

Malte Stieper, Rechtfertigung, Rechtsnatur und Disponibilität der Schranken des Urheberrechts

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Book review

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- 1 Since digital technology renders it possible to mass-disseminate copyrighted works without loss of quality, copyright limitations have caught the attention of both rightholders and users. While users are aiming to maximize their privileges to use and share copyrighted works without expressive consent of the rightholders, the latter are attempting to control the dissemination and use of their works through license agreements and technological measures. Malte Stieper's book – which was written as a post-doctoral thesis at the University of Kiel – addresses the basic principles and elementary questions of this essential and highly topical conflict of interests. Based on a general reflection on the system of exceptions (*part one*), Stieper approaches the legal nature of copyright limitations and the question of whether they can be qualified as subjective rights (*part two*). He then turns the reader's interest to the main focus of the present book: contractual waivers (*part three*) and the relationship between Digital Rights Management and copyright limitations (*part four*). Throughout his work, Stieper keeps an eye not only on the German civil-law-based system of limitations, but also on other, particularly common law, jurisdictions.
- 2 In *part one*, Stieper draws the picture of the system of limitations from philosophical, constitutional, and economical angles. He illustrates that the justification of current German copyright law can be based

upon both the personality of the author (which is the traditional root of continental European copyright law) and utilitarian ideas (which is a prevailing concept in common law jurisdictions). With respect to copyright limitations, German and U.S. copyright law prove to be surprisingly similar, as in both systems utilitarian ideas allow reducing the copyright holder's position to promote social values, such as culture, art, or education. Turning to the constitutional framework for the enactment and interpretation of copyright limitations, Stieper presents and discusses the constitutional positions of the rightholders and users. As copyright is considered "property" under Art. 14 of the German Basic Law, rightholders enjoy constitutional protection. However, the users may as well – depending on the circumstances of their use – exercise constitutional rights such as freedom of speech, freedom of science, freedom of press, freedom of art, or – in particular – freedom of information. Stieper rightly concludes that Parliament has a wide range of discretion to balance the interests involved by means of copyright limitations. Once a limitation is enacted, the constitutional positions influence its interpretation. Stieper emphasizes that there is neither a general rule of wide nor of narrow interpretation of limitations. Instead, limitations are to be interpreted on a case-by-case basis with due respect to all constitutional interests involved. Finally, the author addresses the economic

background of copyright and its limitations. Because, from this perspective, copyright can be considered a means to anticipate market failure caused by the non-exclusiveness of intangible goods, *Stieper* concludes that limitations play an important role in situations where exclusive rights do not guarantee an efficient use of the copyrighted work.

- 3 In *part two*, *Stieper* deals with the dogmatic relationship of exclusive (owner's) rights and limitations. *Stieper* identifies limitations not as a defense (which is still the prevailing view among German courts and scholars) but as a statutory means that a priori carves out part of the rightholder's exclusive position. Consequently, with respect to the criminal offenses of the German Copyright Act, limitations are part of the objective and subjective elements of the crime. In a second step, the author addresses the question of whether one may derive an original subjective (user's) right from copyright's limitations. Concluding that there is not one single answer, *Stieper* confirms that the qualification of limitations as subjective rights depends on the statutory design of each privileged use and on whether the user may enforce his position against third parties and (in particular) against the rightholder.
- 4 *Stieper* dedicates *part three* – which presents the heart of his work – to the question of how and to what extent rightholders may contractually restrict the user's privilege. In a first step, the author analyzes whether contractual waivers may directly affect the statutory scope of the exclusive rights and the respective limitations. *Stieper* rightly concludes that, as a general rule, copyright and its limitations are binding and that, therefore, inter-party agreements may generally impose a direct effect only on the contractual partners involved. In a second step, *Stieper* evaluates these inter-party effects and concludes that on this level, the contractual parties may – again as a general rule – waive copyright's limitations by means of individual agreements, although such provisions may, depending on the circumstances, conflict with Antitrust Law or may constitute a violation of *bonos mores* (para. 138 BGB).
- 5 In a third step, the author addresses the question of to what extent rightholders may waive limitations via general terms and conditions. Based on some general remarks on the different types of general terms and conditions (shrink-wrap licenses, offline and online click-on licenses), *Stieper* discusses the requirement of transparency and the prohibition of inappropriate disadvantage and applies the German law of general terms and conditions to various types of copyright-related contracts. With good arguments, *Stieper* criticizes the current uncertainty with respect to general terms and conditions in German law. As a possible solution to ensure the predictability *de lege ferenda*, *Stieper* finally presents a draft of a hypothetical provision according to which certain provisions would be explicitly considered a prohibited inappropriate disadvantage.
- 6 *Part four* of the present book deals with the relationship of digital rights management (DRM) and copyright limitations. Based on some general remarks on the evolution of DRM and its different functions (access control, usage control), *Stieper* illustrates the German regulations prohibiting the circumvention of technological measures (para. 95a, 95b UrhG). In particular, the author comments on the legal consequences arising from a circumvention of technological measures and on the question of how and to what extent a user may enforce copyright limitations against DRM. As a result of the current German legislation, users may – in theory – enforce certain (“first class”) limitations against DRM. However, and much to the disappointment of the users, some important uses (such as citations accord. to para. 51 UrhG) are not covered.
- 7 *Stieper* then analyzes whether the German anti-circumvention laws conflict with superior legislation (WCT, WPPT, German Basic Law, and European Law). The author concludes that the current legal situation in Germany does not comply with the freedom of information and may be – depending on the circumstances (i.e., in a situation where technological measures impede citations [para. 51 UrhG] and free uses [para. 24 UrhG]) – in conflict with the freedom of speech and the freedom of art. Although *Stieper* presents good arguments, this interpretation will likely remain controversial. In particular, it is arguable whether the freedom of information may, as a legal concept, directly (and not only politically) bar the current legislation. According to *Stieper*, the para. 95a, 95b UrhG should (i.e., must) be generally revised and should on the one hand except circumvention for private use (given that the user had legal access to the copyrighted work). On the other hand, para 95b UrhG should be altered and should include citations (para. 51 UrhG) and free uses (para. 24 UrhG). Furthermore, circumventions that are limited to enable the access to the work should be removed from the anti-circumvention laws.
- 8 Altogether, *Stieper's* work proves to be a well-written and valuable study for anyone interested in the foundations and dogmatic structure of copyright and its limitations. The author sees the big picture and communicates a considerable knowledge of this highly complex and economically important field. There is no doubt that, as the third part of German copyright reform (“*Dritter Korb*”) draws nearer, *Stieper* will have an impact on the ongoing debate.