

Reconstructing Rights: Common Ground

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(1) Normative gap

- Premise of project: normative gap between current scope of economic rights and economic/social reality.

(2) Rights too formalistic

- Current set of economic rights in EU too formalistic:
 - Reproduction right in EU law currently overreaching, no direct connection to exploitation, communication or market impact
 - Communication right both overreaching and underprotecting.

(3) Functionalist approach

- Reconstruct copyright's catalogue of rights in light of copyright's (multiple) functions.
- Functionalist approach can either be based on purely utilitarian rationales, or also on non-economic rationales:
 - Unjust enrichment ('fairness')
 - 'Public sphere'
 - Other: cultural, personalist, etc.

(4) Open norms, more economic analysis

- Move away from formalistic exploitation rights towards more open rule of reason based on economic analysis (market impact, ‘fairness’).
- Learn from unfair competition law, trademark law, competition law.
- Advances in economics of copyright allow court to engage in more economics-based reasoning and adjudication.
- Some indications that CJEU (albeit erratically) is already moving in this direction.

(5) Build openness into economic rights up-front

- Copyright's economic rights should reflect general right to ('reasonable' , 'fair') exploitation.
- Integrate openness into copyright system up-front (at level of rights), not merely at level of L&E's.

(6) Preserve legal certainty

- Open structure of economic rights should not become too ‘muddy’, at the expense of predictability, tradability and enforceability.
- Balance open structure of rights with need for legal certainty

(7) Rules and standards

- Future right model could combine clearly defined, *per se rules* (for clear-cut cases of market impact) with subjective ‘fairness’ / ‘reasonableness’ *standards*
- Combine with staggered burden of proof of harm.
- If possible, integrate scope, liability and infringement rules.

(8) Reconnect rights to work

- Limit scope of economic rights to *use as a work*.
 - E.g. text and data mining excluded.

(9) In some cases: remuneration rights

- No exclusive right in cases where rights are unenforceable or social costs of enforcement or transaction costs prohibitively high.
- But fairness/reasonableness may justify remuneration right for creators.