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ACCESS RIGHT AS A POSTMODERN SYMBOL OF COPYRIGHT DECONSTRUCTION?

THOMAS HOEREN

1. ACCESS RIGHT — DOGMATICALLY

The first question is whether there exists an access right in copyright law. The issue has been raised by Jane Ginsburg arguing that copyright “is not only a ‘copy’ right, but an access right” ⁽¹⁾. The access right relates to new regulations in Europe, USA and other places based on the WCT and the WPPT.

a) WCT and WPPT

The story starts with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). According to Art. 11 WCT and Art. 18 WPPT, “contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used... in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”.

⁽¹⁾ Jane C. Ginsburg, “From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law”, in: *Columbia Law School, Public Law & Legal Theory Working Paper Group, Paper Number 8, New York, 2000, p. 3*, to be downloaded via: <http://papers.ssrn.com/Sol3/paper.Cfm?abstract=id=222493>; cf. also *ibid.*, “Copyright Legislation for the ‘Digital Millenium’”, in: *Colum.-VLAJ.L. & The Arts* 23 (1999), 137, p. 140 ff.

WCT and WPPT do not refer to "access" or "access control". They mention tools which "restrict acts". In addition, they make reference to acts "permitted by law". WCT and WPPT provide for a protection of technological measures under the condition that the measures themselves do not interfere with basic provisions of copyright law, in particular the exemptions in favor of users.

The term "access" itself is only used in WCT and WPPT in the provision on the right of communication to the public (Art. 6 WCT and Art 10 WPPT) which includes the "making available to the public... works in such a way that members of the public may *access* these works from a place and at a time individually chosen by them". As an argumentum e contrario, it can be concluded that not every "access" amounts to an act which can be controlled by the rights holder. The "access" has to be one where members of the public use the protected products from a place and at a time individually chosen by them. The access is not subject to copyright where it is not an act of "members of the public, for instance in the case of access via internal and small networks".

As a consequence, WCT and WPPT do not contain an access right insofar as the rights holder cannot solely authorize or restrict access; the access of a work depends on the rights holder's permission *or* statutory authorization ⁽²⁾.

b) Europe

In Europe, the discussions have been quite different from that approach. The story began with the Software Production Directive (one of the worst pieces of EU legislation), was changed by means of the Conditional Access Directive and found its foul end in the InfoSoc Directive.

aa) Software Protection Directive

According to Art. 7 (1) of the EU Software Protection Directive, Member States shall provide remedies "against" any act of putting into circulation, or the possession for commercial purposes of, which is to faci-

⁽²⁾ See Ginsburg p. 4 in note 7: "Neither the WCT nor the Berne Convention clearly articulate a right to control access".

liate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program" ⁽³⁾.

The EU institutions regarded this issue as a case of secondary infringement; they even used this legal term in the title of the provision during the drafting period ⁽⁴⁾. The regulation is strongly linked to unfair competition as both acts mentioned have a commercial impact. No reference is made to "access". It remains unclear what the protected device is protecting. Therefore, the relationship between Art. 7 and the exemptions embodied in Art. 5 and 6 is unclear ⁽⁵⁾.

bb) Conditional Access Directive

The Council Directive on the Legal Protection of Services based on, or consisting of, Conditional Access ⁽⁶⁾, has to be taken into consideration ⁽⁷⁾. It protects conditional access systems, i.e. "any technical measure and/or arrangement whereby *access* to the protected service in an intelligible form is made conditional upon prior authorization" (Art. 2 (b)).

The Directive obliges the Member States to prohibit the manufacture, import, sale or possession for commercial purposes of illicit devices (Art. 4 (a)). In Recital 21, it is expressly foreseen that this Directive is "without prejudice to the application of any national provisions which may prohibit the private possession of illicit devices". Consequently, the directive can only be applied in a business-to-business environment ⁽⁸⁾. In that way, the text relates to a concept which is akin to unfair compe-

⁽³⁾ For the implementation, see Art. 66 (5) Greek Copyright Law, art 32a Dutch Copyright Act.

⁽⁴⁾ See the documentation of draft made by Thomas Vinje, in: Michael Lehmann/Colin Tapper (eds.), *A Handbook of European Software Law*, p. 89 et seq.

⁽⁵⁾ The discussion in Germany and Austria has been resumed by Walter Blocher, in: Michel M. Walter (ed.), *Europäisches Urheberrecht. Kommentar*, Vienna, 2001, Software Art 7, Note 15 with further references.

⁽⁶⁾ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998, OJ L 320, 28-11-1998, p. 054.

⁽⁷⁾ The European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access, STE 178 of 24 January 2001.

⁽⁸⁾ See Th. Heide, "Access Control and Innovation under the Emerging EU Electronic Commerce Framework", in: *Berkeley Technology*, LJ 15 (2000), p. 993 et seq; Séverine Dusollier, "Incidences et réalités d'un droit de contrôler l'accès en droit européen", in: *Copyright: a right to control access to works?*, Brussels, 2000, p. 25 et seq.

tion. In addition, the whole directive is not related to copyright law (Recital 21) ⁽⁹⁾.

cc) InfoSoc Directive

In addition, Art. 6 of the InfoSoc Directive has to be considered ⁽¹⁰⁾. In conformity with the WCT, the Directive requires the Member States to provide adequate legal protection against the circumvention of any effective technological measures (Art. 6 (1)). Different from WCT, the protection shall include the protection against circumvention tools (Art. 6 (2)). This regulation has nothing to do with copyright law; it is an additional, accompanying measure based on unfair competition. Therefore, the protection against tools only extends to commercial actions, not against private acts.

It should as well be noted that the InfoSoc Directive does not speak of "access". Unlike Sec. 1201 (a) of the US Copyright Act, it restricts unauthorized "acts" (see Art. 6 (3) (1)). The term "access control" is only used as an example to determine the effectiveness of a technological measure (see Art. 6 (3) (2)). The wording of Art. 6 (3) is clear as it relates to "prevent or restrict acts ... which are not authorized by the rights holder". The term "acts" itself relates to the traditional exploitation rights. It is for instance used in Art. 5 (1): "temporary acts of reproduction ...". or in Art. 5 (2) (c): "specific acts of reproduction".

Therefore, the directive is not recognized by several Member States (Art. 2-4).

2. ACCESS RIGHT — NATIONALLY

a) National regulations

An access right does not exist on a national level either. The USA have provisions that restrict the act of obtaining unauthorized access by circumvention (Sec. 1201 (a) (1)) and the manufacture or making available

⁽⁹⁾ See §§ 297 A, 298 of the British CDP A 1988 which proves that the UK misleadingly implemented the Conditional Access Directive by changing the Copyright Act.

⁽¹⁰⁾ Directive 2001/19/EG of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167 of 22-06-2001, p. 10 ff.

http://europa.eu.int/eur-lex/de/dat/2001/1_167/1_16720010622de00100019.pdf

tools for unauthorized access (Sec. 1201 (a) (2)). These regulations have caused some US courts to speak of a "right to control access" granted to copyright owners ⁽¹¹⁾. These wordings seem however not to have been made to describe a new access right. Apparently, the courts only used the term "right to control access" as an equivalent to the anticircumvention rules of the US Copyright Act (and behind that WCT).

The traditional copyright system does not know an access right apart from the existing rights of reproduction, distribution, public performance or communication to the public. The existing ALAI reports demonstrate at least in Europe, an access right does not exist. The states adapt their traditional system of exploitation rights in order to determine the borderline for the possible use of copyright works.

b) The term "Access right"

In addition, I am in doubt whether the term "access right" is useful. Access means traditionally the "way (in) to a place" ⁽¹²⁾. It is thus linked to a certain place, a limited and closed space which has an entrance, a way in. Leaving these territorial roots aside means to use "access" as a metaphor. In fact, there is a legal discussion on "access rights". But in this context "access rights" relate to the free access of the public to information ⁽¹³⁾ and is linked with the freedom of information question ⁽¹⁴⁾. It is therefore misleading to use that term in sense which is clearly the opposite of freedom of information: an exclusive right to restrict public access.

In addition, "access right" is a term used in relationship to a lot of different access control tools. In her article mentioned above, Jane Ginsburg mentions for instance "pay-per-view/listen systems" ⁽¹⁵⁾ or

⁽¹¹⁾ *Los Angeles Times v. Free Republic*, 54 U.S.P.Q. 2d 8BNA 1452, 2000 U.S. Dist. LEXIS 5669 at p. 67 et seq. (C.D. Cal. 2000); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 346, 2000 US Dist Lexis 11 949 (SDNY August 17, 2000). [Editors' Note: This case was affirmed sub nom. *Universal City Studios, Inc. v. Corley*, 273 F. 3d 429 (2d Cir 2001).]

⁽¹²⁾ See the advances *Learner's Dictionary of Current English*, 2nd ed., 1948, p. 6.

⁽¹³⁾ See the title of the work of Norman Marsh (ed.), *Public Access to Government-Held Information*, London, 1987.

⁽¹⁴⁾ For instance Robert Pinto, *La liberté d'information et d'opinion en droit international*, Paris, 1984; Acham Mehra, *Free Flow of Information*, Paris, 1986.

⁽¹⁵⁾ P. F note 11.

“anti-copying systems” (16). She additionally mentions “limit[ing] listening or viewing by number of plays, by number of computers on which the work may be played, by duration of access, and so on” (17). In fact, the concept of access rights has to be distinguished from reprints and permissions, encrypted content solutions, content distribution mechanisms, and copyright enforcement devices (18).

c) Traces of access rights

There have been several attempts to combine the concept of access rights with traditional topics.

aa) First publication

One way of interpreting it was to make a reference to the authors right to the first publication (19). However, the right of first publication is a right of first, public access to copyrightable works. The difference with the access right is obvious. The right to first publication only includes.

- first access
- of the public
- to copyrightable works

This approach does very much cave act contradict the structure of the “access right”. This right apparently includes.

- any access (even to published works)
- of anybody, even he is a close relative or friend of the creator
- to any work even if it is not copyrightable

(16) P. 4. See however, p. 11: “since we are here discussing access controls, and not anti-copying controls...”

(17) P. 7.

(18) See the General Report of Pierre Sirinelli, “The Scope of Protection on Circumvention of Technological Measures: Exceptions”, *ALAI Paper New York 2001*, p. 5 et seq. Further details in J. D. Lasica, “Preventing Content from Being Napsterized: New technologies target theft of online intellectual property”, <http://www.llrx.com/features/napster.htm>

(19) This combination of concepts has been mentioned in the French and the Canadian ALAI report.

bb) Access and Copyright

Moreover, there are clear indications that access rights have nothing to do with copyright protection.

It is the near-future. I am jogging along a tropical beach (which I would never do as I hate jogging). I have my palm-sized book reader player-satellite cell phone that permits instant access through digital networks to an infinite variety of literary works of the 13th century and musical works from the 18th century performed in auditions at the beginning of the 20th century and recorded in 1940.

In spite of the fact that these recordings are in the public domain, I am automatically charged for listening to them or the charge is debited from my account. Although I can read or listen to these works without permission, I have to pay for the access to these works via digital devices. Therefore, the US House of Representatives is right in stating: “These... provisions have little, if anything, to do with copyright law” (20).

cc) Roman Law of Possession

Access rights are in my view deeply rooted in Roman law concepts of possession. If I possess a thing, I can restrict others from using it. If I possess land, I can even build fences to avoid trespassing and control access. Circumvention restrictions in an electronica form now allow us to build up electronic fences. However, these fences are not erected in the sense that I possess all these electronic goods used by millions of customers. No, these fences are a symbol for a virtualization of possession, leaving aside the personal relationship between a possessor and “his” land or “his” object.

As a consequence, there is a parallel between possession and access restriction. However, since the ancient times, all civilized countries believe that possession is not a right as such. Possession does not give a right in the object itself, as even a thief can have possession. Possession is only protected insofar as it is formally unlawful and a violation of the

(20) Committee of Commerce of the House of Representatives, H. R. Rep. No. 105-551, Part 2, 105 th Cong., 2d. Sess. (July 22, 1998), p 24. Similar consideration might be found in Paul Goldstein, “Copyright and Its Substitutes”, in: *Journal of the Copyright Society of the USA* 45 (1997), p. 151.

personal rights of the possessor to take an object away from the person which possessed it before ⁽²¹⁾. The same applies to "access". The mere fact that somebody integrated a control mechanism into a digital product doesn't give him a positive right to control the access to the product. But it might be considered formally unjust that somebody else circumvents or abolishes this access control tool. Therefore, there does not exist a right to control access to copyrighted works. Access control is a mere fact; the big players already control the access to digitized products. The question is whether we want to prevent circumvention devices which are undermining these tools.

But the reference to possession demonstrates further weaknesses of the access right model. If we go back to Roman law of possession, two elements are necessary for justifying a legal protection of possessors: "corpus" (detention) and "animus domini" ⁽²²⁾. When industry uses access control systems they do certainly have animus domini; they wish to be the technically dominating Leviathan of the information world. But they do not have "corpus" in the Roman law sense as all the copies integrating access control systems are in the possession of the users. However, even the Roman law foresaw that in certain cases somebody can be the person who has "corpus" granting him a limited use right (such as a hire or rental agreement). But then we have a major problem for access rights. If industry is really hiring or renting their products to users with an expiration time, they can of course use access control systems for the purpose of stopping the users from using the goods after the expiration date. However, in these cases the companies are subject to severe civil law rules on liability which they do not like. These companies want to combine the elements of rental (for justifying their expiration dates and the non-applicability of the exhaustion doctrine) with the concept of sale (to determine warranties and contractual liability) by using the nebulous term "licensing" (which does not exist in civil law). But this opt-in and opt-out system does not work. If somebody is going to a record shop and buys a CD, he is a party to a sales agreement. But if he buys the copy, he is entitled to use his property without limitations. Technical control mechanisms can therefore not be justified. But if he gets it with a clear indication that there is a expi-

⁽²¹⁾ See Rudolph Sohm, *Institutionen. Geschichte und System des römischen Privatrechts*, München, 1020, p. 431 et seq.

⁽²²⁾ See 1.3 § 1 D. 41, 2.

ration period, he is renting it and he can rely upon the high level of liability in rental contracts (at least in Europe).

dd) Unfair competition and trade secrets

If the law of possession cannot justify access rights, the question remains whether unfair competition law is a reasonable justification. This implies that private use or the actions of researchers (like the case of Dr. Felten ⁽²³⁾) and al brachet are not part of the access control regulations; these activities should be free. There are several courts who referred to common law based trade secret rules as the basis for anticircumvention decisions. For instance, in the DeCSS case a California court decided that CSS is protected as a trade secret under common law ⁽²⁴⁾. Similar decisions might be found for instance in Germany where courts referred to unfair competition law to forbid the use of anti-dongle systems in software business.

The trade secret approach is in my view the most convincing perspective. The use of a specific technology integrated in works is strongly linked with the idea that the technology itself should be protected against persons who try to determine the specific features of the technology and make a business out of their knowledge. However, the trade secret approach leads to further questions I cannot solve in this panel (which is only discussing the mere question whether an access right exists). For instance, it has to be discussed why third parties have to respect trade secrets independent of contractual obligations. Furthermore, a lot of states grant trade secret protection as a kind of property right; but they have to limit this right in consequence of the problem of innocent infringement ⁽²⁵⁾. Furthermore, due to broad extension of the anti-circumvention rules, new limitations have to be created to protect the interests of the public. The case

⁽²³⁾ In June 2001 the Electronic Frontier Foundation (EFF) and others filed suit on behalf of Princeton University professor Edward Felten and a team of researchers who cracked the code for the secure Digital Music Initiative (SDMI) watermark, asking for a declaratory judgement that the team has a First Amendment right to share its findings with the world at large. See for details: <http://www.thestandard.com/article/0,1902,27281,00.html> and <http://cryptome.org/sdmi-attack.htm>.

⁽²⁴⁾ DVD Copy Control Ass'n Inc. v. McLaughlin, 2000 WL 48512, p. 1 (Cal. Sup., Jan. 21, 2000), to be found under: http://www.eff.org/pub/Intellectual_property/DVDCCA.case/20000120pi-o-order.html.

⁽²⁵⁾ See the summary of François Dessemontet, *Le Savoir-Faire industriel. Définition et protection du "know-how" en droit américain*, Genf 1974, p. 277 et seq.

is similar to the new regulations on sports rights where the public interest in important football games is as well protected against the broadcasting of football exclusively by pay-TV-companies (26). This question leads to general principles of media law determined partly by the EU Directive on Television without Frontiers (27).

Let us stop here. No further discussion is needed as the necessary minimum can at least be said: There is no such thing as an access right in copyright law.

3. ACCESS RIGHT — POLITICALLY

But the question remains whether we want an access right to exist. This is a political issue which is open for discussion.

The big players in the entertainment industry seem to have noticed these problems. They try to solve them by introducing technological measures. That step allows them to integrate their own view of copyright in the programming codes (the famous "code as code" problem of Lawrence Lessig) (28).

The big players have considered the borderlines of copyright law internally for years (29). There seems to be a tendency among the "Majors" to focus on technological solutions for that purpose. The technological strategy has some major advantages: The answer to the machine is now in the machine. Lawyers, statutes, courts are no longer needed; technicians are replacing lawyers and programming codes are taking the role of codifications. Technology can be used worldwide — without the limitations of nationally based laws. It is cheap and directly effective. Even if sagas like SDMI suggest that "big players" are in fact having considerable difficul-

(26) Thanks to Prof. Dr. Jon Bing (Oslo) which led me to this idea after along discussion in the JFK airport after the ALAI conference was finished.

(27) OJ L 202 of 30 July 1997, 60. Cf. n. Helberger, Study on the use of conditional access systems for reasons other than the protection of remuneration, to examine the legal and economic implications within the Internal Market and the need of introducing specific legal protection, Report presented to the European Commission, April 2000.

(28) Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York, 1999, p. 3 et seq.

(29) Pamela Samuelson, "Fair use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega", in: *Journal of Intellectual Property* 1 (1993), 49.

ties in preventing hacking (30), technological tools still remain effective as to the majority of users and are being adapted regularly to the highest state of the art.

There are some doubts as to the desirability of these techniques from the perspectives of users *and* creators. Users have to fear that their freedom to use works is undermined as anti-copying devices do not per se take account of statutory exemptions. Strategies which are already in use (like regional encoding techniques) show the power of these tools which restrict technically what can be done legally (for instance according to the exhaustion doctrine).

The authors have to fear that the producers only use the effects of these tools for their own sake (31). Authors normally do not have the knowledge and money to invest in anti-copying devices. In addition, they are not protected against the contractual buy-out of their rights by the big players. If Microsoft, Sony or other big companies want to get the digital rights, they get them — without any additional payment, any equitable remuneration, with a simple signature on a long standard contract formula (32). This can be criticized by people who are supporting creative persons (as myself who has worked for years to support the legal interests of documentary film artists). But it is a fact. We only have to be honest nevertheless about which party we are representing and supporting. Please do not lie. In the present situation, access right is a mere discussion for the benefit of the "Majors".

4. ACCESS RIGHT — DECONSTRUCTIVELY

But even if there is no such thing as an "access right", is there is no need to discuss a fundamental change in the copyright structure? Perhaps the whole discussion on "access rights" is only a symbol, a feverish warning, an inherent feeling that copyright law is becoming ill (33).

(30) This remark relates to the case of RIAA v. Diamond Multimedia Systems, 180 F. 3d 1072 (9th Cir. 1999), GRUR Int. 1999, p. 974.

(31) This problem has been neglected in Ginsburg, p. 9.

(32) Corey Field, "Their mater's voice? Recording artists, bright lines and bowie bonds", in: *Journal of the Copyright Society of the USA*, 2000, p. 145 ff.

(33) For a radical criticism of copyright law cf. John Perry Barlow, "The Next Economy of Ideas: Will copyright survive the Napster bomb?", in: WIRED 8.10, 240; to be

I do not want to stress all the indications that US and European colleagues have described, focusing on the inadequacies of copyright in the digital age⁽³⁴⁾. Let me only hint at a few symptoms.

The traditional concept of exploitation rights is based upon the copyright industry and their needs at the end of 19th century/beginning 20th century. At the beginning, exploitation via tangible goods (books, music records, paintings) was regarded as being dominant; therefore, the focus in copyright legislation was on reproduction and (in several states) "distribution". It took some time until exploitation in an intangible form was regarded as a major problem. When television and broadcasting came up, the legislators simply added some references to these techniques in their copyright acts⁽³⁵⁾. This led to the incorporation of public performance rights in France and the USA⁽³⁶⁾. After cinemas, radio and TV became widespread, the copyright acts incorporated sections on these new techniques. However, these new rights were only linked to dissemination techniques that allowed for a simultaneous transfer of information to an unlimited number of users. With the internet, it became necessary to provide for a new right of "making available to the public". Towards the end, WCT and WPPT solved an important issue in promoting such a right.

However, even after the WIPO discussions, the existing system of exploitation rights does not fit the needs of the information society. Take for instance the reproduction right. There is a worldwide discussion about how we can adapt this old right to digital uses. Some people argue that the reproduction right has internal limits where ephemeral copies (such as RAM, proxy storage) are concerned. Representatives of the digital

found as well at <http://www.wired.com/wired/archive/8.10/download.html>. Similarly among others Douglas J. Masson, "Fixation on Fixation: Why Imposing Old Copyright Law on New Technology will not work", in: *Indiana LJ* 71 (1996), p. 1049.

⁽³⁴⁾ See also Thomas Dreier, "Copyright Digitized: Philosophical Impacts and Practical Implications for Information Exchange in Digital Networks", in: *WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights*, march 1993, p. 15 ff.; Jane C. Ginsburg, "Domestic and International Copyright Issues Implicated in the Compilation of a Multimedia Product", in: *25 Seton Hall L. Review* 1995, 101 ff.; *ibid.*, "Putting Cars on the 'Information Superhighway'", in: Bernt Hugenholtz (ed.), *The future of copyright in a digital environment*, The Hague, 1996, 189 ff.

⁽³⁵⁾ Jane C. Ginsburg, "From Having Copies to Experiencing Works: The Development of an Access Right in U.S. copyright Law", in: *Columbia Law School, Public Law & Legal Theory Working Paper Group, Paper Number 8*, New York, 2000, p. 6.

⁽³⁶⁾ See the law of January 15, 1791 in France and the US Act of August 18, 1856, ch. 169, 11 Stat. 138.

industry (i.e., Microsoft) supported the concept that reproduction is the mega-right in the electronic world, including any temporal reproduction. The WIPO did not find any solution for that problem during the discussions in the WCT/WPPT⁽³⁷⁾. The European Commission tried to solve that issue after a harsh debate, by asking if there was any "independent economic value" of transient copies (Art. 5 (1) of the InfoSoc Directive). However, this regulation does not help at all as it will be nearly impossible to determine which digital copy has an independent economic value. In addition, Art. 8 (3) of the InfoSoc Directive supports the claim of rights holders that access providers should be liable for any proxy storage of works in the light of possible injunctions. In my view, it is a pity that future discussions on copyright and digital use depend on the question whether and when a copy has an independent economic value.

Similar considerations have to be taken as to the "making available to the public right" introduced by the WCT. Even this new and broad right will not solve the problem that the traditional concept of exploitation does not suit the needs of the information society. Even in the light of the WCT, there remains the huge problem of deciding what is "public" (i.e. using intranets). Where are the borderlines between public and non-public use? Are for instance intranets, i.e. small intra-corporation networks, directed to members of the public or not? If we do not solve these difficult issues, the extent of the new making available right remains unclear.

Therefore, I agree with Jane Ginsburg when she describes the different concepts of exploitation rights: "After all, there should be nothing sacred about the eighteenth- or nineteenth-century classifications of rights under copyright, in a technological world that would have been utterly inconceivable to eighteenth-century minds" (38).

An important attempt to solve the issue of new economic rights has been mostly unnoticed although it is clearly embodied in the EU Database Directive, Jens Gaster (European Commission/DG XV) "invented" not

⁽³⁷⁾ See for the different opinions, Mihaly Ficsor, "Copyright for the Digital Era: The WIPO 'Internet' Treaties", in: *Columbia-VLA J. Law & the Arts* 21 (1997), p. 197; Pamela Samuelson, "The U.S. Digital Agenda at WIPO", in: *Virginia Journal of International Art* 37 (1997), p. 369, 390 et seq.

⁽³⁸⁾ Jane C. Ginsburg, "From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law", in: *Columbia Law School, Public Law & Legal Theory Working Paper Group, Paper Number 8*, New York, 2000, p. 8

only the highly disputed "sui generis right" (39). He additionally set aside the traditional cluster of exploitation rights by using new terms. Art. 7 of the Database Directive provides that the maker of a database can "prevent extraction and/or reutilization" of the contents of a database. These new terms relate not only to business-to-business situations. As Recital 42 expressly states, it relates also "to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment".

However, several Member States refused to integrate these new rights in their legislation (40). Especially in Germany, the traditional wording (reproduction, distribution etc.) was used after a long and controversial debate. This change in the terms is a clear violation of the implementation duties of each EU Member State. In addition, this gap demonstrates that many people did not notice that the radical new approach in the directive.

5. ACCESS RIGHT — HISTORICALLY

European copyright concepts are the historical starting point for a discussion on access rights. At the beginning, there was the main principle of freedom of information. Until the Renaissance, everybody could use each book for whatever purpose. Granting monopolistic rights for books was an issue of the 16th century. It is common knowledge that the roots of copyright are linked with the privileges for printers and book traders in Italy, later in the UK and Germany privileges were granted by sovereigns on a national basis. The granting of privileges to printers was linked with the view that these privileges are bound to and have to be used for the "utilitas publica" (41). A "privilegium onerosum", to the disadvantage of society, has to be cancelled (42). Privileges should thus only be granted "in seltenen Fällen" (in rare cases) (43).

(39) See Gaster, VPP-Mitteilungen, 1996, p. 112.

(40) See Raue/Bensingcr, MMR, 1998, p. 510.

(41) See Renate Frohne, "Ashaver Fritsch und das Urheberrecht", in: Elmar Wadle (ed.), *Historische Studien zum Urheberrecht in Europa*, Berlin, 1993, p. 11 ff.

(42) See Benedikt Carpzov, *Iurisprudentia ecclesiastica seu consistorialis*, Paris, 1649, Definitiones, p. 413-416.

(43) Georg Friedrich Lamprecht, *Versuch eines vollständigen Systems der Staatslehre*, Berlin, 1784, Vol. 1, p. 322.

The idea that authors have to be protected as such is a product of the French theory of Enlightenment ("Aufklärung"), the British concept of "literary property" based on John Locke (44) and the German philosophy (45) of idealism (46). The three European traditions merged into the idea that the "genius", the creative author, should be given "geistiges Eigentum", "propriété intellectuelle", a protection of its own apart from the protection for printers (47). However, even until the 19th century there was a pan-European discussion whether the owner of a book copy should be free to reprint it due to his status as the owner (48).

Nevertheless, the question arises whether the idealistic model of creativity is still a valid vision for post-modern society. Of course, there are still many individual authors among us, particularly in the literary, pictorial and even musical realms. But these areas have lost their impact compared to the growing phenomenon of "team-creativity". Movies were the first category of copyrightable works based on inseparable influences of a big team of creators (such as the scriptwriter, the director, the cameraman etc.). The movie world consequently shocked the copyright world so that it took more than fifty years until film works got full protection in international copyright conventions. But the issue of "team-creativity" became even bigger and more threatening with digital technologies. Software, marketing campaigns, applied arts — these works are mostly created by big teams sometimes involving hundreds of developers. This change has to be

(44) See Josef Kohler, *Urheberrecht an Schriftwerken und Verlagsrecht*, Stuttgart, 1907, p. 47 f.

(45) Johann Gottlieb Fichte, *Beweis der Unrechtmäßigkeit des Büchermachdrucks. Ein Raisonement und eine Parabel* (1793), in: *ibid.*, Werke, edited by Immanuel Hermann Fichte, Reprint Berlin, 1971, Vol. 8, S. p. 223 ff.

(46) See Walter Bappert, *Wege zum Urheberrecht. Die geschichtliche Entwicklung des deutschen Urheberrechts*, Göttingen 1957, p. 75 ff.; Martin Vogel, *Der literarische Markt und die Entstehung des Verlags- und Urheberrechts bis zum Jahre 1800*, in: GRUR 1973, p. 303 ff.; ders., *Deutsche Urheber- und Verlagsrechtsgeschichte zwischen 1450 und 1850*, in: *Archiv für Geschichte des Buchwesens* 19 (1978), p. 1 ff.

(47) See also Jane C. Gensburg, "A Tale of Two Cities: Literary Property in Revolutionary France and America", in: *Tulane Law Review* 64 (1990), p. 991, relating to the 19th century roots for determining moral rights in Europe.

(48) See Dölemeyer/Klippel, "Der Betrag der deutschen Rechtswissenschaft zu Theorie des gewerblichen Rechtsschutzes und Urheberrechts", in: *Gewerblicher Rechtsschutz und Urheberrecht in Deutschland. Festschrift zum 100jährigen Bestehen der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht und ihrer Zeitschrift*, Weinheim, 1991, Vol. 1, p. 185, 198 ff.

taken into consideration when discussing the need for a political change in the copyright system.

6. ACCESS RIGHT — PHILOSOPHICALLY

a) Copyright law as one part of information law

Copyright law is thus to be considered as being itself a part of a broader area of law, the information law. Information law is a term which is being discussed more and more worldwide. It is a new model which tries to stress the common lines between the various industries of film, software, telecommunications, media and entertainment. The term "information" is broad and difficult to define⁽⁴⁹⁾. However, recent studies, especially of Jean Nioclas Druey, have demonstrated that it might be possible to explain the content of the term "information" as the bases of a concept of information law in distinguishing between the act of increasing knowledge, the content and the status of having some knowledge⁽⁵⁰⁾. If we use this broad definition, copyright law has to be regarded in a different way than the traditional perspective. Copyright protects information, indeed, it is even the Magna Carta of the information law. However, it has to be considered as only one of various other elements of information law. Media law, public access rights, privacy regulations, antitrust issues of access to information — all these topics are intermingled, and have to be considered together. They are bound to each other even though they sometimes have divergent approaches, but there remains one final question: How do we define rights in information versus the public domain?

If we take this approach as a new axiomatic way of understanding copyright, then the looking glasses of lawyers have to be changed. What is necessary now is to reform copyright law in Information's Image⁽⁵¹⁾.

⁽⁴⁹⁾ See Gerot Wersing, *Informationssoziologie. Hinweise zu einem informationswissenschaftlichen Teilbereich*, Frankfurt, 1973, p. 35 ff.; Wilhelm Steinmüller, *Informationstechnologie und Gesellschaft*, Darmstadt 1993, 198 ff.; Andreas Wiebe, "Information als Wirtschaftsgut", in: Herbert Fiedler/Hanns Ullrich (eds.), *Information als Wirtschaftsgut*, Köln, 1997, p. 93, 99 f.

⁽⁵⁰⁾ Jean Nicolas Druey, *Information als Gegenstand des Rechts*, Zürich, 1995, p. 3 et seq.

⁽⁵¹⁾ This wording is a reference to Jessica Litman's fabulous article "Reforming Information Law in Copyright's Image", in: *Dayton Law Review* 22 (1997), p. 587.

Traditional copyright thinking is still using the old philosophical concepts of 19th century. As copyright law has been an area taught and practised by a small circle of experts, it became self-referential, autopoietic, only fixed upon itself, unable to move. The world changed — but not the copyright lawyers. The philosophical concept remained unchanged, although the rest of the world was totally changed. This was ok as long as copyright only dealt with the protection of fine arts. But at least with the inclusion of software and databases in copyright law things change. Wide parts of our society are now affected by copyright; wide parts of industry are now affected by copyright. The shock for traditional copyright lawyers was apparent when EFF and others protested against DeCSS decisions. As the U.S. Copyright Registrar started at this conference, it was astonishing for it that people discussed these issues so broadly and vividly. But it seemed to have the impression that this broad interest was a mistake, a mere accident.

b) General principle: Freedom of information

The historical considerations which I tried to develop above lead as well to a different understanding of the concept of copyright law as such. It is not mandatory to interpret copyright protection broadly (and vice versa, exemptions in copyright as narrowly tailored) exceptions. The general rule above any intellectual property is freedom of information. This meta-rule determines that any information can be used by everybody for free. In Germany, we have a nice folk song for that issue: "Die Gedanken sind frei". Thoughts, content, ideas, expressions are open to be utilized, integrated, altered by anyone⁽⁵²⁾. The view that knowledge, content, thoughts are common heritage of mankind is not regulated in any act. But is a general view which is underlying our legal regimes. The fact is nowadays recognized at least in the area of law and economics that information is a public good which is by its nature on-exclusive⁽⁵³⁾.

⁽⁵²⁾ See Jean Nioclas Druey, *Information als Gegenstand des Rechts*, Zürich, 1997, S, p. 79 ff.

⁽⁵³⁾ Robert S. Pindyck/Daniel L. Rubinfeld, *Microeconomics*, Upper Saddle River, 2001, p. 645; Niva Elkin-Koren/Eli M. Salzberger, "Law and Economics in Cyberspace", in: *International Review of Law and Economics* 19 (1999), p. 553, 559; Yoichi Benkler, "An Unhurried View of Private Ordering Information Transactions", in: *Vanderbilt Law Review* 53 (2000), p. 2063, 2065 ff.

That can be seen taking into consideration the distinction between ideas and expression. It must be vexing for traditional copyright lawyers that they have been unable to find a workable borderline between the free use of ideas and the protectable expressions. Centuries have passed with attempts to define these terms; but as the discussion on the protectability of show formats has demonstrated, no solution was found. This difficulty has to do with the relationship between copyright law and information law. The idea of free ideas in copyright — only relates to the meta-concept of information law that information is the common heritage of mankind and thus free to be used by everybody.

b) "In dubio pro libertate"

This approach leads to a different interpretation of copyright law. As Michael Fey has stated, "copyright protection exists primarily for the benefit of the public, not the benefit of individual authors"; the aim of copyright is regarded "to ensure the creation of new works" (54). This relates to the Copyright Clause of the U.S. Constitution: the progress of science is promoted by securing "for limited Times to authors ... the exclusive Right to their ... Writings" (55).

Copyright is an exception which needs further justification. The statutory act of reducing public domain in favour of a long and extensive copyright protection can only be made where exceptional circumstances justify that step. This is the case where a high level of originality and creativity is embodied in a specific work. Only where a certain expression has individuality and represents some creativity, an attribution of exclusive rights under the copyright regime can be justified (56).

But apart from that, it was a violation of informational justice to grant a 70 years p.m.a. protection of the "kleine Münze" — even for software, photos and databases. This extension of copyright law to elements which resemble the Feistoverruled U.S. criteria of "sweat of the brow" is a product of recent EU legislation during the last 10 years. No scientific research, no economic analysis has been made before in Brussels; everything

(54) Michael G. Frey, "Unfairly Applying the Fair Use Doctrine", in: *University of Cincinnati Law Review* 66 (1998), p. 959, 1001.

(55) US Constitution, Art. I, § 8, cl. 8.

(56) Similarly Jessica Litman, "The Public Domain", *Emory Law Journal* 39 (1990), p. 965 et seq.

is only aimed at immediately impressing EU lobbyist groups, especially arising from the producing area.

These considerations do not only influence the interpretation of originality requirements. In the same way, they determine the question how the regulations on public access in copyright law should be interpreted. Traditional copyright lawyers often try to interpret these rules as "exceptions" compared to the general rule that copyright owners have the full control of the exploitation (57). However, this view is incorrect. It has to be reinterpreted in the light of "in dubio pro libertate". Exemptions in the public interest are not "exceptions" to the general rule that works are copyrighted. They are limitations in favor of fundamental rights such as freedom of the press, public access or the necessities of research (58). Even private copying has a constitutional background, as it protects the right to privacy against rights owners who want to control the dissemination of their works in private houses. As the limitations are no "exceptions", there is no need to interpret the exemptions narrowly. Instead, a balance between the different rights involved has to be made in interpreting the exemptions. This attempt to find the optimal way of combining the interests of rights holders and users very often leads to a broader interpretation of exemptions taking into consideration the general principle of free use as it has been stressed in several decisions for the German Federal Supreme Court (59).

(57) Keith Aoki, "Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain", in: *Columbia-VLA Journal of Law and the Arts* 18 (1993), 1. Aoki has demonstrated the negative effects of the tendency to narrow the public domain by the extensions of exclusive rights in intellectual property law.

(58) It is interesting to see that Art. 5 of the InfoSoc Directive is titled "exceptions and limitations". The EU legislators left the question open for discussion whether the exemptions in the Directive are "exceptions" or "limitations" (similarly Recital 19 of the Directive).

(59) See the German Supreme Court (Bundesgerichtshof), Decision of 20 January 1994, *Computer und Recht* 1994, p. 275 — Holzhandelsprogramm.