# Copyright Law for the EU

## An open debate with the European Copyright Society

Friday, 20 May 2016 – Barcelona

On Friday May 20th 2016, in Barcelona, the European Copyright Society (ECS) has organized a full day conference to debate on the several copyright issues being examined at an EU level and exchange opinions with the academic and professional copyright communities. As attendees we had the chance hear about the reports issued by the ECS on topics such as the following: the linking as an act of communication to the public, the harmonization of limitations, the remuneration of authors, etc.
The European Copyright Society is a platform for critical and independent scholar thinking on European Copyright policies. It was founded in January 2012 and its members are scholars and academics from different European Member States. Its main tasks are policy making in Brussels, mainly of the European Commission, and to give the European Courts their legal opinions on copyright issues.
The following text goes through the principal ideas expressed by the members of the ECS during this full day conference.

The first panel was about **"Copyright law for the EU: how to do it?",** presented by **Prof. P. Bernt Hugenholtz, Director of the IVIR at the University of Amsterdam**. He considers alternatives of unification or harmonization for copyright law in Europe, and points out the fact that despite many years of harmonization, the European Union only reaches agreements through directives and therefore still has 28 different national Law systems. The effect of this "harmonization" through directives is that the territoriality of copyright is left mostly intact despite 25 years of harmonization.

Prof. Hugenholtz explains that the Commission's approach to the problem of territoriality has mainly consisted on the following: a proposal for portability regulation opposed to further harmonization (for instance, for radio broadcasting services, the Satellite Directive grants a cross-border transmission of content) and territorial licensing, very much present in the Commission's policies, through the application of competition law to absolute territorial licensing. Finally, for the long-term, building an EU single market would drive to the unification of copyright because of the territorial removal of European borders and because of the directly binding instrument we would have.

Following this intervention, **Prof. Reto Hilty, Director of the Max Planck Institute for Innovation and Competition in Munich** talked about "geoblocking" and a proposal for a regulation of the European Parliament on ensuring the cross-border portability of online content, although according to him, this portability would not imply equal terms.
In this regard, he puts up the question of whether would be possible to have such portability without counting with a copyright harmonized system.
He goes through the cornerstones of geoblocking within the European Union: the implementation of a legal fiction through which licenses involving one or more member states would entitle the license to provide content in the whole internal market; the limitation of contractual freedom and TPMs could be avoided through VPN services; and finally, the possibility of harmonization of limitations and exceptions, as a digital single market requires highly uniform limitations and exceptions across member states.
Prof. Hilty points out that any further regulation should take into account whether a single Market desirable at all before unifying our copyright systems.

The second panel entitled **"The scope of protection: redesigning the rights of exploitation under copyright"** was opened by **Prof. Ole-Andreas Rognstad**, Professor of Law at the University of Oslo, Norway. He presented an example of the CJEU decision on a Norwegian case of cable retransmission (GEP vs. Norwaco) and he explained the role of Norwaco as a copyright organization that enters into agreements on the secondary use of audiovisual works. Rognstad has advocated for a new principle in copyright for further use as elemental concept in copyright.

Prof. Rognstad was followed by **Prof. Lionel Bently, Director of the Centre of Intellectual Property and Information Law (CIPIL) of the University of Cambridge**, whose presentation was entitled **"Linking "Svenson" and beyond".** He went through some of the CJEU decisions on hyperlinking and its relation to copyright. On the first place, the ECS's opinion on the Svensson decision is that there is no communication to the public (as in article 3 of the directive), because communication requires transmission and a clickable link is not a transmission. Plus, the work that would be linked has already been made available to the public. Prof.

Bently mentioned as well the Bestwater case about an advertising film on YouTube, the C More Entertainment AB case, the GS Media BV vs. Sanoma Media case and the Wathelet case, where the new public doctrine is applied. Because there is communication to the public (unlike in Svensson), but the work is generally available on the Internet, we consider there is no new communication to the public, which simply means no communication to the public of the work.

He made the following observations: both parts are searching for compromise but there are some difficulties as national law, accessory liability, moral rights and the unharmonised aspects of EU law.

Prof. Bently arises the question whether the CJEU will follow the Wathelet doctrine or abandon it in further cases involving communication to the public of works.


**Prof. Axel Metzger**, from the **Humboldt-Universität zu Berlin**, followed presenting the Directive on contracts for the supply of digital content. What is regulated in the instrument?

The most important issues to discuss in ECS Meeting 2016 are:

- Digital single market package of December 2015
- The CESL (Common European Sales Law) approach
- The full harmonisation.

He arised different aspects on the contracts:

- Contracts for the supply of digital goods (intangible, media copies)
- Contract law problems: license contracts, service contracts. Resale of digital goods and no resale of copyright content: core copyright issues are left out.
- Different types of Counter-performance (money, personal data … provided by the user)
- Interoperability issues and the portability. Interoperability should be part of the good you bought → otherwise resolution of the contract possible.
- Delimitation of supplier in the Directive
- About personal data in the contract law directive: implicit obligation to respect the "spirit" of the contract, which in that case, as a bilateral binding contract, would be to deliver data correctly.
- Many open questions: no validity matters treated by the instrument.
- Something not generally available on the internet → the link becomes indispensable.

Some conclusions were:

- Protection of consumers and other users are still underdeveloped.
- EU legislator should implement a holistic approach which addresses the consumer's concerns
- EU instruments on the supply of digital goods should not be restricted to typical issues of sales and services contracts.

**Panel 3** was about the scope of protection: **who and what is protected under copyright.** It was opened by **Prof. Séverine Dusollier, from Sciences-Po Paris and Prof. Valérie-Laure Bénabou, from the University of Versailles**, who talked about "**who exploits copyright**". They describe exclusive rights as the means that facilitate the control from authors over the exploitation of their works, and they observe two defaults on the definition of exclusive rights: that they are based on economic rights and that they completely forget the digital aspects. To their opinion, exclusive rights are not anymore means of exploitation.


On the other hand, the role of distributors has become fundamental in copyright matters. But what would be the definition of the distribution right? Distribution has been thought for material goods and not only for digital content, and therefore, is it applicable to online platforms? Do we consider them distributors, publishers, etc.? There is a circulation of content often accompanied by a remuneration which does not take into account copyright, and therefore we can consider that these actors benefit from the value of a

work (as proven by the revenues gotten through advertising, for instance).
Professors Dusollier and Bénabou present some alternatives to the application of exclusive rights in order to guarantee a correct exploitation from works of art by different actors of the market: the creation of other sources of remuneration, or the creation of neighboring rights for new beneficiaries. It is needed a new distribution framework.

**Prof. Alain Strowel, Professor at the Université Saint-Louis in Brussels,** presented **the "Reprobel" case and the fair remuneration of authors.**

He started reminding the copyright history (traditional view of continental copyright, author centric view) and he presented the ECS opinion: the publisher's rights derive from the author's rights; no own right to remuneration; assignability or transferability of the right is essential to the fabric of copyright; contractual moment in copyright.

He presented the milestones since 2010, relating to the CJEU case law on private copying and fair remuneration (Padawan, … Amazon, … Copydan and Reprobel) and explained the regulation focused on the Reprobel case. The litigation between HP and Reprobel about reprography levy was based on speed of MF printer. The Brussels Court argues that is not possible to treat similarly copies made by a physical person for private or non commercial use and copies made by other user for commercial use. It is not possible to automatically allocate part of the remuneration to publishers, no undifferentiated levy for the copy of sheet music and copies made from unlawful sources, and it is not possible to have a dual remuneration system (remuneration paid in advance and a proportional remuneration determined by a price per copy).

The situation in 2015 is the prohibition in Belgian law of assignability by the authors and the 50% division with the publishers is not compatible with the InfoSoc Directive. Reprobel case could be a risk for the hamonisation (new exclusive related rights for publishers? new right to remuneration for publishers? In the ECS opinion is not a good way forward.

Closing panel 3, **Prof. Martin Kretschmer, Professor of Intellectual Property Law and Director of CREATe Centre at the University of Glasgow** talked about **the role of publishers.**

He analized some indicators and noted that only a 10% of top creators receive a disproporcionality of total income. He showed different examples from the Annual earnings from self employed writing (2001), ALCS survey, UK writing income, Germany UG Wort Payments.

German government proposal (19 feb 2016) is modelled on Art. 8(2) Rental Directive (92/100/EEC) codified as 2006/115/EC).

He closes talking about the consultation on change in EU law to grant publishers a new neighbouring right (closes 16 june 2016). That consultation will show different point of view to pay the digital content made by newspapers, magazines, bboks and scientific journals…

He pointed that the remuneration's right needs to be redesigned more easy.

The last panel, **panel number 4**, was entitled "**Limitations: aiming at the proportionality and flexibility?**".
The first intervention was made by **Prof. Jonathan Griffiths, Professor at the School of Law of the Queen Mary University of London**, who more specifically developed **the Deckmyn case and the question of harmonization of limitations**.

The decision mentioned goes beyond the pure sphere of copyright by making the balance between copyright and freedom of speech when analyzing the parody exception contemplated by article 5.3.k) of the Infosoc Directive. There is a recognition that European Copyright law depends on a "fair balance" between competing fundamental rights.


Moreover, the ECS considers that there is a clear harmonizing tendency in the judgment which is very welcome. It does not leave too much freedom to member states when determining the limits of the parody exception.

In conclusion, Prof. Griffiths considers that the judgment has some revolutionary consequences: EU secondary legislation is significantly diminished, as uses protected by Charter rights must be permitted and the charter is finally applied over copyright rules; plus, this introduces flexibility into the system of exceptions and limitations.

The second intervention of panel 4 was made by **Prof. Marie-Christinne Janssens, Professor at the University of Leuven,** and was about **"New exceptions for text and data mining and (full) panorama freedom at EU level".**

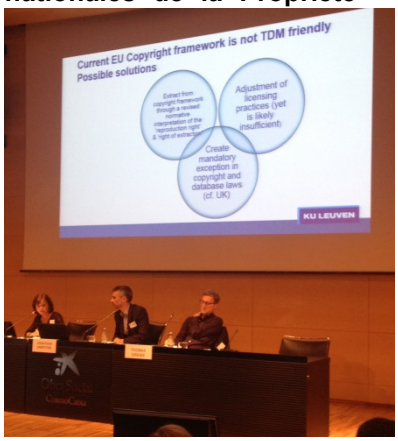
**She points out that te**xt and data mining exists since the 1990s but that the amount of data has grown significantly, and so new discussions arise. When doing data mining, we do the following actions that are concerned by copyright (adaptation, copying), even if it is done in small amounts, but the current copyright legal framework is not "TDM friendly". She considers some possible solutions: first of all, to revise the normative interpretation of the "reproduction right" and the "right of extraction"; second of all, she proposes an adjustment of licensing practices; finally, she considers creating a mandatory exception in copyright and database laws, which should contemplate commercial and non-commercial uses and a requirement of attribution.

About the freedom of panorama exception, she points out that we already have such an exception at a European Level, and that the fact that it is optional should not be seen as the main problem because most of the exceptions contemplated by the Directive are optional. We therefore have a big diversity of application of this exception within member states.

Prof. Janssens was followed by the intervention on **"A strategic revision of limitation" by Prof. Thomas Dreier from the University of Karslruhe / Karlsruhe Institute of Technology (KIT).** The system of exceptions and limitations seek to find the optimal relation between copyright protection and incentive to creativity. More limitations or exceptions would discourage creation, and less would probably do so as well. Exceptions and limitations contemplated in article 5 of the infosoc directive create an optimal system. Some strategic options when revising that system would be the following: pursuing a maximum of harmonization (but more exceptions would be mandatory); to adapt the existing exceptions or to create new ones adapted to digital environments; creating flexibility.

Finally, **Prof. Christophe Geiger, Director of the Centre d'Etudes Internationales de la Propriété Intellectuelle (CEIPI) in Strasbourg** presented **"the role of the CJEU".** To his opinion, the CJEU has been doing a good work when harmonizing and creating law through its decisions, as the Court deals with complex issues on copyright law. There is now a huge influence of jurisdictional practices in copyright evolution in European legislation.

He sees flexibility in law texts (for instance through more open limitations / exceptions) as something positive, because it allows the evolution of legislation though the decisions of the CJEU and helps avoid long legislative processes that would be required in case we had more specific legal dispositions.

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