

Regulatory Aspects of Open Access

by **Nikolaus Peifer**, Cologne

Prof., Dr. iur., Director of the Institute for Media Law and Communications Law and the Institute of Broadcasting Law at the University of Cologne.

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A. Open access and regulation¹

- 1 Open access (OSS) is a philosophy as well as a system of self-regulation that helps to organise technical or intellectual information. It has developed within existing laws as a reaction to an over-exclusive tendency in constructing and understanding property laws in intangibles. OSS follows but shifts the logic of the law of licenses.² Licenses are currently used to exclude but also to allow usages against payment and further obligations of the licensee. Open access drops the payment but keeps the obligation. Obligations are not imposed to exclude but to keep the system open and usages free (“copyleft” instead of copyright). As far as information or content is protected by IP laws, the system works like IP laws by transforming the logic of the property right (again, copyleft instead of copyright). As far as information is not protected, it works like a contract.
 - ▶ binding laws such as coercive moral rights legislation that may allow or enforce what participants may be willing to do (i.e. the distortion of a literary work);
 - ▶ patent laws that may restrict the publication of information before filing because inventions lose their patentability if they lack novelty;³
 - ▶ laws to protect property rights of third parties (neighbouring rights) that may restrict the use of content for OA platforms (i.e. audio and visual content);
 - ▶ laws to protect property positions of unknown third parties, as in the case of orphan creations, that may do the same.
- 3 Friendly regulation pertains to the following:
 - ▶ the enforcement of contracts and licenses through legal rules and the court system;
 - ▶ laws safeguarding priority (attribution of authorship);
 - ▶ laws safeguarding authenticity (integrity rights);
 - ▶ transparency rules (consumer protection, information rules).

- 4 Regulatory assistance for open access is needed where hostile state rules or the nonexistence of friendly rules jeopardize the goals of the philosophy.

B. Regulatory assistance of open access goals

I. A short definition

- 5 The concept of open access comes from the software world.⁴ In this environment its main task is to uncover technical information held secret by copyright provisions that were enacted to restrict decompilation uses.⁵ In the field of academic publications, open access is commonly defined as “making scientific articles freely accessible on the web.”⁶ This gives rise to an access claim regarding any kind of scientific or academic knowledge, whether copyrightable or not, originally secret or pre-published. IP laws traditionally protect the interest of the contributor to keep information secret or at least to control the degree of publicity or restrict the audience the content is aimed at. Law usually does not force the contributor to disclose knowledge. A general access right to private information⁷ is only given in situations in which there is a legal relationship between the party holding the information and the party interested in that information.⁸ A duty to disclose knowledge will only hold if there is a special legal duty, such as the duty to inform consumers about features of a product.⁹ Nondisclosure is the principle; access requires consent or regulatory force. If regulation to force access is unwanted, incentives to provide information are needed.

II. How to convince contributors to uncover secrets

- 6 The traditional incentive mechanism works by giving gratification. This is the technique used in patent law where technical information has to be disclosed in exchange for a property right. The mechanism is also used in Sec. 4 subs. 2 of the GPLv3 where the right to convey copies of a program at a price is bound to the duty to deliver the source code.¹⁰ Trade secrets will be uncovered only for a price. Scientific knowledge may be disclosed if a contract obliges the knowledge provider to do so. Other incentives might be that the contributors receive access to knowledge themselves or – typical for academics – receive a reputation from the academic market if they publish their work. The latter mechanism does not work if the publication is organised by a commercial publisher who cannot live from reputation alone but needs direct or indirect financing through advertising to recoup organisational costs,

such as with players like Google. Voluntary granting of access to knowledge therefore needs incentives.

III. How to convince publishers and other right holders to cooperate

- 7 If there are no sufficient market incentives, regulation is required. This has necessitated regulation with regard to special obligations in the relationship between academics and their employing institution and between academics and publishers. The relationship between academics and the employing institution is of particular importance in a situation in which the institution pays not only for the production of knowledge but also for its distribution among academic consumers such as students and researchers.¹¹ This is the rule in the public and the private university sector. Work-for-hire rules might mean that the institution is the original owner of academic results, but the rule does not work in most continental European systems in which individual authorship is the principle. A legal duty to publish is hardly enforceable and in some jurisdictions will even violate constitutionally protected academic freedom, which encompasses the freedom not to publish.¹² This constitutional position of academics is also violated by a legal duty to offer publications to a university-owned or -run repository.¹³ The place of publication is vital to the reputation of the academic. If an academic decides to publish in a commercially run, renowned, peer-reviewed journal, the university should not interfere. This is in harmony with copyright law because the moral right to first publication¹⁴ encompasses the right to choose when and also where to publish.¹⁵ Again, moral rights protect the personal and academic reputation of the author.¹⁶ This does not preclude a contractual obligation to publish in certain journals because this preserves the author’s will. Therefore, no objections should be made if the academic applies for a funded research program and receives the funding on the premises that the results have to be published by an open access mode.
- 8 An author-friendly model reserves for the academic the right to publish on the green road of open access.¹⁷ Usually commercial publishers will be reluctant to license such a right to the author. Therefore, a binding copyright provision would be needed to protect the author’s decision. Such a provision would not be an exception or limitation to copyright;¹⁸ in the absence of a contractual obligation to an employer, the author retains the right to decide on the secondary publication of the author’s work.¹⁹ However, the solution would at least touch upon the publisher’s freedom to contract and therefore needs a justification. The suggestion that has been discussed internationally calls for a solution in which the author retains a secondary publication right af-

ter a maximum waiting period of six months if the author publishes in a format that differs from the typographical format of the original publication.²⁰ This solution has been attacked as unsuitable for the STM world,²¹ but I do not share this view. In most cases, STM publications will report data and facts. The expression used in these publications is very often far from being original. I would even argue that many of the texts are not even copyrightable because the reporting of facts and data does not fall into the realm of copyright law.²² For social sciences and humanities, the six-month period should be adequate to protect the author's and publisher's interests as far as journal contributions are concerned. Even if the publisher's interests were harmed by such a regulation, the state is not barred from fostering and financing the free access to research results achieved with the help of public funding as long as the state does not exclude private entities from those resources.

IV. How to safeguard integrity and authenticity

- 9 Open access philosophy should not be interested in facilitating fraud and deceit. Authenticity and integrity of publications should be in the vital interest of the research and the publication system. These aims are backed by moral rights legislation which, however, is in a distressing state of international and European harmonisation. With the sole exception of Article 6bis RBC, international law has more or less ignored the moral interests of authors.²³ This is deplorable because the right to attribute the work to a certain source or author and the right to keep it intact in its original form, or at least clearly mark where modifications to the original form have been made, is vital to a legal system in which individuality is the highest value. It is also vital to a system in which truth and integrity in research have to be defended against irresponsible behaviour and misappropriation. It is no wonder that current open access license schemes and the Berlin Declaration both bind the license to use content to the obligation to indicate its source, therefore granting attribution to the author or a team of authors.²⁴
- 10 Integrity rights are a more complex issue. All licenses allow for modifications. The GPL License is concerned with safeguarding the integrity of the original version by binding the license to an obligation to mark any changes made during modifications of the version received.²⁵ The Creative Commons License gives the author the opportunity to allow for changes, but safeguards the author's integrity right only by the obligation to clearly attribute the new version to its author and cite the name of the author of the original work. The DPPL License is mindful of the fact that modification rights may not allow for distortions and mutilations. Therefore, it follows

the path of the other licenses with regard to attribution rights (§ 6 subs. 2), but allows modifications only if "the personal interests of the original authors are respected" (§ 2 subs. 1). To safeguard these interests, the author of the original may not be cited as the author of the derivative, and the work has to be given a new title.

- 11 It is obvious that these peculiarities do not fully safeguard integrity interests. It is also obvious that they do not fully protect the authors of derivative works. In the past, authors have not aggressively fought against mutilations. The danger of copyright abuses may be much weaker in this regard than the ethical standards of the academic community. As a result, further regulation is not needed on the national level of most continental European copyright laws. However, the usual gap towards common law countries is still a concern.

V. How to enable access to works of known right holders

- 12 A huge problem rests with the protected content that has not been submitted to an open access license. The future of electronic content is not the static text and the pdf file. The full potential of network capacities can only be activated if texts, data, pictures and audiovisual or sound files are combined. Electronic content will have to develop into multimedia content.²⁶ The main problem these days is how to combine text with pictures, especially photos. Given the fact that most photos are protected by copyright or a neighbouring right, open access models risk remaining text-based but image-free. Access to protected content will not be available by the existing limitations to copyright as typically citation rights or free use rights will not give access to mere illustrative use of photos.²⁷ This is especially vibrant when photos are used to illustrate the situation depicted but not to explain the photo use. Citations rights usually will only be granted if the author of the citing work explains the cited work. What can be seen on the photo, however, is not the cited work but the photo itself. German copyright law at least is hopelessly outdated and overprotective in this regard. Researchers in practice have never refrained from using pictures in their lectures or at conferences. And they should not be barred from doing this by a narrow interpretation of citation rules with regard to their publications. Regulation may not be necessary if courts grant wider freedoms not only for artistic²⁸ but also for academic and educational use.
- 13 The problem remains vital with respect to audio and visual content that has a mere illustrative function, which is helpful but not necessarily needed to explain a problem. This problem calls for a regulatory approach on the European level. Rights management

regulation needs to find a way to get easy access to affordable license conditions through collective societies. One-stop shopping is vital for granting access to cultural content.

VI. How to enable access to works of unknown right holders

- 14 The “orphan works” problem is still unsolved despite the scrutiny it has received at the national and international level. There is a clear regulatory problem.²⁹ It consists of defining what orphan works are and in granting access to the usage of these works. A brief definition reveals that orphan works are works whose “right holders cannot be identified or, if they can be identified, cannot be located” with reasonable and careful efforts.³⁰
- 15 Roughly three models are discussed to grant access to these works:
 - ▶ granting of a non-exclusive license for any user who is willing to pay a license fee (Canadian model), either through a government agency or through a collective society from the field the work belongs to;³¹
 - ▶ extension of the collective management system to orphan works (Nordic model);³²
 - ▶ liability privilege for users who can show and prove that they have diligently searched for the author or the current right holder (US proposal to solve the orphan works problem).³³
- 16 The deregulation of liability rules will not work in Europe with regard to the newly enacted Enforcement Directive.³⁴ However, the legal capacity to grant a right to license, whether via an extended license system or – where suitable – through a government agency, seems to be the right way to solve the orphan works problem. The extended collective license system is already mentioned in recital 26 of the Info Society Directive. Indeed, collective societies are under a relatively tight inspection with regard to their license practices and their pricing strategies.
- 17 The legal presumption for orphan works might not be ideal from the point of view of authors and right holders who do not know about the uses being made to their works without their fault. However, the under-usage of works does not help anybody as long as the right holders do not claim their authorship. The solution offered here is quite similar to what Google has done with its Book Search. However, whereas Google had no legal capacity to act on behalf of authors of works that are out of print or out of stock, collective societies would be in this position if the legislator helped in this regard. As collective societies

act as trustees to authors and publishers, misuse of this capacity is less probable. The funding that they receive from the licensing of orphan works can easily be used to trace right holders and let them participate in this funding. If right holders cannot be identified at all, limitation statutes might be enacted that would help to use the revenue for cultural purposes after a period of five or ten years.

C. Future goals

I. Do we need privileges (deregulation) for open access system managers?

- 18 The German legislator has asked interested circles whether future regulation should care for special rules in favour of and to foster open source and open access models.³⁵ This question is legitimate. Indeed, OSS models operate on the same footing as any commercial provider. Usually, commercial providers hold exclusive rights and therefore profit from legal presumptions of their rights ownership. The management of OSS systems may be complex. Rarely can the managers of wikis or complex software environments claim to be the sole right holder or owner of the rights attached to the work. A legal presumption that may be used to control the licenses given within the system would be feasible. German copyright law holds such a presumption in two cases. First, § 10 states that a presumption for rightholdership applies if a person is designated on the copies of a work.³⁶ Moreover, the members of a group of artists (i.e. the members of a rock band or an orchestra) are presumed to be represented by an elected group leader (Sec. 80 subs. 2, 74 subs. 2). Such a presumption would help manage large groups of authors as well. It requires a definition of orphan works and a definition of the position of the group leader.
- 19 So far, litigation in OSS cases is not too extensive. The cases that have come to court in Germany and the US show that individual programme developers were usually in a position to claim their own authorship.³⁷ This is a clear advantage of the GPL License, which uses the direct licensing system. However, as more contributions level up the programme, collective ownership becomes the rule. This is also the case in large academic groups or with respect to wikis. A legal presumption granting a standing to sue would help.

II. How to reduce complexity in license schemes

- 20 OSS agreements might be very complex. The DPPL License is a good example of a fairly complex and – from the perspective of the ordinary user – possibly overly complex contract. The Creative Commons License is simpler and clearer, but it might raise doubts about legal certainty that the DPPL clearly avoids. Simplicity and clarity for the user are vital to the success of OSS models. The user will have to be able to trust simple formulations and – even better – simple icons. The Creative Commons License is a model in this regard. Other license models will have to use icons to make clear in a fast and efficient way what the right holder wishes to grant and what the user wishes to get. Icons must be internationally understandable. This requires legal rules dealing with the formation of a contract to accept this simplicity. Courts might feel enough sympathy for OSS models to grant some tolerance to help execute those contracts. However, some regulation might be helpful.
- 21 Icons should be generally accepted as verbal descriptions of what rights are granted in OSS models. Icons should grant protection by some type of collective trademark system. At least the law of deceptive advertising should be used to enforce honest uses of these icons and prevent misleading uses.
- 22 OSS terms are generally regarded as standard business terms.³⁸ Usually this means that any obscurity in interpreting these terms is at the expense of the party which uses these terms. The consumer, however, is protected. This tendency of interpretation is not suitable in cases where a right is granted generously and free of charge. Standard business terms should therefore favour the operator of the license scheme. A presumption which calls for an interpretation that favours the conclusion of a contract might be adapted by courts. A legal presumption which favours the existence of a contract, however, would give more clarity.
- 23 However, the user will also need a certain degree of protection. In copyright law, licenses usually have to use a maximum of clarity and specificity. If contracts are interpreted in favour of the operator of the OSS system, doubts will fall at the expense of the user (the consumer). This calls for a certain standardisation of license terms, a register for typical user rights adjusted to the term “open source”. A standard interpretation of user rights which are typical for the OSS model might be formulated by legislators. A definition of OSS and typical OSS user rights should be a part of copyright laws.
- 1 Director of the Institute for Media Law and Communications Law and the Institute of Broadcasting Law at the University of Cologne. Web sources cited were visited on 5 March 2010.
 - 2 Peifer, Urheberrechtliche Rahmenbedingungen von Open-Access-Konzepten (Copyright Framework for Open Access Concepts), in Peifer/Gersmann (eds.), *Forschung und Lehre im Informationszeitalter*, p. 39; see also Peifer, *Zur rechtlichen Problematik des Elektronischen Publizierens (Legal Problems of Electronic Publishing)*, in CLIO (Hg.), *Elektronisches Publizieren in den Geisteswissenschaften: Erfahrungen, Probleme, Perspektiven*, Berlin 2007, vol. I, p. 172-190 (Online-download available under http://edoc.hu-berlin.de/histfor/10_1/).
 - 3 See Art. 54 subs. 1 and 2 European Patent Convention. Patent law reserves the publication for its own filing system. The patent application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Art. 83 EPC).
 - 4 www.fsf.org/philosophy/free-sw.html. See also Kuhlen, *Wem gehört die Information im 21. Jahrhundert? (Whose Property Is Information in the 21st Century?)*, in Dreier/Büllesbach, (same title) 2004, p. 1 et seq.
 - 5 This is contrary to what the patent system wants to achieve by its disclosure requirement; see Art. 83 EPC and footnote 3 above.
 - 6 Document accompanying the “Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on scientific information in the digital age: Access, dissemination and preservation, SEC (2007) 181 final, p. 3. The much more extensive definition of the “Berlin Declaration” contains a requirement to “grant to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship (...), as well as the right to make small numbers of printed copies for their personal use;” http://oa.mpg.de/openaccess-berlin/berlin_declaration.pdf.
 - 7 Public entities are sometimes forced to provide information from administrative records within “freedom of information” acts; in the US, see 5 U.S.C.A. § 552; in Germany, *Informationsfreiheitsgesetz des Bundes*.
 - 8 This is usually restricted to situations in which rights have been infringed or information is needed to seek for private relief in courts; see Art. 47 TRIPs and Art. 8 Directive 2004/48/EC on the enforcement of IP rights, OJ L 195 p. 16. Courts in Germany have argued that there is no general duty to inform nor a general right to be informed which could be based on the constitutional right to have access to private or not publicly available information; see BVerfGE 103, 44, 60 – n-TV case; Heintschel von Heinegg, AfP 2003, 295; Thum, AfP 2005, 30.
 - 9 See Article 7 Unfair Commercial Business Practices Directive 2005/29/EC, OJ L 149 p. 30.
 - 10 Article 4 subs. 2 of the GPLv3 reads: “You may charge any price or no price for each copy that you convey.” Article 2 subs. 1 and Article 6 subs. 1 GPLv3, which deal with the conveyance of “covered works,” do not hold this price clause. Art. 10 subs. 3 forbids the user to “impose any further restrictions on the exercise of the rights granted or affirmed under this License;” see Koglin CR 2008, 137, 141: “two distinct cost clauses which must never be mixed.”
 - 11 B. Bauer, *It’s economy, stupid?*, *Information Wissenschaft & Praxis (IWP)* 5/2009, p. 271; Pflüger, *The Legal Protection of Open Access*, in: *European Commission/German Commission for UNESCO, Open Access. Opportunities and Challenges*, 2008, p. 101.
 - 12 This is true for Germany with respect to university professors who have no enforceable legal duty to publish their research results, Schricker/Rojahn, *Urheberrecht*, 3rd ed. 2007, § 43 Rn.

- 131; Haberstumpf, ZUM 2001, 819, 825. The same is true for academic staff in general, OLG Karlsruhe GRUR 1988, 536, 540; GRUR 1991, 523, 525 – Grabungsmaterialien; Ullmann, GRUR 1987, 6, 8; Ulmer, Urheber- und Verlagsrecht, 3rd ed. 1980, § 95 II 2, S. 403; but see VG Berlin, NJW 1978, 848.
- 13 Attempts to alter this situation by codifying a legal duty in this respect have been unsuccessful in Germany, but see in favour of this model *Pflüger/Ertmann* ZUM 2004, 436, 441.
- 14 This right is indirectly protected by Art. 3 subs. 3 Berne Convention, which defines “published works” as those works having been published with the consent of the author.
- 15 Hansen, GRUR Int. 2005, 378, 379; Hirschfelder MMR 2009, 444, 447.
- 16 Section 12 German Copyright Act clearly states: “The author has the right to decide *whether and how* his work is to be published.” See Art. 6-bis RBC: “... the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which *would be prejudicial to his honor or reputation*.” With respect to the first publication, Art. 5 subs. 3 states: “The expression ‘published works’ means *works published with the consent of their authors*, whatever may be the means of manufacture of the copies, *provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work*.”
- 17 See Hansen, GRUR Int. 2005, 378, 387. The idea has been used by the German Bundesrat to argue in favour of a cogent right to publish on open access servers if the work has been licensed to a publisher; see recommendation of the Commission for Education, Science and Culture of the German Parliament, Bundestags-Drucksachen 16/5939, p. 26.
- 18 But see Hirschfelder MMR 2009, 444, 445; Heckmann/Weber GRUR Int. 2006, 995, 998.
- 19 Peifer, GRUR 2009, 22, 27. International copyright clearly distinguishes between “limitations and exceptions” (Article 13 RBC) and “the conditions under which the rights ... may be exercised” (Art. 11-bis subs. 2 RBC).
- 20 See Dewatripont et al., Study on the economic and technical evolution of the scientific publication markets in Europe, 2006, p. 69 (overview of the current open access policies).
- 21 Dewatripont et al., p. 69.
- 22 Art. 2 subs. 8 RBC states: “The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.” Art. 9 (2) TRIPS agreement clarifies with regard to the RBC: “The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.” Article 2 WCT repeats: “Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”
- 23 See Peifer, Die Inhalte des Urheberrechts, in Riesenhuber (ed.), Systembildung im Europäischen Urheberrecht, 2007, p. 155, 173; Grosheide, Moral Rights, in Derclaye, Research Handbook on the Future of EU Copyright, 2009, p. 242, 249.
- 24 The Berlin Declaration clearly defines open access by “proper attribution of authorship.” This is not merely a copyright concern as the Berlin Declaration also refers to the publication of non-copyrightable raw data (see above footnote ##). The GPLv3 states in Article 4: “You may convey verbatim copies of the Programs source code as you receive it, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright notice; keep intact all notices stating that this License and any non-permissive terms added in accord with section 7 apply to the code.” Sec. 6 of the DPPL license (version 2008) requires citing the names of the original authors. Creative Commons Licenses will in all versions oblige the user to cite the original author; see <http://de.creativecommons.org/was-ist-cc/>.
- 25 See Preamble sub. 7 which states: “... the GPL requires that modified versions be marked as changed, so that their problems will not be attributed erroneously to authors of previous versions.”
- 26 See Fröhlich, in: Information Wissenschaft & Praxis (IWP) 5/2009 p. 253, 255.
- 27 See Peifer, UFITA 2007/II, 327, 335; Stang, ZGE 2009, 167, 199.
- 28 See BVerfG GRUR 2001, 149, 151 – Germania III.
- 29 As part of the “i2010:Digital Libraries” project, the European Commission launched a Recommendation on the digitisation and online accessibility of cultural material in which it calls on the Member States to facilitate the use of orphan works; see Art. 6 a Recommendation 2006/585/EC of 24 August 2006, OJ L 236/28.
- 30 Koskinen-Olsson, in Ricolfi et al. (ed.), High Level Expert Group: Final Report on Digital Preservation, Orphan Works, and Out of Print Works, 2008, p. 10; see http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf. A more accurate definition is given by the Joint Report “Sector-specific Guidelines on due diligence criteria for orphan works, sub 1.2: work protected by copyright of which the first or current owner, first creator or the holder of a derivative right is unknown or untraceable by diligent search.” The Guidelines make further proposals for various work categories; see http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf.
- 31 Sec. 77 Canadian Copyright Act, <http://laws.justice.gc.ca/PDF/Statute/C/C-42.pdf> states: “Where, on application to the Board by a person who wishes to obtain a licence to use (a) a published work, (b) a fixation of a performer’s performance, (c) a published sound recording, or (d) a fixation of a communication signal in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be.” A similar solution is offered by Art. 70, 67 of the Japanese Copyright Act, where the Commissioner of the Agency for Cultural Affairs is competent to issue blanket licences for orphaned works. In the United Kingdom, Sec. 190 of the CDPA allows licences to be issued by the Copyright Tribunal for the use of previous recordings. In Hungary, Art. 57/A of the Copyright Act, as amended by Act CXII of December 28, 2008 and with effect from February 1, 2009, gives the Hungarian Patent Office legal status to grant a non-exclusive licence for the use of orphan works which is valid for five years. See Ágnes Dudás, Main Aspects of the Orphan Works Licensing in Hungary, <http://www.ifross.org/artikel/main-aspects-orphan-works-licensing-hungary>.
- 32 This is a solution used in the Scandinavian Copyright Laws with respect to certain privileged uses (mainly copying and broadcasting use); see as an example Article 36, 38a of the Norwegian Copyright Act. Section 36 (1) reads: “When there is an agreement with an organization referred to in section 38a which allows such use of a work as is specified in sections 13b, 14, 16a, 17b, 30, 32 and 34, a user who is covered by the agreement shall, in respect of right holders who are not so covered, have the right to use in the same field and in the same manner works of the same kind as those to which the agreement (extended collective licence) applies. The provision shall only apply to use in accordance with the terms of the agreement. The provision shall not apply in relation to the rights that broadcasting organizations hold in their own broadcasts.” Section 38a reads: “Agreements intended to have an effect as specified in section 36, first paragraph, shall be entered into by an organization which in the field represents a substantial part of the authors of the works used in Nor-

way, and which is approved by the Ministry. For use in certain specified fields, the King may decide that the organization which is approved shall be a joint organization for the right holders concerned.” See <http://www.kopinor.no/en/copyright/copyright-act>. The system currently does not cover making available rights.

- 33 Draft Orphan Works Act of 2006; see <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5439>. Section 514 (a) of the Draft states: “(1) ... in an action brought under this title for infringement of copyright in a work, the remedies for infringement shall be limited under subsection (b) if the infringer sustains the burden of proving, and the court finds, that (A) before the infringing use of the work began, the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement of the work (i) performed and documented a reasonably diligent search in good faith to locate the owner of the infringed copyright; but (ii) was unable to locate the owner; and (B) the infringing use of the work provided attribution, in a manner reasonable under the circumstances, to the author and owner of the copyright, if known with a reasonable degree of certainty based on information obtained in performing the reasonably diligent search.” Subsection b) states that monetary relief will usually not be given in such a case, but injunctive relief may still be granted. See also Report on Orphan Works (January 2006), <http://www.copyright.gov/orphan/orphan-report.pdf>.
- 34 Sec. 3 (2) of the Enforcement Directive 2004/48/EC, OJ L 195 p. 16 (corrected version) demands efficient, proportionate and dissuasive measures to protect intellectual property. The de-regulatory approach of the E-Commerce Directive stands in contrast to this postulate.
- 35 See Bundestags-Drucksache 16/5939 p. 26.
- 36 Sec. 10 (1) reads: “The person who is indicated as author in the usual way on copies of the published work or on the original of a work of plastic art is deemed to be author until the contrary is proven; this is also the case if a pseudonym or an identifying sign is used which is known to relate to a certain author.” Sec. 10(3) reads: “The presumption in subs. 1 applies to exclusive rightholders when preliminary injunctive relief or seize and desist orders are asked for. The presumption does not apply with respect to the author or the holder of a neighboring right.”
- 37 See LG München I, MMR 2004, 693 (GPL license, individual program developer sued against commercial user); LG Frankfurt/M., ZUM-RD 2006, 525 (same as before); LG Berlin, CR 2006, 735; LG München I, CR 2008, 57 and Jacobsen v. Katzer, 535 F.3d 1373, 1379 (C.A. Cal. 2008:); no dispute on ownership.
- 38 See the German decisions cited in previous footnote.