

# Intellectual Property Rights: Friends or Foes?

*Rethinking European media and Communication Policies –  
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> Antitrust > Global Litigation > Intellectual Property

## Why o why?

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Rationale for IPRs:

- encourage creation and investment
- enlarge cultural offer (and thus knowledge of public)

Led to:

- legal monopolies
  - copyright
  - patents
  - designs
  - trade marks
- territorial rights

## While seeking a balance

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For copyright:

☞ dual protection:

☞ through moral rights

☞ and economic rights

☞ subject to exceptions

☞ for a limited period of time

☞ only for:

☞ works of authorship (« originality »)

☞ formal expression (no ideas/data)

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## Also viable in the information society?

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- Necessary application in the information society
  - of the protection
  - and the balance...
- Yes in theory, but what in practice?
  - enforcement?
  - overruled by DRM and on line contracts?

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## Quid in Europe?

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- 📁 Information Society Directive 2001/29
  - 📁 Rental Directive
  - 📁 Satellite and Cable Directive
  - 📁 Resale Directive
  - 📁 Term Directive
- 📁 Computer programs Directive 91/250 and Database Directive 96/9
- 📁 Enforcement Directive 2004/48

## Current discussions

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- Reinforcement of performers' and producers' protection
- Harmonisation of levies for private copying
- Access to digital content – « orphan works »
- Collective management for on line-service
- ...
  
- Recently published discussion papers
  - Gowers report and ivir reports 2006-2007
  - ivir report and Pamela Samuelson @ Fordham IP Conf, NYC, March 2008

## Facts sheet

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- Fact 1: continuing confirmation of the importance of copyright
- Fact 2: more attention for « second » objective (« balance »)
- Fact 3: Europe is not the world...

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## What's up, doc?

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There is a need for harmonisation of exceptions

- on the international level
- within the copyright framework
- but in a flexible way (« soft law », e.g. recommendation of WIPO Standing Committee on Copyright)

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## Starting point

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InfoSocDirective, Art. 5:

- closed list of exceptions to economic rights
  - but counter-balanced by a « grandfather » clause
- composed by:
  - 1 mandatory exception
  - a list of optional exceptions (« cherry-picking »)
- distinction between:
  - compensated exceptions (« fair compensation » « harm »)
  - uncompensated exceptions

BUT

- subject to « 3 steps-test »
- possibly overruled by DRM and on line contracts

## But that's not the global picture!

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Also:

- within the copyright framework:
  - limited scope of application (no facts, no official acts, only original works, etc.)
  - limitations to economic rights (exhaustion, 'de minimis' rule applied to right to communication to 'public', etc.)
- outside the copyright framework:
  - freedom of expression (art. 10 ECHR)
  - competition law (mainly artt. 81 and 82 EC Treaty)
  - other national concepts (abuse of rights, balance of interests, etc.)

## Europe versus U.S.

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Europe:

- open system of rights (« concepts » with broad interpretation)
- closed system of exceptions (restrictive interpretation)

U.S.:

- exhaustive enumeration of « acts » subject to authorisation
- « fair use »-concept

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## A « mediation » exercise

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Step 1: define the rationale of possible exceptions (« less is more »)

Step 2: cluster the existing exceptions by the policies they serve

Step 3: define the conditions of application, taking into account:

- the protection of rights
- the balance with other interests

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Cluster	Type of L&E	Examples of Specific L&E's
Innovation Promoting	mandatory	private study; no protection for unoriginal compilations; incidental copying; reverse engineering
	permissive	ISP storage; time, space and format shifting of works
Fundamental Freedoms	mandatory	no protection for news of the day and official texts; quotation right; parody; private copying
	permissive	
Vulnerable Groups	mandatory	disability-related exceptions; personal use exceptions
	permissive	important public purpose-promoting exceptions
Protecting Institutions	mandatory	nonprofit teaching & educational use exceptions now permitted under the Berne C.
	permissive	government use exceptions; library, public archive and public broadcasting exceptions
Provisions for Exceptional Circumstances	mandatory	national security exceptions; exceptions for administration of justice
	permissive	exceptions implementing TRIPS art. 8, TRIPS art. 40, and GATT art. XX(d)

NOTE: This matrix was developed based on a presentation by Prof. Pam Samuelson during a workshop sponsored by the OSI and held at the Cardozo School of Law in New York on 16-18 December, 2007.

## It's no « no man's land »

Leads to:

- a complex but refined system of exceptions
  - type of work
  - type of act
  - purpose
  - person
  - any other condition

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- that certainly needs to be (re-)assessed:
    - more discipline in legislative technique & more simplified
    - continuing modernisation
      - multimedia works, incl. CP and DB
      - technology-neutral

## Remains to be discussed:

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Scope of application?

Mandatory or optional exceptions?

Can it be overruled by rightholders?

(« privatisation » of copyright)

Where do we need compensation?

Exhaustive or enumerative list?

Application of « 3 steps-test » by whom at which level?

## That's the way... (aha aha) I like it!...

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I like this approach:

- respectful
  - no « tabula rasa »
  - built upon the « droit acquis »
- nuanced
  - going back to objectives of creating copyright
- constructive
  - practical results?
  - on the long term?

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## A harmonisation to be continued

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Also re:

- conditions for protection
- moral rights
- ownership and contractual rules
- collective management etc.

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## Finally...

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I conclude:

- is there a lead to be taken by experienced and neutral academics in the future?
- we need more discussion papers and more discussion!