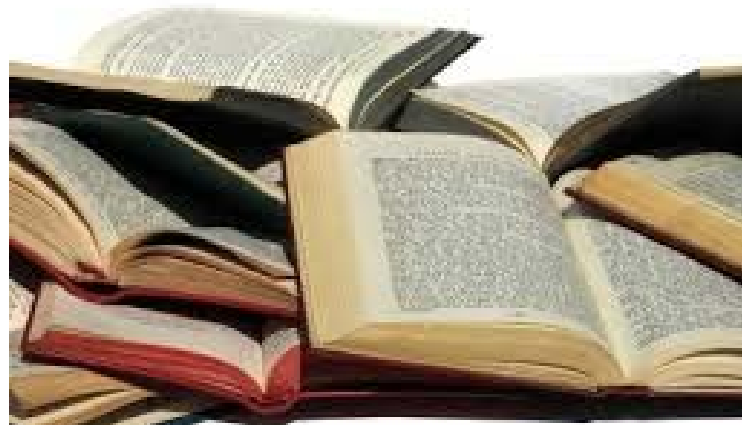
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Readings

- » Kur, Annette & Dreier, Thomas, *European Intellectual Property Law. Text, Cases & Materials* (EE Publishing, 2013), Ch. 5



Today's Agenda

- » Exclusive Rights:
 - » Moral Rights
 - » Economic Rights
- » L&E
- » Digital complications
- » EU ©Reforms



Reminder - Elements of all IP Laws

- » Subject matter to be protected
- » Qualifications for protection
 - » Who can claim
 - » Procedure for claiming
 - » Substantive criteria
- » **Set of exclusive rights (rights to exclude other people's uses of the IP)**
- » Limitations & exceptions on exclusive rights
- » Infringement standards
- » Set of remedies



Set of exclusive rights - Copyright

1. Moral Rights
2. Economic Rights



1. Moral Rights

- » **Right to paternity:** to be named as author
- » **Right to integrity:** to refuse any modification to the work (or its context) or any re-use of it
- » Moral rights do not have a harmonized term: in some countries (France), moral rights are perpetual, whereas in others, they expire at the same time as economic rights
- » Moral rights are untransferable (but they can be waived in their entirety)

Example – Rocky Island with Sirens



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- » A house owner pays for the creation of frescoes in the staircase of his house. Artist A creates an island with naked, elegant Sirens
- » Thereafter, the house is sold to a new house owner who asks Artist B to dress the Sirens by painting over the old frescoes
- » Which rights of Artist A could be infringed?
- » Ref: Vgl. RG, 08.06.1912 - Rep. I. 382/11



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© 2011 by the artist. All rights reserved.

2. Economic Rights

- » Economic rights expire 70 years after the author's death
- » Economic rights may be transferred
- » Next to exclusive rights there is also a number of remuneration rights, e.g. rental and lending rights
 - » **Right of reproduction** (art. 2 InfoSoc Directive; art. 4(1)(a) Software Directive; art. 5(a) Database Directive)
 - » **Right of adaptation, including translations** (not harmonized in the EU except for software (art. 4(1)(b) Software Directive) and databases (art. 5(b) Database Directive))
 - » **Right to live public performance** (not harmonized in the EU (C-283/10 Circul Globus) except for databases (art. 5(d) Database Directive))
 - » **Right to communicate the work to the public by wire or wireless means** (art. 3 InfoSoc Directive; art. 5(d) Database Directive; art. 2 Cable and Satellite Directive; also art. 8 Rental and Lending Rights Directive (for performers and broadcasting organizations))
 - » **Right to distribute copies of the work** (art. 4 InfoSoc Directive; art. 4 Software Directive; art. 5(c) Database Directive; art. 9 Rental and Lending Rights Directive (for performers, phonogram producers, producers of first fixations of films and broadcasting organizations))
 - » **Rental and lending rights** (art. 4(1)(c) Software Directive; art. 3 Rental and Lending Rights Directive)

Reproduction Right

- » InfoSoc Directive, Art.2
- » Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:
 - » (a) for authors, of their works;
 - » (b) for performers, of fixations of their performances;
 - » (c) for phonogram producers, of their phonograms;
 - » (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
 - » (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Some General Principles

- » Copying means that there must be a causal link between two works in that one is derived from the other
- » Copying does not have to be intentional to be infringement
- » The assessment is straightforward if the reproduction is the same as the original. BUT: infringement can arise also when the copying is not exact (literal)
- » A work may be derivative of another work, yet not infringe because the second work's author has used independent 'skill and labour' to achieve the result
- » It is more complicated when the reproduction is merely similar (Note: the similarity has to be the result of 'copying'; independent creation is allowed)
- » A parody may or may not be treated as an infringing copy – it depends on the facts of the particular case
- » The copy may be transient or temporary (especially important for computer programs, databases and the Internet)

Example 1 – TIC vs NET



Example 2 - KKO 1979 II 64

Kalervo Ojutkangas' photograph



Pekka Jylhä's painting





Example 3 -Marvin Gaye vs Robin Thicke & Pharrell Williams

- » 'Blurred Lines' vs 'Got to Give it Up'
- » <https://www.youtube.com/watch?v=ziz9HW2ZmmY>

Right to Communicate the Work to the Public

» InfoSoc Directive, Art. 3

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

[for performers, phonogram producers, producers of first fixations of films and broadcasting organizations]

Right to Communicate the Work to the Public

- » Extensive case law by the CJEU (C-306/05 SGAE v Rafael Hotels; C-403/08 & 429/08 Football Association Premier League; C-135/10 SCF v Marco Del Corso; C-607/11 ITV v TVCatchup; C-431/09 & 432/09 Airfield, C-162/10 Phonographic Performance (Ireland) and C-351/12 OSA, C-466/12 Svensson & C-348/13 BestWater)
- » In sum:
 - » There is “**communication to the public**” if:
 - » **1) there is a “communication”** → Implies an intervention by the user making the work available, providing access to the work/protected subject matter; **AND**
 - » **2) the communication is “to the public”** → must reach fairly large nr. of people; concept of “new public”

Example - C-466/12 Svensson

- » Sverige is a Swedish company which operates a website through which users receive hyperlinks to articles on other websites
- » Svensson is a journalist who writes articles published in the *Göteborgs-Posten* newspaper and on the newspaper's website, where they are freely accessible
- » Retriever Sverige provides hyperlinks to these articles on the *Göteborgs-Posten* website without the permission of their respective authors
- » Qs:
 - » If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public?
 - » Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
 - » When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?

Distribution Right

» InfoSoc Directive, Art. 3

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Distribution Right (Cont'd)

- » Digital exhaustion
 - » Software
 - » Can you resell software bought on and downloaded from the Internet? (C-128/11 Usedsoft)
 - » Media
 - » Can you resell e.g. mp3s, e-books and movies? (C-419/13 *Art&Allposters*)

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Limitations and Exceptions

- » Works never in copyright or in the copyright in which has expired, are often said to be “in the public domain”
- » Permitted acts: acts that would be infringements of copyright but are made lawful by specific statutory provision
- » Authors’ rights systems vs. Copyright systems

Authors' Rights Systems

- » Authors' rights systems
 - » Closed list of L&E's
 - » Different exceptions for each different right
- » *Three-step test* (Art. 9(2) Berne Convention; art. 13 TRIPs ; art. 10 WCT) - L&E are only allowed:
 - » In certain special cases
 - » Provided they do not conflict with the normal exploitation of the work
 - » Do not unreasonably prejudice the legitimate interests of the right holder.
- » EU InfoSoc Directive (2001): exhaustive list of optional (except one) L&E's → i.e., MS's legislation provides for statutory limitations (e.g., scientific use, library and archive use, educational use/teaching, private use, users with handicap, quotation)
 - » Limitations don't require authorization but payment of a forfait quote is necessary

Copyright Systems

- » Copyright systems
 - » Fair use: open norm allowing range of ‘fair’ uses
 - » Fair dealing: list of L&E’s with some flexibility
- » US Fair Use Doctrine (17 U.S.C. 107)
 - » Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
 - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Assessing © Infringement

In sum:

- » [what law applies?]
- » Is the allegedly infringed subject-matter protected by copyright?
 - » Does it meet the criteria for protection, e.g. originality?
 - » Has the term of protection lapsed?
- » Does the suing party have a right to do so (e.g. (co-)author, right holder, assignee or licensee)?
- » Does the act under review infringe any moral or exclusive right (without authorization)?
- » Can an exception be invoked?

Digital Complications

Some Statistics

- » The U.S. “core” copyright industries accounted for an **estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP)** in 2005, up from 6.48% of the U.S. GDP (\$760.49 billion) in 2004
- » The U.S. “total” copyright industries accounted for an **estimated \$1.38 trillion or 11.12 % of GDP** in 2005, up from 11.09% of the U.S. GDP (\$1.3 trillion) in 2004. (*Copyright Industries in the U.S. Economy: The 2006 Report*)
- » **The “core” copyright industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole**
- » It is estimated that some 37% of all CDs purchased (legally or otherwise) in 2005 were pirate – 1.2 billion pirate CDs in total. Pirate CD sales outnumbered legitimate sales in 2005 in a total of 30 markets.
- » IFPI estimates that almost 20 billion songs were illegally downloaded in 2005.” (IFPI Piracy report 2006)

EPIP – European Policy for Intellectual Property

» <http://www.epip.eu/>



Some Problems

- » Digital environment lacks geographic boundaries
 - » Very cheap and easy to make multiple copies and disseminate via networks, as well as to manipulate w/o detection
- » New ways to appropriate information (e.g. P2P)
 - » E.g. Napster/ Grokster/Pirate Bay
- » People see that much Internet information is free and expect it all to be (or nearly so)
- » Can't access or use digital information without making copies

- » “I am firmly of the view that a passive and reactive approach to copyright and the digital revolution entails the major risk that policy outcomes will be determined by a Darwinian process of the survival of the fittest business model. The fittest business model may turn out to be the one that achieves or respects the right social balances in cultural policy. It may also, however, turn out not to respect those balances. The balances should not, in other words, be left to the chances of technological possibility and business evolution. They should, rather, be established through a conscious policy response.” (Francis Gurry, Director General WIPO, 2011)
- » “New technologies are changing the way creative content is produced, distributed, accessed and preserved. Adapting the EU’s IP rules to the realities of the Digital Single Market, in the light of the digital revolution, new consumer behaviours and Europe's cultural diversity is one of the priorities of the Juncker's Commission.” (European Commission, 2015)

The Case for © Reforms in EU

- » L&Es (private copying; for research and education purposes; for libraries, museums and archives)
- » Fair remuneration (to ensure that creators receive adequate remuneration for the exploitation of their works and performances)
- » Enforcement and position of intermediaries
- » Improving cross-border access to copyright protected content

EU © Law: the Future

- » Proposed solutions:
 - » EU unitary copyright title (based on 118 TFEU)
 - » European © Code (EU Commission 2011 IPR Strategy):
“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”
 - » EU © Code model drafted by the Wittem Group (April 2010): <http://www.copyrightcode.eu/>



”ONLY ONE THING IS IMPOSSIBLE TO GOD: TO FIND ANY SENSE IN ANY COPYRIGHT LAW ON THE PLANET. WHENEVER A COPYRIGHT LAW IS TO BE MADE OR ALTERED, THEN THE IDIOTS ASSEMBLE”.

Mark Twain's notebook, 23 May 1903

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