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Chapter X

Facing human rights attributes of copyright in Europe in the context of the EU Digital Single Market

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1. Subject and Purpose

The focus of the article is the initial development of the study on the human rights attributes of copyright in Europe in the context of the EU Digital Single Market. The article is written in the form of a condense research proposal and consists of three parts: 1. Subject and Purpose; 2. Description of issues and organization; 3. Validity for research and results.

German cultural philosopher, Walter Benjamin in the 1930s believed that the aura surrounding artistic work and its protection would diminish with the increase of reproduction techniques. But as our experience of today tells us nothing could be further from the truth. On the contrary, that aura and the assumption of genius and authenticity has increased thousands of times.[1]

As opposed to what is the case with other traditional areas of law such as property law, copyright law has historically been an international discipline. The profound and gradual development of copyright is a recent internationalizing factor. Copyright has great political, economic and cultural significance recognizing no national borders. The sources of copyright origin in the different relationships of copyright within and outside the European Union. They consist of international copyright treaties as well as regulations having unitary effect and harmonizing directives to be implemented in national law. The main principles and rules of modern copyright law are enshrined in the Berne Convention of 1886 for the Protection of Literary and Artistic Works. Copyright are the rules

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[1] Joost Smiers, Marieke van Schijndel, *Imagine There is No Copyright and No Cultural Conglomerates Too,* Institute of Network Cultures, Amsterdam 2009, p. 13.

for protection of original expressions that has been among the legal disciplines most powerfully affected by the new digital environment. Therefore the Berne Convention has been reviewed few times after that to adapt it to emerging technologies, but the essence of the rights of the authors and the users as well as the principles by which these rights are awarded have not attracted any significant changes. The subsequent developments, for instance the WIPO Copyright Treaty or the INFOSOC Directive did not introduce any changes to the main concepts of copyright and copyright protection. They, instead, insisted on keeping the same standards and rules of protection as in the XIX century, accompanied by skepticism about the proposition that new developments in technology implies the need for new laws or rules.[2]

Now, copyright in Europe is facing something profoundly new, and that is the EU Digital Single Market — which is the consequence of the growing concepts of European Knowledge Society and Digital Europe that were in particular supported and developed during the Swedish Presidency of the European Union. This type of a market gives Europeans previously unimagined opportunities for distribution of and access to copyright protected material to the benefit of both authors and users. On the negative side, the new technology facilitates massive copyright infringements, and, conversely, enables technical control potentially intervening with legally recognized 'fair use' rights. The remaining question is whether copyright of today is still in a position to maintain the delicate balance between proprietary rights and public access.

The EU Digital Single Market emerged as a result of three major developments in modern technology: the possibility to transform knowledge (including data and information) to a digital format, to communicate information through computer network systems and to use standard communication protocols (e.g. the Internet Protocol) and application protocols (e.g. World Wide Web). Therefore, in this type of the Market, data, information and knowledge are the main assets and thus legal rules determining their use and exploitation are of utmost importance. At the beginning of 2014, we are witnessing vivid debates on copyright in Europe as a threat to: public open data, open access to knowledge and also guaranteed access to the open Internet. According to Member States that calls for consultations on emergent copyright law in order to modernize those rules and to make them fit the requirements of the new open era, fit the EU Digital Single Market.[3]

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[2] Frank H. Easterbrook, *Intellectual Property is Still Property*, "Harvard Journal of Law and Public Policy", Winter 1990, Vol. 13, No. 1, p. 108–118, esp. p. 108; see also Makeen Fouad Makeen, *Copyright in a Global Information Society. The Scope of Copyright Protection Under International, US, UK and French Law*, Kluwer Law International, Hague–London–Boston 2000, p. 27–30.

[3] See recent e.g. Neelie Kroes, *A vision for Europe*, World Economic Forum Davos, January 2014. See also *Digital Agenda for Europe*. Available at http://ec.europa.eu/digital-agenda/en/digital-agenda-europe (access: 05.04.2015).

What creates the background of the study on the identification of the human rights attributes of copyrights in the context of the EU Digital Single Market is the relation between international human rights and copyrights. Both sets of rights have been isolated from each other for a long time.[4] There is only one explicit reference to intellectual property in the Charter of the Fundamental Rights of the European Union that says that copyright as a main part of intellectual property shall be protected.[5] Moreover there are no references to human rights in the major copyright treaties.[6]

> While the international community was concerned with guaranteeing the human beings dignity and well-being by the means of human rights treaties, copyright, has remained a normative backwater in the burgeoning post-World War II human rights movement, neglected by international tribunals, governments, and legal scholars while other rights emerged from the jurisprudential shadows. For many years since the formation of human rights and copyrights (irrespectively also intellectual property rights), no one was exploring the clash, if any connection at all, of these two set of laws. This inattention can be due to the fact that at least in their facade and from a dogmatic point of view they are highly dissimilar and separate, one belonging to the area of public international law and the other mainly bearing the characteristics of a private law member.[7]

The International Committee on Economic, Social and Cultural Rights (ICESCR) in 2001 for the first time interpreted the relationship between copyright provisions and economic, social and cultural rights, when presenting a Statement on Human Rights and Intellectual Property.[8] In this statement, copyright protection was introduced as one that should serve the objective of human well-being, to which international human rights instruments give expression. The Committee also pointed out that copyrights must both promote and protect all human rights. What was crucial for the Committee was the fact that e.g. Article 15 of the Covenant on

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[4] Willem Grosheide (ed.), *Intellectual Property and Human Rights. A Paradox*, Edward Elgar, Northampton 2010, p. 3–37; Laurence R. Helfer, Graeme W. Austin, *Human Rights and Intellectual Property. Mapping the Global Interface*, Cambridge University Press, Cambridge 2011, p. 64–81.

[5] See Article 17(2) of the Charter of the Fundamental Rights of the European Union. See also Ronan Deazley, *Rethinking Copyright. History, Theory, Language*, Edward Elgar, Northampton 2007, p. 135–139.

[6] See Paul L.C. Torremans (ed.), *Intellectual Property and Human Rights*, Wolters Kluwer Law & Business, Austin 2008, p. 36–38; see also Agreement on Trade-Related Aspects on Intellectual Property (TRIPS Agreement) of 1994. TRIPS is recognizing intellectual property rights as private rights; Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, "Minnesota Intellectual Property Review" 2003, Vol. 5, p. 47–61, esp. p. 50.

[7] Clare Ovey, Robin C.A White, *The European Convention on Human Rights*, 4th Edition, Oxford University Press, Oxford–New York 2006.

[8] See the UN Economic and Social Council, Comm. on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C12/2001/15, 14. Available at www.unhchr.ch/tbs/doc.nsf/0/lelf4514f8512432c1256ba6003b2cc6 (access: 02.03.2015).

Economic, Social and Cultural Rights (CESCR) includes the requirement to balance the protection of private and public interest in data, information and knowledge. Therefore, the private interest should never be unduly advantaged. According to the Committee the public interest in enjoying broad access to data, information and knowledge should be given due consideration. In this Statement the Committee introduced an agenda to draft General Comments on each of the CESCR's copyright clauses. Up to this date the majority of the Comments are developed and binding for the governments that often do not pay them sufficient attention, or even do not pay attention at all to this fact while progressing with copyright provisions, e.g. General Comment No. 17, "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author", Art. 15 (1) (c) of 2005; General Comment No. 13, "Right to education", Art. 13 of 1999; General Comment No. 21, "Right of everyone to take part in cultural life", Art. 15, para. 1 (a), of 2009.

In that context, the purpose of the proposed study would be to explore the human rights attributes (and at the same time distinguishing them from the non-human rights aspects) of copyrights' law in Europe in the context of the emerging EU Digital Single Market in order to suggest new approaches that could be introduced into present copyright law in Europe. These approaches would focus on the specification of the minimum outcomes that human rights law requires of EU Member States in terms of public open data, open access to knowledge and also guaranteed access to the open Internet. The research eventually will approach the question whether copyright in Europe in the context of the emerging EU Digital Single Market is in a position to maintain the delicate balance between proprietary rights and public access on behalf of creators, inventors and users. The focus of the study will remain not on the companies that own copyright but on creators and consumers—as human beings and citizens of Europe that freely create, use and disseminate data, information and knowledge.[9]

2. Description of issues and organization

First of all, the research will aim to provide an overview and synthesis of the meaning and principles of the EU Digital Single Market. In order to do that firstly the EU Digital Single Market will be presented as a natural consequence of the ongoing development of the Knowledge Society with the accompanying idea of the Information Society and even the Industrial Society in the past.[10] This

[9] See Lior Zemer, *The Idea of Authorship in Copyright*, Ashgate Publishing Limited, Aldershot 2007.

[10] Rochelle Dreyfuss, Diane Leenheer Zimmerman, Harry First, *Expanding the Boundaries of Intellectual Property*, Oxford University Press, Oxford 2001, p. x–xxiv.

will be analysed in light of the theories of knowledge and also in the light of the implications of knowledge and value based approaches in Europe.[11] Secondly the new *Digital Agenda of the EU, A Europe 2020 initiative* will be introduced as a tool that focuses on the update of the EU Single Market rules for the digital era. The framework conditions of this type of market will be clarified together with the need for action in various areas of copyright that relate to: public open data, open access to knowledge and guaranteed access to the open Internet. The alternative is that the entire system will lose in credibility and confidence. The threat of different Member States heading in different directions will be suggested as a dangerous development, and a negative force towards coherence and capability of one Internet: single, unified, innovative.[12]

The focus of this overview and synthesis will stay within the content of the number of areas of legal concern and future legislative reform proposals. The areas that might be chosen for the purpose of this research are the following: establishing a way forward regarding transformation in copyright in Europe; simplifying the distribution of creative content; simplifying pan-European licensing for online works; preserving orphan works and out of print works; opening up public data resources re-use; simplifying the distribution of creative content; protecting copyright online.[13]

For example the problem related to the fact that legal online use of creative content, especially films is tough in Europe. European online platforms are an easy way to distribute and exchange all kinds of creative content: music, films, pictures and more. Individual consumers have high expectations — they want to access content of their choice anytime and on a range of devices. But Europe lacks unified markets for online content. It can be difficult, for example, for a Maltese consumer to download or stream from a Swedish website. In this situation both creators and consumers lose out: consumers do not have access to diverse European content, and creators are losing revenue because of the illegal markets which spring up to bridge the gaps. Often, difficulties with accessing content online are due to licensing issues. Industry-led changes combined with the improvement of the legal framework will enable innovative and consumer-friendly content distribution across Europe. The European Commission proposed legislation on collective rights management in 2012 and is working with the European Parliament and the Council to ensure its swift adoption. A structured stakeholder dialogue "Licenses for Europe" started in 2013 and will continue with the objective of identifying practical solutions to ensure that copyright management stays fit for purpose in the digital world. The Commission will complete its on-going review of the EU copyright framework, based on market studies and legal drafting work, with a view to deciding in 2014–2015 whether to table the resulting legislative reform proposals.

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[11] See Peter Drucker, *The next society*, available at www.economist.com/surveys (access: 20.03.2015); see Zygmunt Bauman, *Socjologia*, Wydawnictwo Zysk i S-ka, Poznań 1996; see also idem, *Globalization: The Human Consequences*, Columbia University Press, New York 1998.

[12] See *The Digital Single Market EU Agenda. Pillar I.* Available at http://ec.europa.eu/digital-agenda/en/our-goals/pillar-i-digital-single-market (access: 17.08.2015).

[13] *Ibidem*.

One more example, with regard protecting copyright online can refer to MMORGs.[14] They characteristics lies in the fact that they offer their users the tools to create their own content e.g. cloths, houses, designs, texts. These worlds are taken very seriously by many of their users and can be the main arena for expression of their creativity. Unfortunately, despite the originality of such work the things that users create do not give them rights because they create by using the tools that are provided by the owner of the virtual world. Before using the MMORG a user is asked to agree on the terms and conditions that most usually state that all intellectual property rights belong to the company. [15]

The second step in the research would be to specify the concrete minimum outcomes that international human rights law requires of Members States of the EU states in terms of data, information and knowledge protection and dissemination, works preservation, freedom of expression, cultural participation and benefit from scientific advancements, copyright in learning material, adequate standard of living, self-determination and also human development.[16] What will be crucial for the research is that copyright in Europe plays only a secondary role in this version of the studies. However where necessary, for the validity and coherency of the arguments, some copyright issues might take over, like e.g. copyright limitations and 'free uses' or new protected subject matter: databases and computer programs. Both protective and restrictive dimensions of human rights framework will be analysed in this regard.

It will then be vital for the research to make the claim that where copyrights help to achieve human rights outcomes, governments should embrace it and where it hinders those outcomes, its rules should be modified. However the main focus of the research will remain on the minimum levels of human well-being that states must provide, using either appropriate copyright rules or other means.[17] Alongside the human rights framework it may also be interesting to touch upon the development of the copy-duty approach to copyright in Europe alongside the more developed copy-right approach. This approach also brings more attention to a few more issues that might be brought to the fore such as the role of the Access to Knowledge (A2K) movement as a social movement for the European market and its roots in the environmentalism. Then it might be interesting to touch upon the issue of the minimum outcomes that international human rights law requires of EU Members States in terms of environmental protection and what might be the lesson learned for the purposes of this research.

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[14] Massive Multiplayer Online Role-playing Games, for instance, the World of Warcraft. Available at http://eu.battle.net/wow/en/ (access: 04.03.2015).

[15] Thomas B. Ward, Marcene S. Sonneborn, *Creative Expression in Virtual Worlds: Imitation, Imagination, and Individualized Collaboration*, "Psychology of Aesthetics, Creativity and the Arts" 2009, Vol. 3, No. 4, p. 211–221; see also Erez Reuveni, *Authorship in the Age of Conducer*, "Copyright Society of the USA" 2007, Vol. 54, Issue 218, p. 1801–1859, esp. p. 1827.

[16] Asbjørn Eide, Catarina Krause, Allan Rosas, *Economic, Social and Cultural Rights*, 2nd Edition, Martinus Nijhoff Publishers, Dordrecht–Boston–London 2001, p. 87–90.

[17] Laurence R. Helfer, Graeme W. Austin, *op. cit.*, p. 513–522.

In the last part of the study a profound analysis of the General Comments on each of the CESCR's copyrights' related clauses (that are binding to governments of the state members signing the CESCR) will follow and hopefully will enrich the results of the minimum outcomes as such. Where necessary, this analyses will be deepened by a study of the notion of dignity and the minimum level of human well-being as pillars for a human rights moral stand drawing on practical examples of adequate legal mechanisms and where possible, case law. This might for example lead to an analysis of the broad topic of adequate remuneration of the author or the variety of new legal mechanisms within the copyright system, which are relevant for the stimulation of technology and the spreading of technology in the context of the EU Digital Single Market, e.g. *reverse engineering* or *creative commons;* and try to answer the question what are the human rights attributes vis-à-vis these concrete mechanisms.[18]

For example as one of the General Comments suggests, the question "how does the creative worker get paid?" can itself be characterized as a human rights issue. In this context it is interesting to observe that often markets help e.g. writers find a paying audience for their work. Under some legal regimes in Europe these private sources of income may be more protective of the creator's rights than alternative means of payment, such as government-controlled systems of patronage, which might be accompanied by opportunities for abuse. If so, acknowledging and protecting the creator's human rights may in some cases also invite recognition of ways that markets (created and sustained by economic vehicles such as copyright) can protect creative workers from governmental censorship and, in so doing, even further a human rights agenda.[19]

Another example might be in relation to the variety of new legal mechanisms within the copyright system. One of them is the process of reverse engineering that allows engineers to create a computer program on the basis of another program. *Reverse engineering* is starting with a known product and working backwards. This process is like 'taking out' knowledge from what we already have. In fact reverse engineering creates new knowledge, which has been 'transformed'.[20] The aim of the reverse engineering process is to get to the computer program's source code. Then this code is the subject of further development of a certain computer program. According to the new European Computer Program Directive only interoperability of independently created computer programs with original computer programs constitute the only reason to perform reverse engineering legally. Taking this into consideration, reverse engineering is a legal tool encouraging software engineers to independently develop computer programs which seamlessly interact with each other. *Reverse engineering* is often perceived as a process of 'depending creation'. It is depending because it is based on the knowledge of others, but it is not less valuable due to that it stimulates the development of digital technologies.

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[18] See Christopher S. Brown, *Copyleft, the Disguised Copyright: Why Legislative Reform is Superior to Copyleft Licenses*, "University of Missouri Kansas City Law Review" 2010, Vol. 78, p. 749–785.

[19] Laurence R. Helfer, Graeme W. Austin, *op. cit.*, p. 196–196.

[20] See Pamela Samuelson, Suzanne Scotchmer, *The Law & Economics of Reverse Engineering*, "Yale Law Journal" 2002, Vol. 111, No. 7, p. 1575–1663, p. 1578; see also: Andrew Johnson-Laird, *Reverse engineering of software: separating legal mythology from actual technology*, "Software Law Journal" 1992, Vol. 5, Issue 2, p. 331–354, esp. p. 331; Chris Reed, *Reverse engineering computer programs without infringing copyrigh*, "European Intellectual Property Review" 1991, Vol. 47, No. 1, p. 51.

A final conclusion will be made regarding whether the human rights attributes of copyright in Europe in the context of the emerging EU Digital Single Market are suitable to assist in satisfying a fair balance between private and public interests in data, information and knowledge protected by the system of current copyright law, valuing both individual and collective emancipation. And at the same time if the framework can be applied not only in theory but also in practice of governments, creators, artists, consumers involved so they are able to argue human rights and use human rights instruments in a more applicable manner. It will hopefully mean that finally human rights will stop being just something only blurry and not legally comprehensible with regard to copyright in today's Europe. Proposed study will further aim to propose guidelines on how the legal norms of copyright in Europe could be changed. It is hard to predict the level of concreteness of such guidelines, since main emphasis will be given to the role of a new phenomenon in copyright in Europe and that is namely the phenomena of human rights. To give more credible suggestions a comparative analysis of several different legal systems (USA and Russia, for instance) might prove necessary.

3. Validity for research and results

It is quite obvious that something is not completely right with the copyright of today. There are of course different perspectives and ways of consulting on copyright in Europe in order to modernize those rules and to make them fit for the new open era and fit for the *EU Digital Single Market*. The ongoing research question is whether copyright of today is still in a position to maintain the delicate balance between proprietary rights and public access. The majority of the research now addresses copyright from the perspective of the intermediaries or researchers center their studies' questions around the changing idea of authorship in the digital society or are choosing to focus only on the issues related to access such as e.g. access to culture, where they believe human rights play a secondary role or are not even considered and perceived as an incomprehensible, impractical framework for the needs of the markets of today. The proposed research is, on the contrary, aiming at analyzing this problem from the perspective of human rights. That perspective is unique as such since it takes under consideration the initial creator such as e.g. an artist or researcher as a human being who actually creates work, as well as users who today are consumers and who apply the data, information and knowledge in various ways.

In this way this study proposal aims to find a sustainable and peaceful approach to the transformation of copyright in Europe in the EU Digital Single Market which is, in any case, bound to happen soon. In this process some even go as far as suggesting that there should be no copyright at all and that if e.g. an artist cannot live without creating, he or she will create despite that no guarantees

will be given to them.[21] However, if one wants to speak about any kind of dialogue while reshaping the copyright law in Europe, human rights has to be taken under consideration in a systematic way. This research is precisely aiming to address this side of the dispute and, contribute to the comparatively small amount of scholarly thought on this topic. The overall ambition of the research is also to involve the European public in a critical discussion on the future of copyright looking at its economic, political and cultural implications in a systematic and interrelated manner that the human rights framework offers.

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[21] See Joost Smiers, Marieke van Schijndel, *op. cit*., p. 12–20; see also Lawrence Lessig, *Free Culture. How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press, New York 2004, p. 38–39.

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