

Synallagmatic Copyright

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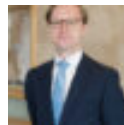
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ON MATTERS CONSTITUTIONAL



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This article belongs to the debate » Enabling Access, Fostering Innovation: Towards a Digital Knowledge Agenda in Europe

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Or Why Copyright Law Must Provide for Concrete Obligations to Enable the Exercise of Access Rights

The world's first copyright act, the 1710 Statute of Anne, was “[a]n act for the encouragement of learning”. The US Constitution of 1787 empowers the US legislator to “promote the Progress of Science and useful Arts” by granting time-limited exclusive

rights for writing and inventions. In France, one of the first two copyright decrees of 1793 was elaborated by the Committee of Public Instruction, recalling the close link between copyright and the dissemination of knowledge that existed from its outset when copyright emerged in the 18th century. At the international level, Article 27 of the Universal Declaration of Human Rights of 1948 first provides for the “right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” before pronouncing in the second paragraph of said provision the “right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Copyright, which provides the exclusive rights that allow authors to control the use of their works, is based on a societal bargain – a social contract – that grants rights in exchange for purpose-bound access to the works protected. In the EU (as elsewhere), this contract has become imbalanced. On the substantive level, the EU copyright acquis has granted ever stronger rights to rightsholders while users of protected works (including creators of new works such as researchers) must rely on weak and vague exceptions. But also at the enforcement level, rightsholders retain the upper hand. Copyright, in order to honour its social contract, must empower users and follow-on creators to enforce the limited rights they have by providing them with efficient enforcement tools. Moreover, with persistent substantive imbalances reflected in the law, rightsholders must incur positive obligations to enable access for purposes that reflect copyright’s underlying social contract, most notably for research and education.

Exceptions are not only ‘exceptions’ to a rule, but user rights

Copyright exceptions are key to fulfilling copyright’s mission and securing the fundamental rights of users and tomorrow’s creators who need access to protected works to create new ones. The very purpose of copyright, to generate creative and informative works, is indeed expressed through limitations and exceptions to exclusive rights. At the EU level, the Court of Justice of the European Union (CJEU) has gradually moved away from an exceptionalist understanding of the user’s side of the social bargain towards a rights-based understanding of copyright as an enabling mechanism. In its early case-law (e.g., *Infopaq International*, para. 56) on the interpretation of copyright exceptions, the CJEU still followed a rights-vs-exceptions dogma, interpreting rights broadly and exceptions strictly, a differentiation suggested by Recital 4 of the Directive on Copyright and Related Rights in the Information Society (InfoSoc Directive). In subsequent rulings, however, the Court added that in order to ensure the effectiveness of exceptions (*FAPL and Others*, para. 163; *Eugen Ulmer*, para. 43), they must be interpreted in light of fundamental rights (*Deckmyn*, para. 25). Eventually, the CJEU recognised exceptions as users’ rights (e.g., *Spiegel Online*, para. 50). In the context of online uses on social media platforms, Article 17(7) of the Directive on

Copyright and Related Rights in the Digital Single Market (CDSM Directive) clearly states that users enjoy a “right to the exempted use”, which Member States need to secure and provide redress mechanisms as a guarantee. While rhetorically the Court and the legislature seem to have considerably strengthened the position of exceptions vis-à-vis exclusive rights, the practical tools to enforce these user rights, however, still remain unclear to this day, as we will see. Their substantive scope also remains unsatisfactory, in particular for educational and research practices, and it remains very unclear how to secure the needed flexibility of the copyright system to adapt to technological advances.

Imbalanced enforcement tools

The substantive discrepancies between rights and exceptions are further exacerbated by missing enforcement mechanisms for users who want to exercise exceptions and, more broadly, require access to protected works for purposes relating to research and education. Here, copyright’s imbalance stands out most strongly, and the social contract breaks down. Whereas rightsholders can utilise effective enforcement tools, such as injunctions, to block and remove content online, and can further rely on the support of intermediaries to enforce their exclusive rights, users lack tools to give effect to their own rights. This enforcement contrast appears particularly problematic in relation to ‘ordinary’ media, such as audiovisual entertainment material, whose online enforcement regime has already raised significant concerns as to its compatibility with fundamental rights. To remove (potentially) infringing content, rightsholders benefit from concrete obligations incurred by intermediaries: for copyright, the CDSM Directive provides for such obligations vertically, and the Digital Services Act horizontally. Both enforcement frameworks oblige certain online platforms to remove content from their services, either pursuant to a notice or even as a self-standing obligation to exercise best efforts to avoid the upload of (possibly) unlawful user uploads.

Users do not possess such an arsenal of enforcement tools, and certainly not a horizontally applicable set of tools that can be used to ensure their rights. While users do enjoy (on certain online platforms) specific safeguards against the removal of their uploads, and the CJEU has pointed out the importance of these safeguards to ensure the balance within copyright law and the compatibility of EU copyright law with the fundamental right to free expression (*Poland v Parliament and Council*, paras. 93 et seq.), these safeguards are, in practice, either still lacking or rather ineffective.

Moreover, rightsholders can increase the scope of protection for their works through private ordering through terms and conditions and employ technological protection measures that can even make lawful use more difficult to exercise. Granted, the EU legislator has anticipated certain frictions with the lawful use of protected works and has,

thus, foreseen prohibitions on contractual overrides in relation to a few selected recently introduced exceptions, and also obliged Member States (not rightsholders) to provide systems that make works protected by digital locks accessible. Again, the implementation of these obligations remains insufficient.

Countering control over access models: the missing pieces of the synallagma

The design of access models is currently the most efficient means of control rightsholders can exercise, leaving users without any effective remedies. Indeed, the decision, if and how to provide lawful access to protected works lies with rightsholders: exclusive rights allow them to control under which conditions users can access these works and thereby also how they can use the content. For example, rightsholders can decide to sell a book only in analogue form and provide access to an e-book version subject to a licence. Instead of individual licences, certain titles are made available to libraries only as part of larger subscription packages, which increases the price for obtaining access but also prevents libraries and other cultural heritage institutions from building permanent digital collections.

This immense level of control, paired with technological and contractual restrictions over access to information, requires counterweights in the form of obligations that rightsholders incur as part of the social contract underlying copyright law. As a result, at least the exercise of certain exceptions that are essential for teaching and research activities – for example, those expressly mentioned in Article 6(4) InfoSoc Directive and those shielded from contractual override under Article 7(1) and Article 17(7) CDSM Directive – must be supported by positive access obligations, or a right to access. For this specific use, which reflects the object and purpose of copyright and is essential for the exercise of fundamental rights, obstructive and restrictive access models must be countered with a right to access that is safeguarded by positive obligations. In other words, rightsholders must ensure and guarantee access to protected works under certain conditions if access to and use of these works is essential for education and research. The ‘essentiality’ criterion cannot, however, be understood in a strict competition law sense as referring to (indispensable) essential facilities that objectively constitute an absolute condition for market access (*IMS Health*, para. 45). Whether a knowledge resource is essential must be assessed by the user, i.e., a teacher, researcher, or a knowledge institution. In this spirit, a presumption of a right to access must work in favour of certain, institutionally-bound actors, such as educators and researchers. Positive human and fundamental rights of access to information, including the right to research, speak strongly in favour of such obligations.

Realising the social contract

A contract, even an implied one reflecting ordinary law, must make both parties satisfied. A significant imbalance in the distribution of rights and obligations creates dissatisfaction, disillusion, and eventually makes at least one party lose faith in the set of obligations created by said contract. Translated into the social contract that underlies copyright law, this means that apparent imbalances make users doubt the legitimacy of copyright as a normative framework. This is a phenomenon that can currently be witnessed in relation to the spread of large-language models which have the capacity to generate outputs capable of displacing human works, and thereby threaten the sustainability of creative value chains. To regain trust, exceptions must be better formulated to reflect the object and purpose of copyright, which have been discussed elsewhere in this blog symposium (here and here). In addition, the misshapen ‘rights’ that users enjoy require strong and effective enforcement mechanisms that are at least as effective as the mechanisms rightsholders can rely on to enforce their exclusive rights. User rights must be supplemented by positive obligations to guarantee access on fair and reasonable terms (comparable to the FRAND conditions under patent law) to protected works.

Article 17 of the CDSM Directive was introduced to close the value gap – the discrepancy between the volume of online uses of protected works and the economic benefits derived by rightsholders – by imposing obligations on certain online platforms to help rightsholders to ensure fair participation in the exploitation of their works online. For this purpose, it even imposes on platforms an obligation to negotiate in good faith with rightsholders. New rules and mechanisms are now needed, including positive obligations for rightsholders, to close the knowledge gap. Such obligations must also be introduced to promote access to knowledge: in short, when it comes to research and education, policy makers should focus less on the value gap and more on the knowledge gap. Negotiating access requests between rightsholders and users could, for example, be embedded in an institutional framework that helps develop fair licensing solutions and keeps the additional transaction burden on rightsholders at a proportionate level. More fundamentally, a reflection on how best to safeguard fundamental rights in the online world needs to be conducted. Access to knowledge is crucial for digital innovation and Europe’s competitiveness, as well as for democratic participation. For this purpose, a re-examination of copyright’s social bargain in light of digital constitutionalism seems to be the right way forward.

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