

**RECONSTRUCTING RIGHTS.
RETHINKING COPYRIGHT'S ECONOMIC RIGHTS IN A TIME OF HIGHLY
DYNAMIC TECHNOLOGICAL AND ECONOMIC CHANGE**

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INTRODUCTION

As the European Commission's recent consultation document on the review of EU copyright law¹ implicitly acknowledges, the current set of economic rights granted to copyright holders under EU law lacks clarity and consistency, and raises serious obstacles for rights clearance and the roll-out of innovative content-related services. In the digital environment the rights of communication to the public and of reproduction increasingly overlap, requiring providers of digital content services to negotiate multiple permissions from concurrent right holders for acts that – seen from an economic perspective – are single acts of usage (s.a. content streaming). Moreover the right of distribution is not defined and interpreted consistently across the various harmonization directives.

Recent case law of the European Court of Justice² on the scope of the three core economic rights – the rights of reproduction, of communication to the public and of distribution – has added confusion and further decreased legal certainty by applying complex reasoning and inconsistent interpretations to acts that – seen from an economic or technological perspective – should not be all that difficult to qualify (s.a. online resale, online retransmission, and hyperlinking).

All this suggests a growing disconnect between the legal definitions of the economic rights that are historically patterned on 19th and 20th century modes of exploitation of copyright works, and the economic and technological realities of the 21st century. This disconnect may lead to overprotection or underprotection of copyright works, and is therefore likely to act as a disincentive for investment in innovative content and information services.

At the international level the core economic rights are harmonized only to a limited extent. The main international treaties (Berne Convention, TRIPs Agreement, WIPO

¹ European Commission, Public Consultation on the review of the EU copyright rules, Brussels, December 2013, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm.

² See e.g. CJEU 3 July 2012, Case C-128/11 (UsedSoft GmbH v Oracle International Corp.); CJEU 7 March 2013, Case C-607/11 (ITV Broadcasting Ltd e.a./TVCatchup Ltd); CJEU13 February 2014, Case C-466/12 (Nils Svensson and Others v Retriever Sverige AB).

Copyright Treaty) leave contracting states considerable freedoms to implement and interpret the economic rights as they see fit. As a result, interpretations of the right of distribution and the right of communication to the public differ markedly between, for example, the EU and the United States. This is particularly vexing in an increasingly networked world where acts of usage of copyright works occur on a global or regional scale rather than on a purely national territorial basis.

This research project will reexamine the core economic rights protected under EU copyright law, with the aim of bringing these rights more in line with economic and technological realities. The project will follow an interdisciplinary approach, combining economic and legal methods. One part of the project will assess the proper scope of the economic rights from a perspective of welfare economics. The other, legal part will normatively evaluate the scope of the economic rights.

Economic part

The economic part of the study will examine the welfare costs and benefits of an extension or reduction of the scope of the economic rights, and estimate at which point total welfare is maximized. As Matthew Sag has concluded, “we are unlikely to be able to ascertain a generalizable optimal level of copyright scope”³, and there will be variation in the optimal level, both between and within industries. However, that does not render economic analysis of the scope of the economic rights useless. Following a piecemeal empirical approach based on a number of real-world case studies, and bearing in mind the economic relevance of parameters such as 1) the possibilities of private contracting; 2) transaction costs; 3) (the costs of) uncertainty; 4) the costs of litigation; 5) dead weight losses due to double marginalization; 6) the relevance of certain uses for the business model of right holders, we propose to distinguish, from a welfare economics perspective:

- a) Which uses of works in the digital realm should (within the foreseeable future) be within the scope of copyright protection;
- b) Which uses should be outside the scope of copyright protection; and
- c) Which uses should be subject to ad hoc consideration following the general principles of a three-step test. For this category, we propose to establish guidelines for the economic arguments relevant for application of the three-step test. This will (i.a.) be based on the parameters mentioned above.

Legal part

The other part will evaluate the economic rights primarily from a legal-normative perspective. It will assess the existing array of economic rights, query whether these adequately fit the purposes of a future European legal system that is fit for the 21st Century, and suggest solutions. The research questions addressed in this part include:

- What is the proper scope of the economic rights, in light of the prevailing rationales of EU copyright?

³ Matthew J. Sag, *Beyond Abstraction: the Law and Economics of Copyright Scope and Doctrinal Efficiency* (2006).

- What legal norms and benchmarks can help determine what are economically relevant or irrelevant acts of usage? Is there an (inverse) role for concepts developed under the fair use doctrine or the ‘three-step test’ (Article 13 TRIPs Agreement)?
- Is it possible to more precisely calibrate the scope of the economic rights by way of legislation in a time of highly dynamic economic and technological change?
- How can such calibration be reconciled with the need for open norms and flexibility that is inherent in a static legislative system such as EU law?
- Would it be possible to create more easily adaptable legislative instruments, such as guidelines or other forms of soft law?

METHOD

The project will be a collaborative research effort between the Institute for Information Law (IViR), the Centre for Copyright and New Business Models in the Creative Economy (CREATe), and other leading scholars in the field of copyright law and economics in the EU. It will be interdisciplinary and collaborative, combining legal and economic methods. It will comprise two interrelated parts that will be carried out in parallel.

The economic study will be carried out by a senior researcher (Joost Poort, IViR) in cooperation with and under supervision of Prof. Martin Kretschmer (CREATe). The legal part of the study will be conducted in a dialogue (‘think tank’) with and between selected leading European scholars, taking into account interim results from the economic study.

The legal research group will be composed of the following academic experts:

Prof. Stefan Bechtold (ETH Zurich)

Prof. Séverine Dusollier (CRIDS, University of Namur/Sciences Po, Paris)

Prof. P. Bernt Hugenholtz (IViR, University of Amsterdam)

Prof. Ansgar Ohly (LMU University of Munich/University of Oxford)

Prof. Ole-Andreas Rognstad (University of Oslo)

Prof. Alain Strowel (Université catholique de Louvain).

All members of the research group are leading, forward-looking scholars in the field of European copyright law. Each member of the group will produce a commissioned thought-provoking research paper (‘think piece’) on a subtopic to be designated.

The research papers produced by the research group and the interim results of the economic study will be discussed in a series of six academic workshops organized biannually in Amsterdam and/or at Microsoft conference premises in Brussels or Berlin. The workshops will be invitation-only; besides the applicants and the members of the research group, invitees to the workshops will be leading copyright scholars and economists (from the EU, the U.S. and elsewhere), legal practitioners, and high-level officials from the European Commission (DG Markt, Copyright Unit, and DG Connect) and possibly WIPO.

DELIVERABLES AND IMPACT

The research project will result in a study and a series of groundbreaking research papers that are intended to profoundly influence and advance copyright doctrine in Europe, and have a significant impact on copyright law and policy in the EU.

Research papers and other research output will initially be made available on a dedicated project website, and eventually converted into articles to be submitted to leading, peer-reviewed international economic journals and legal reviews.

At the end of the project the main results will be summarized into a concise report/position paper with conclusions and recommendations, to be presented to the European Commission and the European Parliament.

INDEPENDENCE

Pursuant to the principles of academic freedom, IViR, CREATE and its academic research partners operate in complete intellectual independence from third parties, including its patrons.

RESEARCH GROUP

The project will be led by Professor P. Bernt Hugenholtz, Director of the Institute for Information Law at the University of Amsterdam (IViR), in cooperation with Professor Martin Kretschmer, Director of the Centre for Copyright and New Business Models in the Creative Economy (CREATE). The economic study will be carried out at IViR by Dr. Joost Poort in cooperation with and under supervision of Prof. Kretschmer. Research support will be provided by a research assistant.

Prof. Hugenholtz is a leading expert in the field of European and International Copyright Law. He is a member of the Dutch Copyright Committee that advises the Minister of Justice of the Netherlands, has regularly acted as a consultant to the World Intellectual Property Organization (WIPO), the European Commission, and several national governments, and has produced influential studies for the European Commission, the European Parliament, WIPO, and various Dutch government agencies. Prof. Hugenholtz is the general editor of the Information Law Series, published by Kluwer Law International, and the co-author (with Prof. Paul Goldstein) of *International Copyright. International Copyright. Principles, Law, and Practice* (Oxford University Press, 3rd ed., 2012). He is the co-founder of the Wittem Group that drafted the *European Copyright Code*. Prof. Hugenholtz is a regular invited speaker at international conferences, including the annual Fordham Conferences on International Intellectual Property Law & Policy. He teaches at the University of Amsterdam, the Munich IP Law Centre, and the University of Bergen (Norway). He is also an adjunct-judge at the Court of Appeals in Arnhem.

Joost Poort is senior economic researcher at the Institute for Information Law. He adds an economic perspective to various research projects in media, copyright and telecommunications. In 1998, Joost started as an economic researcher at Nyenrode Forum for Economic Research (NYFER). Since 2003, he has worked at SEO Economic Research: first as a senior researcher, and since 2008 as head of the Section Competition Policy and Regulation. Joost Poort has written performed a large number of studies on market structure and regulation in a variety of markets. Also, he has done much research at the interface culture, heritage and economics. Over the years, he has specialized in the economic aspects of copyright, telecommunication and media. In many of these studies at SEO, he co-operated with the Institute for Information Law.

Prof. Kretschmer is Director of CREATE (the Centre for Copyright and New Business Models in the Creative Economy), a UK national research hub based at the University of Glasgow. Prof. Kretschmer is a leading European expert on the law & economics of copyright. From 2000-2012, he was Director of the Centre for Intellectual Property Policy & Management (CIPPM) at Bournemouth University. Previously, he was a postdoctoral research fellow at Cass Business School, City University, London (ESRC Media Economics and Media Culture programme). Prof. Kretschmer specialises in the law and economics of intellectual property, and empirical methods. He is the (co-)author of a series of influential policy studies for the UK Intellectual Property Office (2011-13), the UK Cabinet Office (2012), and the UK Strategic Advisory Board for IP Policy (2010). Since 2011, Professor Kretschmer sits on the UK government's Copyright Research Advisory Committee.

Prof. Bechtold is professor of intellectual property law at the ETH Zurich. He is the author of the chapter on the EU Information Directive in *Concise Copyright* (2006), and has written extensively on the economics of copyright and other rights of intellectual property. *Prof. Dusollier* is professor of law at the University of Namur, and Director of the CRIDS (Research Centre in Information, Law and Society). She is the co-author of a recent study for the European Commission in preparation of the review of the Information Society Directive; she has also recently written a thought-provoking article suggesting ways of 'pruning the IP tree'.⁴ *Prof. Ohly* is professor of intellectual property and unfair competition law at the Ludwig Maximilians University of Munich, and visiting professor of law at the University of Oxford. Prof. Ohly adds expertise on the interface between the law of intellectual property and unfair competition law, and combined knowledge of civil and common law. *Prof. Rognstad* is professor of private law at the University of Oslo and a leading copyright scholar in the Nordic countries. He has written groundbreaking articles on the scope of economic rights in a digital environment, especially regarding hyperlinking. *Prof. Strowel* is professor of law at the University of Louvain. He combines broad academic expertise of EU copyright law with vast experience as a legal practitioner specializing in the interface between IP law and information technology.

⁴ Severine Dusollier, Pruning the European Intellectual Property Tree - In Search of Common Principles and Roots, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2127737

TIME TABLE

The project will commence in the Fall of 2014 and will continue for three years until the end of 2017. The first workshop will be organized in Spring 2015, and thereafter every six months.

Research papers will be published online and in article form in the course of the project. Final results will be summarized in a concise report/position paper by the end of the project.

Amsterdam, 21 March 2014