

P. Bernt Hugenholtz (ed.), Copyright Reconstructed

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

by **Thomas Dreier**, Prof. Dr. iur.; M.C.J. (New York University); Director, Center for Applied Legal Studies at the Karlsruhe Institute of Technology (KIT), Karlsruhe, and Honorary Professor at the University of Freiburg, Germany.

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1 The fact that copyright law is coming under pressure due to digital technology and, in particular, the networking of an increasing number of mobile devices has not only recently been acknowledged. Moreover, the economic, as well as cultural importance of copyright, copyrighted subject matter and the copyright industries has consistently risen over the last few decades (with copyright-intensive industries representing almost 11.6 million of jobs – 5.4% of employment in the EU – and 6.8% of EU GDP; see Factsheet, European Commission, 2018). However, up until today, copyright statutes use legal terms and contain rules that have their roots in the early days of book printing (“reproduction”) and of sound records, as well as of broadcasting (“public communication”). The use of an essentially scholastic method applied to interpret these terms and rules with regard to problems of digitization and networking, however, sometimes leads to strange results. Above all, this does not do justice to neither the economic current framework for the exploitation of copyrighted works and related subject matter, nor to the economic business models and technical configurations based on them. In the

words of the promotional flyer of the book: “The historical evolution of copyright has led to a growing disconnect between the legal definitions of economic rights and the business and technological realities they regulate, eroding copyright’s normative content and distorting the scope of its economic rights.” This is all well known, and yet there are not many studies that undertake, or at least aim at, a comprehensive reconstruction of existing rights with regard to copyrighted works. However, undertaking such an exercise is of major importance, particularly since the CJEU got itself entangled in interpreting the existing exclusive rights without being able to design a coherent picture which could satisfy the needs of the digital environment – which was mainly due to the isolated cases that are being referred. Moreover, the European legislature does no longer seem to have the political power to design and implement a legal system which constitutes an adequate response to digital challenges, but rather contends itself right from the outset with what is politically feasible, as it is well demonstrated by the rather restricted scope of the EU Commission’s proposal on a Directive on Copyright in the Digital Market.

- 2 Before beginning this book review, a caveat seems appropriate, since the editor and co-author of the opening and closing chapters of the book to be reviewed and the writer of the present review are both co-editors of the Concise Commentary on European Copyright Law (also by Wolters Kluwer, now in its second edition, 2016). Such proximity may seem rather unusual for a book review. But it can easily be explained by the fact that a considerable number of European specialists in copyright law have contributed a chapter to the book to be reviewed, while others who did not participate are busy working on other projects and therefore did not deem themselves in a position to accept writing a review of such a rich book at short notice. Although it is hoped that this fact does not bias the judgement of the reviewer, the reader might wish to keep it in mind while reading the present review. Also, it seems worth mentioning that – as stated in the promotional flyer – the book “is the result of a collaborative research project ‘Reconstructing Rights’ funded by Microsoft Europe that ran from the Autumn of 2014 to the Summer of 2017 and normatively examined the core economic rights protected under EU copyright law, with the aim of realigning these rights with economic and technological realities.” Of course, funding by one of the players of the area to be explored might be problematic. However, as the editor ensures the reader in the preface of the book, the sponsor let the research be carried out “with complete academic independence”.
- 3 The starting point and basic assumption on which the reconstruction work is based is that “the existing set of economic rights granted to right holders under EU copyright law [...] has become disordered”. The reproduction right “already covers every imaginable act of (digital) copying”, and “recent CJEU decisions have also stretched the right of distribution to include acts of online dissemination of software”, whereas at the same time the CJEU “has very narrowly construed the right of communication to the public in cases of distribution of broadcast television programme-carrying signals to signals redistributors”. As a consequence, “the scope of copyright protection in the EU has become increasingly difficult to predict, at the expense of legal certainty, and EU’s delicate structure of rights and exceptions is becoming”, as the editor of the book explains, “gradually unbalanced”. As a result, it is claimed, “the natural link with economic exploitation” has been lost, “leading to cases of over- as well as of under-protection”, and is therefore “likely to act as a disincentive for investment in innovative content and information services”.
- 4 While the premise of the book was that “we must return to a more intuitive starting point”, and while the authors who have contributed individual chapters to the book share the common belief that “in an ideal copyright system the scope of copyrights’ economic rights should more adequately reflect the justifications of copyright protection”, the book does not propose one single solitary solution. Rather, each author proposes his or her own model to reconstruct copyright’s structure of exclusive rights. Hence, not all of the proposals made with regard to the five areas selected (namely, digital resale, private copying, hyperlinking and embedding, cable retransmission, and text and data mining), “are mutually compatible, nor are they meant to be”. Rather than developing a blueprint ready to be followed by any well-meaning legislature, the project was primarily intended as “a theoretical, ‘utopian’ exercise”.
- 5 However, the book has several parts that are not labelled as such, but which can easily be discerned. The first chapter contains a project synthesis as well as recommendations (*Hugenholtz/Kretschmer*), the second chapter (*Quintais/Poort*) retells a brief history of pre-internet value gaps and how copyright was modified to close them. Chapters 3 to 8 (*Bechtold, Ohly, Rognstadt/Poort, Dusollier, Strowel, Hugenholtz/Quintais*) present a variety of models for reconstructing copyright’s economic rights. The final chapter (*Poort*) examines what the proper scope of economic rights should be from a perspective of welfare economics. Since the other chapters refer to this economic analysis, it may well be said that the book “follows an interdisciplinary approach, combining economic and legal methods”, as it has been emphasized once again in the promotional flyer.
- 6 As summarized in the first chapter, the different approaches presented in the book can be labelled in the following way. One approach would be to rely on a “regulatory toolbox” (*Bechtold*), i.e. on a “more open and malleable structure”, which can be found in competition law and used in order to “shape rights by an empirically testable link between scope of protection and intended purpose”. Similar flexibility could be achieved by modelling copyright as a “right to prevent unfair uses” (*Ohly*), thus creating “a three-tiered system of rights and exceptions [...] and acts that are to be considered unfair”. This approach seems to borrow largely from the model of the black, white and grey lists as they are known from, and form an integral part of many laws against unfair competition. In contrast, another approach suggests replacing the existing layer of different exploitation rights which no longer appropriately describes the economic importance of single acts by one unified exclusive right to control acts that conflict with the economic interests of the right holder (*Rognstadt/Poort*). This idea goes back to an earlier proposal already made some years ago by Rognstad, together with the late Professor Jon Bing. Another approach might be to place the emphasis on the control of the dissemination of works in the public sphere, including the exploitation of derivative works

(*Dusollier*), or on the control of communicative as opposed to non-communicative uses such as, for example, text and data mining (*Strowel*). In view of what has already been implemented in several laws in order to cure market failure, it is also proposed to “convert economic rights into compensation schemes”, where exclusive rights are unenforceable (*Hugenholtz/Quintais*). Here, it might be added that a similar idea was already proposed in the WITTEM-Draft of a European Copyright Code (www.ivir.nl/copyrightcode/introduction/), not only for situations of market failure, but for all cases where the right holders’ main interest lay in remuneration rather than control, and where access and use interests of users prevailed over the limited control interests of right holders.

- 7 The final economic chapter by *Poort* intends to determine the optimum scope of exclusive rights from a welfare economic perspective, according to which the optimum “follows from the optimum long-term effect it has on total social welfare, taking account of the dynamic effects of copyright on the creation and quality of works, and on the incentives it provides for their active protection”. In other words, the public good market failure, which would result if no exclusive protection was granted to right holders is corrected by way of shaping the exclusive rights in a way that takes into account incentives to create and exploit copyrighted works as well as transaction cost and dead weight losses that come with the granting of exclusive rights. What is thereby suggested is to treat copyright markets “no differently from other markets”. Of course, as such, this approach is not new. Applying it to digitization and the scope of exclusive rights, however, *Poort* arrives at the conclusion that currently copyright “extends to acts that lack the underlying market failure to justify protection”. He identifies acts such as, “digital resale, most copying for private use, linking to unauthorized content, text and data mining in data bases a user has legitimate access to, and even retransmission of free-to-air television and radio stations within the reception area of the signal”. Likewise, as the author concludes “economic arguments remain valid to somehow prevent linking to unauthorized content”, and “the potentially negative effect of embedding on the exploitation opportunities for a right holder is acknowledged.” Of course, any solution, the author emphasizes, has to “take account of transaction cost and dead-weight losses, which dictates opt-out solutions for right holders that do not want to be embedded”.
- 8 It is well known that the economic approach of law and economics is based on a rather utilitarian understanding of copyright, and hence is closer to the Anglo-American approach to copyright than to the human (natural) rights approach, which is generally found in continental Europe. Yet, leaving

moral rights aside, on the one hand it should be noted that even the continental European human (natural) rights approach does not release legislatures and courts from the obligation to define the limits of the exclusive rights granted or to be granted to right holders. On the other hand, it might surprise a reader who grew up in a human (natural) rights jurisdiction that the economic analysis undertaken in this book arrives at conclusions which by and large mirror existing European exceptions and limitations to copyright. Or at least exceptions which are currently under discussion, such as the exception for text and data mining – including its restriction to databases to which the person undertaking the text and data mining has legitimate access – as proposed by the Commission in its text for a Directive on copyright in the digital single market. This does not only add an important argument in favor of these exceptions, as well as provide a solid basis on which the decisions of the CJEU could rely. It likewise points into the direction of not leaving their adoption as optional limitations to Member States, but of declaring these exceptions as mandatory. In this regard, the Commission seems to pursue the right way – if only in the limited instances listed on the new Directive’s proposal, as well as for the wrong reason of trying to achieve legal unity instead of harmonization within the EU.

- 9 Of course, under the present political conditions, the chances that the proposals made in this book regarding a re-conceptualizing of copyright’s exclusive rights are most likely minimal. In addition to restrictions based on political reasons, the issue of flexibility versus legal security most likely needs further exploration. Yet, pursuing the aim of achieving a more adequate definition of copyright’s exclusive rights based on a convincing rationale, seems worth the effort. After all, it is quite possible that some of the original thinking of the book will indeed find its way into the process of future law making. Also, future generations might be interested to read and rediscover what their ancestors have already thought through. In sum, as the authors *Hugenholtz* and *Kretschmer* rightly conclude at the end of their introductory chapter, “reconstructing copyright is not for the impatient or the faint-hearted; there remains much work to be done.”