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Bernd Justin Jütte

Reconstructing European Copyright Law for the Digital Single Market

Between Old Paradigms and Digital Challenges



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Preface

Copyright is at the heart of the „Creative Industries“ from books and music to audiovisual media and more. At the same time it is a legal construct which has been challenged more than many others by the „Digital Revolution“ with an ever-expanding online use of copyrighted materials.

It is against this background that the European Union in view of the economic aspect of creating a common market in Europe attempted at harmonising gradually parts of copyright – or in the French and German terminology *droit d’auteur* and *Urheberrecht* – over the last decades. Most notably, preparing copyright for what was then called „information society“ resulted 2001 in the introduction of several exclusive rights for authors in the InfoSoc-Directive. Less than 20 years on and also considering the limited impact of the Enforcement Directive, the EU framework – or more generally the traditional approach to copyright – is questioned and ready for a complete reform or overhaul. No small task to approach for a Ph.D. thesis but this book that we are very happy to see published as Volume 10 of the „Luxemburger Juristische Studien – Luxembourg Legal Studies“ with Nomos and Hart publishers originated in exactly that.

Bernd Justin Jütte had the courage to analyse the traditional concepts in view of their validity in the digital context and present an extensive sketch of where and how EU copyright law should be adapted. The thesis explains in very convincing terms what **„Reconstructing European Copyright Law for the Digital Single Market“** means. Irrespective of whether readers agree with all conclusions concerning the way EU Directives and Regulations should be adapted in this highly political context (as presented in chapter 4), the value of the very concise overview of current EU copyright law in the international context (chapter 2) and the basis for the policy discussion (chapter 1) is highly appreciated in a time when the complexity of the copyright acquis and reform proposals can easily lead to getting lost. In the core chapter (3) of this work, the author presents us with four key areas of copyright law which are used to explain not only these concepts but also how they change or are challenged by the digital use of copyrighted works. What makes copyright such an interesting area for analysis also for EU scholars and readers that are non-experts in the

field is that the very notion of “territoriality” of copyright is an inherent matter of conflict with the idea of a single market which exists without national or e.g. language frontiers. In how far the idea of “exhaustion” of a work protected by copyright by introducing it at any point into the single market is expandable also to a digital single market is the first layer of analysis. This is followed by the so-called “L&Es”, the limitations and exceptions that are the only factor narrowing down the otherwise exclusive rights of authors. Again, these were developed in light of an “information society” that did not know many digital uses of works that are common standard today. Beyond these concepts, Bernd Justin Jütte also analyses two important instruments used for the better management of copyrighted works. On the one hand the Technical Protection Measures attached to works which are not allowed to be circumvented and with which – also in the digital context – works are supposed to be protected against unauthorized use, may point a feasible way forward with the advancement of technology. Another important element of copyright management that the EU has started to explore is the extension of Collective Management Organisations and the type of author representation that these should cover in the future.

All of this analysis is based on a very extensive and thorough discussion of the relevant case law of the Court of Justice of the European Union as well as national courts and a wide range of literature. The author manages to employ a convincing approach by first “deconstructing” existing EU copyright law in the way presented above before offering solutions on how to “reconstruct” it. He underlines convincingly the need to do so in a coherent and in a way horizontal approach to the questions related to copyright management in order to have a future-proof and potentially more widely accepted system. That this field belongs to the most controversial between supporters of the traditional approach to copyright and critics that conclude the old system has failed completely, makes it all the more astonishing how mature for a junior researcher the analysis in this thesis is. The result concerns a “moving target” in the midst of the political debate around the reform and the author has clearly positioned himself in this ongoing process. With the result of his research the fundamental questions and his analysis offered can be useful irrespective and beyond the current reform, but at the same time I am convinced it will prove valuable if considered by representatives in the forthcoming legislative procedures.

The goal of copyright law as much as of the proposals discussed in this thesis are and should be to foster the development and offer of creative content, ideally in a pan-European context which allows cultural and social exchange between the people(s) and individuals constituting the European Union. Achieving this would be of great help beyond the copyright law question and Bernd Justin Jütte's thesis subtitle "Between Old Paradigms and Digital Challenges" aptly describes a more general challenge to the EU and its legal framework in today's world. We are very pleased to see that this thesis was developed in Luxembourg, one of the hearts of Europe, and that it is published in the University of Luxembourg's Research Unit in Law series. The book deserves wide attention as well as many other contributions of the author to specific questions of copyright law. I am convinced that his future academic work, which he is pursuing outside of the Luxembourg origins, will continue to be linked to the beginnings with the "Reconstruction of European Copyright Law".

Dr. Mark D. Cole

Professor for Media and Telecommunication Law
University of Luxembourg

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This final version of the work bears the marks of many who contributed directly or indirectly. They are, however, not to blame for the mistakes that remain, they are my own.

Professor Mark D. Cole let me explore copyright and more. Without his unwavering trust and constant support and encouragement I could not have completed this work. I valued and enjoyed working with him and his team. From all my colleagues Jenny Weinand stands out for many a reason.

I am also very much indebted to Professor Matthew Happold, who showed me how to approach the academic profession with a necessary modicum of humanity. Professor Stefan Braum encouraged me to come to Luxembourg in 2009 and motivated me to constantly rethink my research. Albeit reluctantly, I am glad I followed his advice. Professor Christophe Geiger and Professor Ole-Andreas Rognstad kindly agreed to examine my thesis and challenged me during my defense.

The Faculty of Law, Economics and Finance provided me with an academic environment that allowed me to pursue my research freely. The funding provided by the Luxembourg National Research Fund enabled me to conduct my research free from any financial worries and constraints. I must also thank my students in Luxembourg and in Kaunas, teaching them has been more than a mere complement to my research.

I am, not only as a matter of causality, deeply indebted to my parents. I owe my ability to think and to think critically to them. A good measure of common sense and decency I attribute to the influence of my late grandparents, whom I dearly miss.

Last, but foremost, I am grateful to my wife and best friend Maryia, I would have not been able to complete this work without her unlimited support.

Nottingham, March 2017

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Abbreviations

AG	Advocate General
Am. U. Int'l L. Rev.	American University International Law Review
Berkeley Tech. L.J.	Berkeley Technology Law Journal
BGH	Bundesgerichtshof (Federal Court of Justice of Germany)
Brook. L. Rev.	Brooklyn Law Review
Bus. Inf. Rev.	Business Information Review
A.I.P.L.B.	Australian Intellectual Property Law Bulletin
Cal. L. Rev	California Law Review
C. & I. Lawyer	The Computer & Internet Lawyer
Cir.	US Circuit Court of Appeals
CISAC	International Confederation of Societies of Authors
CJEU	Court of Justice of the European Union
CJLT	Canadian Journal of Law and Technology
CLI	Competition Law International
C.M.L. Rev.	Common Market Law Review
CMO/CRMO	Collective Rights Management Organization
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. J.L. & Arts	Columbia Journal of Law & the Arts
Colum. L. Rev.	Columbia Law Review
Cornell L. Rev.	Cornell Law Review
CR	Computer und Recht
CRi	Computer Law Review International
DRM	Digital Rights Management
Duke L. & Tech. Rev.	Duke Law & Technology Review
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECL	Extended Collective Licensing
ECtHR	European Court of Human Rights

Abbreviations

EFTA	European Free Trade Association
E.I.P.R.	European Intellectual Property Review
E.L.Rev	European Law Review
EU	European Union
EuR	Europarecht
EU Charter	Charter of Fundamental Rights of the European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
F.	Federal Reporter (US)
F. 2d	Federal Reporter, Second Series (US)
F. Supp.	Federal Supplement (US)
F. Supp. 2d	Federal Supplement, Second Series (US)
Fordham Intell. Prop. Media & Ent. L.J.	Fordham Intellectual Property, Media and Entertainment Law Journal
Fordham L. Rev.	Fordham Law Review
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
GRUR-Prax	Gewerblicher Rechtsschutz und Urheberrecht. Praxis im Immaterialgüter- und Wettbewerbsrecht
IIC	International Review of Intellectual Property and Competition
Int. J. Law Info. Tech.	International Journal of Law and Information Technology
I.P.Q.	Intellectual Property Quarterly
IRCTL	International Review of Law, Computers & Technology
IRIS	IRIS – Legal Observations of the European Audio-visual Observatory
J. Copyright Soc'y U.S.A.	Journal of the Copyright Society of the U.S.A.
J. Corp. L.	The Journal of Corporation Law
JIS	Journal of Information Science
J. Intell. Prop. L.	Journal of Intellectual Property Law
JIPITEC	Journal of Intellectual Property, Information Technology and E-Commerce Law

JIPLP	Journal of Intellectual Property Law & Practice
JIPR	Journal of Intellectual Property Rights
J. Legis.	Journal of Legislation
JWIP	The Journal of World Intellectual Property
L&Es	Limitations and Exceptions
LG	Landgericht (Regional Court, Germany)
Lewis & Clark L. Rev.	Lewis & Clark Law Review
Loy. L.A. Ent. L. Rev.	Loyola of Los Angeles Entertainment Law Review
Minn. Law Rev	Minnesota Law Review
MLR	Modern Law Review
MMR	MultiMedia und Recht
NJW	Neue Juristische Wochenschrift
Nw.U.L.Rev	Northwestern University Law Review
NY.U. L. Rev.	New York University Law Review
OECD	Organisation for Economic Co-operation and Development
OHIM	Office for Harmonization in the Internal Market
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht (Higher Regional Court, Germany)
Ohio St. L.J.	Ohio State Law Journal
UOLTJ	University of Ottawa Law & Technology Journal
QMJP	Queen Mary Journal of Intellectual Property
Queen's L.J.	Queen's Law Journal
RRA	Reciprocal representation agreement
Rutgers Computer & Tech. L.J.	Rutgers Computer and Technology Law Journal
S. Ct.	Supreme Court Reporter (US)
S.D.N.Y.	US District Court for the Southern District of New York
SSRN	Social Science Research Network
TEC	Consolidated version of the Treaty Establishing the European Community
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
TPMs	Technological Protection Measures

Abbreviations

TRIPS/TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
Tul. L. Rev.	Tulane Law Review
UCLA Ent. L. Rev.	UCLA Entertainment Law Review
UCLA L. Rev.	UCLA Law Review
UGC	User-generated content
U. Pa. L. Rev.	University of Pennsylvania Law Review
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte (Copyright Law of Germany)
US/USA	United States of America
U.S.	United States Reports
U.S.C.	US Code
Vand. J. Ent. & Tech. L.	Vanderbilt Journal of Entertainment and Technology Law
VoD	Video on Demand
Washburn L.J.	Washburn Law Journal
Wash. L. Rev.	Washington Law Review
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
ZGE/IPJ	Zeitschrift für Geistiges Eigentum/Intellectual Property Journal
ZUM	Zeitschrift für Urheber- und Medienrecht

“Ach, Luise, laß ... das ist ein zu weites Feld.”
“Ah, [Commission], that’s enough ... that’s too vast a subject.”

*Theodor Fontane (Effi Briest)*¹

1 Adapted by the author, the translation is taken from the leading English edition of Fontane’s novel of 1896, translated by Hugh Rorrison and Helen Chambers, London: Angel Books (Angel Classics) 1995.

