

Copyright Reconstructed

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Prof. P. Bernt Hugenholtz, Institute for Information Law, University of Amsterdam.

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Introduction & Contents

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Rethinking Copyright's Economic Rights in a Time of
Highly Dynamic Technological and
Economic Change

Edited by

P. Bernt Hugenholtz

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Preface

This book is the result of a collaborative academic research project ('Reconstructing Rights') that ran from the Autumn of 2014 to the Summer of 2017. The aim of the project was to 'reconstruct' the economic rights protected under EU copyright law, by bringing these rights more in line with economic and technological realities.

The project – designed as a thinking exercise – brought together a small group of leading, forward-looking legal and economic scholars in the field of European copyright law: Stefan Bechtold (ETH Zurich), Séverine Dusollier (Sciences Po, Paris), Ansgar Ohly (LMU Munich), Joost Poort (Institute for Information Law, University of Amsterdam), Ole-Andreas Rognstad (University of Oslo) and Alain Strowel (UC Louvain). The project was directed by Bernt Hugenholtz (Institute for Information Law, University of Amsterdam), in cooperation with Martin Kretschmer (CREATE, University of Glasgow).

Each member of the group was charged with drafting (individually or in co-authorship) an ideal model of economic rights, and presenting and discussing this – as a work in progress – in regular project group meetings. Full drafts of the papers were thereafter presented at a public symposium in Brussels on 26 September 2016. Earlier and later drafts were also presented at the EPIP Conferences in Glasgow (2015) and Bordeaux (2017).

I wish to thank the members of the project group for joining me on this sometimes perilous, 'utopian' adventure, for their constructive cooperation on the project, for the inspiring and insightful debates we have had over the course of these three years, and most of all for the thought-provoking essays and studies that are presented in this book.

Preface

We wish to thank Microsoft Europe for generously funding the project, for hosting project meetings, for providing logistical support, and – most importantly – for letting us design, develop and carry out this research project with complete academic independence. Our thanks are also due to Sara Moran for immaculate copy editing.

Bernt Hugenholtz

Chapter 1

Reconstructing Rights: Project Synthesis and Recommendations

P. Bernt Hugenholtz & Martin Kretschmer

1.1 INTRODUCTION

As recent jurisprudence of the European Court of Justice and ongoing discussions in the European Union (EU) legislature illustrate,¹ the existing set of economic rights granted to right holders under EU copyright law – the rights of reproduction, communication to the public and distribution – have become disordered. While the right of reproduction, due to its all-encompassing definition in the Information Society Directive,² already covers every imaginable – direct or indirect, temporary or permanent, partial or integral – act of (digital) copying, the right of communication to the public is being extended well beyond its originally intended scope and purpose, to include acts of hyperlinking, facilitating file sharing and possibly even large-scale content aggregation.³ Recent CJEU decisions have also stretched

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1. See e.g., European Commission, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Brussels, 14 September 2016, COM(2016) 593 final. The proposed Directive confronts several scope-related issues, such as text and data mining (Art. 3) and large-scale content aggregation (Art. 13).
 2. Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ No. L 167/10, 22 June 2001 (Information Society Directive), Art. 2.
 3. CJEU 13 February 2014, Case C-466/12 (*Svensson and Others*); CJEU 8 September 2016, Case C-160/15 (*GS Media*); CJEU 26 April 2017, Case C-527/15 (*Stichting Brein*,

Chapter 1

the right of distribution to include acts of online dissemination of software, thus extending the exhaustion rule to digital resale of software licences⁴. By contrast, the European Court has very narrowly construed the right of communication to the public in cases of distribution of broadcast television programme-carrying signals to signal redistributors.⁵

As a consequence, the scope of copyright protection in the EU has become increasingly difficult to predict, at the expense of legal certainty, and EU copyright law's delicate structure of rights and exceptions is becoming gradually unbalanced. Another concern is that 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 – amount to single acts of usage (e.g., content streaming).

While the economic rights protected under copyright are historically patterned on nineteenth and twentieth century modes of exploitation of copyright works, such as theatrical performance, printing and broadcasting, due to the proliferation of digital media technologies in recent decades these media-specific rights have given way to a structure of more abstractly worded, general exclusive rights. As a result, the natural link with economic exploitation has been lost, causing a growing disconnect between the scope of protection and the economic and technological realities of the twenty-first century. This has in some cases led to overprotection or, occasionally, 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 Copyright Treaty)⁶ leave contracting states considerable freedom to implement and interpret the economic rights as they see fit. Consequently, definitions and interpretations of these rights differ markedly between, for example, the EU and the United States.⁷ This is particularly vexing in a networked world where acts of usage of copyright works almost inevitably occur on a global or regional scale rather than on a purely national territorial basis.

Filmspeler); CJEU 14 June 2017, Case C-610/15 (*Stichting Brein, 'The Pirate Bay'*). See also Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (note 1), Art. 13.

4. CJEU 3 July 2012, Case C-128/11 (*UsedSoft*); CJEU 12 October 2016, Case C-166/15 (*Ranks and Vasiļevičs*).

5. CJEU 19 November 2015, Case C-325/14 (*SBS Belgium*).

6. The 1886 Berne Convention for the Protection of Literary and Artistic Works, the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights, and the 1996 World Intellectual Property Organization Copyright Treaty.

7. Paul Goldstein & P. Bernt Hugenholtz, *International Copyright. Principles, Law, and Practice*, 3rd ed., New York: Oxford University Press 2012, pp. 306 ff.

This book is the result of a collaborative research project ('Reconstructing Rights') that normatively examined the core economic rights protected under EU copyright law, with the aim of realigning these rights with economic and technological realities.⁸ While the collaborators in the project, as the following chapters reveal, propose diverse models to 'reconstruct' copyright's structure of exclusive rights, all authors start from the common assumption that in an ideal copyright system the scope of copyright's economic rights should more adequately reflect the justifications of copyright protection – economic or otherwise.

The project that produced this book was fashioned in the form of a three-year long interdisciplinary dialogue between some of Europe's leading copyright scholars and copyright economists. While the project's aim was to rethink European copyright law with an eye towards future reform, it was primarily a theoretical, 'utopian' exercise. Its results therefore are not a recipe for EU copyright amendment in the short term.

This book is structured as follows. Following a historical chapter (by Quintais & Poort) that illustrates how a structure of media-specific economic rights has developed in international copyright law as copyright's catalogue of rights followed new markets enabled by new media technologies, a number of alternative models for 'reconstructing rights' are presented in the form of essays. While some of the models concur in their approach or outcome, not all are mutually compatible, nor are they meant to be. Nevertheless, as will be pointed out in the final part of this introductory chapter, the models do occupy significant common ground.

1.2 METHODOLOGY

In copyright doctrine, 'economic rights' are understood as exclusive rights that contrast with 'moral' or personality-based rights that persist even after the transfer of the exclusive rights (such as the right of the author to be named and to object to certain modifications).⁹ In addition, remuneration rights (i.e., rights to benefit from the exploitation of a copyright work) are sometimes attached to economic rights, for example, if there is a compulsory licensing scheme for the broadcasting right.¹⁰ A further complication is

8. Reconstructing Rights. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change, *see* project description at <https://www.ivir.nl/nl/projects/reconstructing-rights-rethinking-copyrights-economic-rights-in-a-time-of-highly-dynamic-technological-and-economic-change/> (accessed 14 December 2017).

9. Berne Convention, Art. 6*bis*(1).

10. Berne Convention, Art. 11*bis*(2). The European Union has established several remuneration rights, including the public lending right (Directive 2006/115/EC, Art. 6), and the resale right (Directive 2001/84/EC, Art. 1(1)).

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introduced by limitations and exceptions to the economic rights that limit the control right holders can exercise over their works.¹¹

All these aspects of copyright law will have market effects and can, in principle, be subjected to economic analysis. So, the core regulatory question for the best design of copyright law relative to its policy aims appears to be a behavioural question. Which activities in the market should be restricted, and which should be possible without obtaining the right holders' permission? However, the interplay of exclusive rights, moral rights, remuneration rights, and limitations and exceptions has become extraordinarily complex and, as history shows, intractable.

The premise of this project was that we must return to a more intuitive starting point. If the core economic rights are seen as a stack of exclusions (defining the ability of the copyright owner to say 'No'), what might a coherent formulation of these rights look like? In order to make progress on this question, we decided to engage in a sustained interdisciplinary dialogue that went beyond the orthodox 'law and economics' assumption that the allocation of resources simply requires precision in defining copyright as a property right (so that it can be transacted in the most efficient way). Welfare economics allows a more subtle discussion that extends from conditions for production and use of creative works to their communicative function.

As a focus for the project, we selected five examples of potentially copyright relevant acts that lie at the borders of exclusive rights: (a) digital resale, (b) private copying, (c) hyperlinking and embedding, (d) cable retransmission, and (e) text and data mining. Should these acts fall within the scope of exclusive rights and, if so, under what conditions? There are rapidly evolving precedents from the European Court of Justice which seems to understand copyright relevant use as *economically exploiting copyright subject matter with respect to a (new) public*. Our discussions with economists over the past three years were designed to challenge legal scholars to explore the reasons behind where to draw the line on these borderline cases, and link these back to fundamental principles about the function of copyright law.

Initially, each author offered a new normative model that might govern the scope of exclusive rights. Perhaps unsurprisingly, several contributions took inspiration from branches of law where economic reasoning had already been absorbed into doctrine, such as unfair competition law, trademark law and antitrust (competition) law. More radical proposals offered new groundings from principles of public communication rather than the economic conditions of creative production. In half-yearly workshops with invited guests, authors presented drafts and were challenged to extract economic reasoning from legal doctrine, and vice versa.

11. These vary greatly by jurisdiction, and are circumscribed by the so-called three-step-test (Berne Convention, Art. 9; TRIPs Agreement, Art. 13; Information Society Directive, Art. 5(5)).

The resulting proposals for reconstructing economic rights that are presented in this volume, and are summarized in the next section of this chapter, can be labelled as follows:

- ‘*Regulatory toolbox*’ (Bechtold): shape rights by an empirically testable link between scope of protection and intended purpose.
- *Copyright as a right to prevent unfair uses* (Ohly): reconstruct copyright as a three-tiered system of rights and exceptions (per se infringements, acts that cause negative market effects, and acts that are unfair).
- *Copyright as a right to reasonable exploitation* (Rognstad and Poort): replace the current multi-layered copyright structure by a single comprehensive exploitation right restricting acts that conflict with the economic interests of the right holder.
- *Copyright as a right to control public circulation of works* (Dusollier): copyright should allow the creator control over uses of her work in the public sphere.
- *Copyright as a right to prevent use of work ‘as a work’* (Strowel): non-communicative uses are not actionable.
- *Remuneration rights for non-commercial consumptive uses online* (Hugenholtz and Quintais): where exclusive rights are unenforceable convert economic rights into compensation schemes.

In the final part of this book (Chapter 9) Joost Poort examines what the proper scope of the economic rights should be from a perspective of welfare economics, with a special focus on acts that cause market failure. This economic study, making synthetic recommendations on the borderline cases, serves as important background material for the normative chapters, and is therefore regularly referenced throughout this book.

1.3 COMPARING THE MODELS

Following Chapter 2’s ‘history of value gaps’, which shows that over time new rights were introduced and expanded as new media technologies facilitated novel modes of exploitation, Chapters 3 to 8 present a variety of models for reconstructing copyright’s economic rights.

To begin with, Stefan Bechtold ‘deconstructs’ copyright by comparing copyright’s system of predefined economic rights to the more open and malleable structure of antitrust (competition) law. As Bechtold explains, this flexible structure allows competition authorities and courts to apply ad hoc economic analysis on a case-by-case basis. Might a similar ‘effects-based’ approach be applied in copyright, moving away from the paradigm of ex ante defined property rights? As Bechtold points out, such a ‘deconstruction’ of copyright would require courts to assess the effects on the market and society

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at large in the process of awarding or denying copyright protection in each individual case. Are courts equipped for this task? And would it be possible to design a ‘more economic’ structure of copyright without completely abandoning the legal certainty that comes with predefined rights?

In Chapter 4, Ansgar Ohly draws inspiration from bodies of law somewhat closer to copyright, in particular unfair competition law and trademark law. In his *Fairness-Based Approach to Economic Rights*, Ohly diagnoses copyright’s main shortcoming as an overly formalistic structure that does not take economic reality into account. Unlike fairness-based intellectual property rights, such as trademark and unfair competition law, copyright lacks ‘market-sensitivity’. Ohly’s ‘therapy’ is to inject a measure of fairness into the European copyright system, somewhat similar to the fair use doctrine that allows US courts to consider (*inter alia*) market impact in copyright infringement cases. Ohly proposes to implement his ‘fairness-based approach’ as a three-tiered system of rights and exceptions: (1) a ‘black list’ of well-defined, hard-core cases of infringement, subject only to specific exceptions; (2) a broader list of exceptions subject to a market-effect test; and (3) a general clause of unfair use.

In Chapter 5, Ole-Andreas Rognstad and Joost Poort join forces in an attempt to concretize the ‘right to reasonable exploitation’ that Rognstad first developed in an earlier publication.¹² This all-encompassing right would systemically simplify copyright by replacing the current six-stage structure of economic rights (rights, limitations, secondary liability rules, safe harbours, protection of technical protection measures and corresponding exceptions) by a single, comprehensive right. But how to give normative content to ‘reasonable exploitation’? The authors propose to concretize this norm by operationalizing the right of exploitation as a right to control the use of the work to the extent necessary to secure current or future exploitation opportunities for the right holder. The ‘reasonableness’ of the exploitation is determined primarily on the basis of a broad conception of social welfare, ‘filtered through’ the guiding principle of efficiency. Ultimately, other guiding principles, such as freedom of expression and information, may further mitigate the scope of the right.

In Chapter 6, Séverine Dusollier moves further away from a purely economic, market-oriented approach. Like other authors she starts by observing that the economic rights ‘have become estranged from exploitation’, but she then goes on to point out that ‘exploitation’ is not a purely economic notion. According to Dusollier, the main function of copyright is to promote and regulate *the circulation of works in the public sphere*; this ‘communicative function’ of copyright should therefore be restored. Reasoning from this Habermasian conception of copyright, Dusollier posits the economic right as a right to control relevant means of communicating a

12. O.-A. Rognstad, ‘Restructuring the Economic Rights in Copyright – Some Reflections on an “Alternative Model”’, *Journal of the Copyright Society of the U.S.A* 62(4), 503–544.

work, including: (1) marketing a work for permanent use; (2) providing a service or an experience of the work; and (3) exploiting a derivative work.

In Chapter 7, Alain Strowel attempts to reconcile copyright's increasingly prominent economic functions with doctrinal 'fundamentals'. Strowel proposes to delimit the reproduction right by introducing an infringement requirement that would limit its scope to uses of the work *as a work* – thus ruling out, for example, copies made in the context of text and data mining. As for the right of communication to the public, Strowel proposes applying economic analysis when considering whether a use is a communication to the public, by adding a double market test.

The final model, presented by Hugenholtz and Quintais in Chapter 8, differs from the others in that the authors propose to partially replace an economic right by a right to remuneration. The premise underlying this model is that copyright enforcement against non-commercial, consumptive online uses has negative overall welfare effects. Not only is enforcement largely ineffective, and enforcement costs disproportionate, but it is also harmful to the open internet by forcing intermediaries to block access to infringing content. In light of empirical research showing that consumers are willing to pay for unencumbered access, the authors propose a statutory licence permitting non-commercial online uses of music, video, images and text, subject to a right to fair remuneration for creators, which would be payable by the internet access providers to designated collecting societies.

1.4 COMMON GROUND AND CONCLUSIONS

While the various legal models for reconstructing the economic rights presented in this book are diverse, and not designed to concur or even to be mutually compatible, there is substantial common ground between them. In this final part of the introductory chapter, the main common features are identified. Thereafter, the implications of the proposed legal models for the 'borderline cases' examined in Poort's economic analysis (Chapter 9) are briefly evaluated. Finally, a few general conclusions from the entire research project are drawn.

1.4.1 DEFINITION OF RIGHTS TOO FORMALISTIC

Not surprisingly, all authors accept the general premise of this project, i.e., that the main economic rights currently protected under EU copyright law are crafted too formalistically, and require (more) normative anchoring. This is the case, clearly, for the reproduction right in its present, largely technical, definition. But it may also be true for the right of communication to the public, which due to its very abstract wording is similarly disconnected from any impact on the market. As a consequence, the reproduction right is

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generally overprotective, whereas the communication right may be either overreaching or underprotecting.

1.4.2 'ECONOMIC EFFECTS'; COMBINE RULES WITH STANDARDS

Another idea common to many of the models presented is to move away from formalist exploitation rights towards a 'rule-of-reason' guided by economic effects in the market. Here, copyright might learn from antitrust (competition) law, unfair competition law and trademark law. As several authors observe, there are some indications that the copyright jurisprudence of the European Court of Justice is already moving in this direction. Similar to present trademark law, a copyright law thus reconstructed might combine clearly defined, *per se* infringement rules that apply to clear-cut cases of negative market impact with more flexible 'fairness' or 'reasonableness' standards that would apply to harder cases.

1.4.3 FUNCTIONALIST APPROACH

All authors agree that copyright's catalogue of exclusive economic rights should be reconstructed in light of copyright's (multiple) functions or rationales. This functionalist approach can be based on utilitarian premises that underpin economic thinking about the efficient allocation of scarce resources, but might also take account of copyright's other societal functions, such as facilitating speech in the public sphere, or promoting fairness. Reconnecting rights to function would also immediately solve the copyright problem of text and data mining. By limiting the scope of the reproduction right *to uses of the work as a work*, performing data analysis on copyright works would not give rise to infringement.

1.4.4 RIGHT TO 'REASONABLE', 'FAIR' EXPLOITATION

Regardless of copyright's functions or rationales, there is also some consensus that the scope of exclusion defined by the so-called economic rights ideally be crafted as, or derived from, a general right to 'reasonable' or 'fair' exploitation that would more directly connect copyright protection to market-relevant acts of exploitation. This approach would have the added advantage of making an extensive list of copyright limitations and exceptions largely redundant. In some cases, efficiency and fairness might justify replacing an exclusive right by a right to remuneration for creators and other right holders where enforcement is disproportionate or inefficient.

Will it make a difference which of the proposed reconstructions of economic rights may be adopted by future policymakers or courts? The relationship between doctrine and market effects is difficult to evaluate.

Higher courts are often said to reason back from the desired outcome. Within this research project, we therefore encouraged the authors to commit to what they believe would be the behavioural consequences of their revisionary normative models. The following summary attempts to illustrate what these outcomes might be.

1.4.4.1 Digital Resale

Under Ohly's fairness-based approach, negative market effects of permitting digital resale should be balanced against user interests and free movement interests. Poort and Rognstad suggest that resale without multiplication is unproblematic and that contracts which override resale should be subject to general rules of consumer protection and fair business. Dusollier sees successive sales of artistic works as a way of transmitting creative value to the public that should be subject to a *droit de suite*.

1.4.4.2 Private Copying

According to Poort and Rognstad, most private copies can be priced into the purchase and create no market failure. The same reasoning applies to levies for systematic time shifting and wide dissemination of private copies. Under Dusollier's right to control public circulation of works, reading, viewing, receiving and enjoying a work are not exploitation activities. On the other hand, social networks institute a public sphere that need to be licensed. Hugenholtz and Quintais define online activities carried out by individuals for personal enjoyment as non-commercial uses that should be subject to compensation. For Ohly, private copying normally has negative effects and should be prohibited.

1.4.4.3 Hyperlinking and Embedding

Under Poort's welfare analysis, linking to legal content is presumed to be copyright irrelevant. However, there should be an opt-out for embedding, and a notice-and-takedown process or levy for links to illegal content. Ohly argues that no negative market effect can be presumed but it may be established where there is substitution or a commercial benefit is derived from embedded content. For Dusollier, links to copyright works reference works that are already in the public sphere and should be permitted.

1.4.4.4 Cable Retransmission

Under Dusollier's right to control public circulation of works, retransmission constitutes exploitation. Ohly too assumes that retransmission resulting in profit is unfair without compensation. Under Poort's welfare analysis, right holders do already exert control over exploitation opportunities if the original

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transmission took place without access control and within the original reception area.

1.4.4.5 Text and Data Mining

For Strowel, copying for the purpose of providing information is not ‘use as a copyright work’, and should be outside the scope of exclusive rights. Poort and Rognstad argue that the value users derive from text and data mining can largely be priced into access contracts. There is no market failure. Dusollier argues that text and data mining does not result in the public circulation of the processed works and that the act is therefore outside of the scope of her proposed exclusive right.

In conclusion, there is considerable consensus among the proposals for reconstructing economic rights that the current scope of copyright easily leads to perverse outcomes, with aspects of over- or underprotection that cannot easily be reconciled with any underlying rationale for copyright protection. For example, text and data mining would not be treated as a copyright relevant act under any of the models under discussion. But for most borderline cases, assessment of effects appears to be conditional. Compared to antitrust (competition law), functionalist theories of copyright law may need to assess long-term dynamic effects, for example on future creation. This is difficult to draft in legislation and for courts to operationalize, as the current wave of uneven and unpredictable jurisprudence of the European Court of Justice perhaps already illustrates.

In sum, reconstructing copyright is not for the impatient or the faint-hearted; there remains much work to be done.