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Balancing IP Claims and the Freedom of Art and Communication

# The Challenge of Balancing Digital Copyright

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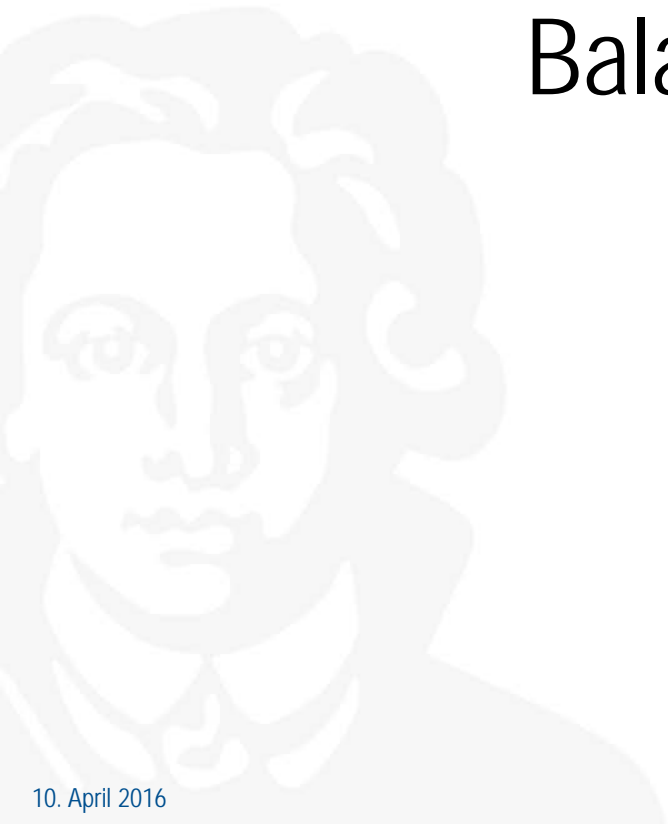
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# The Challenge of Balancing ~~Digital Copyright~~ Five Layers of Content Protection

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# Balancing copyright/IP



## The five layers of content protection online

- 1 Copyright and related rights in individual content (“balancing”)
- 2 Database protection (para-copyright 1)
- 3 Technology (access and copy controls, TPMs, DRM)
- 4 Anti-Circumvention laws (protection of the integrity of TPMs: para-copyright 2)
- 5 Contract

- Old issue:
  - Joel R. Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology', 76 Texas Law Review 1998, 553
  - L. Lessig, Code and Other Laws of Cyberspace, 1999 ("Code is law.")
  - P.B. Hugenholtz, Code as Code, Or the End of Intellectual Property as We Know It, 1999
  - S. Bechtold, Vom Urheber- zum Informationsrecht, 2001
- The (relatively) new example of text and data mining

# The analogue world



## Limitations/exceptions Art. 5 InfoSocDir 2001/29

1. Temporary acts of reproduction ... shall be exempted from the reproduction right provided for in Article 2.
2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
  - (a) in respect of reproductions on paper or any similar medium...
  - (b) in respect of reproductions on any medium made by a natural person for private use...
  - (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives...
  - (d) in respect of ephemeral recordings of works made by broadcasting organisations...
  - (e) in respect of reproductions of broadcasts made by social institutions...
3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
  - (a) use for the sole purpose of illustration for teaching or scientific research...
  - (b) uses, for the benefit of people with a disability...
  - (c) reproduction by the press ...
  - (d) quotations ...
  - (e) use for the purposes of public security ...
  - (f) use of political speeches as well as extracts of public lectures or similar works ...
  - (g) use during religious celebrations or official celebrations ...
  - (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
  - (i) incidental inclusion of a work or other subject-matter in other material;
  - (j) use for the purpose of advertising the public exhibition or sale of artistic works ...
  - (k) use for the purpose of caricature, parody or pastiche;
  - (l) use in connection with the demonstration or repair of equipment;
  - (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
  - (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals...
  - (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law...

## Limitations/exceptions Art. 9 Database Dir 96/9:

### Article 9 Exceptions to the sui generis right

Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
- (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.



## Limitations/exceptions Art. 9 Database Dir 96/9:

Article 9 Exceptions to the sui generis right

Member States may stipulate that **lawful users of a database** which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
- (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

# The digital offline world



## TPMs and Limitations/exceptions in the offline world

1. Temporary acts of reproduction ... shall be exempted from the reproduction right provided for in Article 2.
  2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
    - (a) in respect of reproductions on paper or any similar medium...
    - ~~(b) in respect of reproductions on any medium made by a natural person for private use...~~
    - (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives...
    - (d) in respect of ephemeral recordings of works made by broadcasting organisations...
    - (e) in respect of reproductions of broadcasts made by social institutions...
  3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
    - (a) use for the sole purpose of illustration for teaching or scientific research...
    - (b) uses, for the benefit of people with a disability...
    - ~~(c) reproduction by the press ...~~
    - ~~(d) quotations ...~~
    - (e) use for the purposes of public security ...
    - (f) use of political speeches as well as extracts of public lectures or similar works ...
    - ~~(g) use during religious celebrations or official celebrations ...~~
    - ~~(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;~~
    - ~~(i) incidental inclusion of a work or other subject matter in other material;~~
    - ~~(j) use for the purpose of advertising the public exhibition or sale of artistic works ...~~
    - ~~(k) use for the purpose of caricature, parody or pastiche;~~
    - ~~(l) use in connection with the demonstration or repair of equipment;~~
    - ~~(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;~~
    - ~~(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals...~~
    - ~~(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law...~~
- Art. 9 Exceptions to the sui generis right
- ~~(a) in the case of extraction for private purposes of the contents of a non-electronic database;~~
  - ~~(b) in the case of extraction for the purposes of illustration for teaching or scientific research~~
  - ~~(c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.~~

- The online world
  - Freely and lawfully accessible content
  - Illegally available content
  - Content legally available from an access controlled database (e.g. databases of scientific publishers)

## Online world: level 2

- EU sui generis database right, dir. 1996/9:
  - Art. 7(1) Exclusive right of the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part of the contents of that database.
  - Art. 7(4) The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights.

- Access controls (pay walls)



## Online world: level 4, Art. 6(4) subpara 4 InfoSocDir 2001/29

1. Temporary acts of reproduction ... shall be exempted from the reproduction right provided for in Article 2.
  2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
    - (a) in respect of reproductions on paper or any similar medium...
    - (b) in respect of reproductions on any medium made by a natural person for private use...
    - (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives...
    - (d) in respect of ephemeral recordings of works made by broadcasting organisations...
    - (e) in respect of reproductions of broadcasts made by social institutions...
  3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
    - (a) use for the sole purpose of illustration for teaching or scientific research...
    - (b) uses, for the benefit of people with a disability...
    - (c) reproduction by the press ...
    - (d) quotations ...
    - (e) use for the purposes of public security ...
    - (f) use of political speeches as well as extracts of public lectures or similar works ...
    - (g) use during religious celebrations or official celebrations ...
    - (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
    - (i) incidental inclusion of a work or other subject matter in other material;
    - (j) use for the purpose of advertising the public exhibition or sale of artistic works ...
    - (k) use for the purpose of caricature, parody or pastiche;
    - (l) use in connection with the demonstration or repair of equipment;
    - (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
    - (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals...
    - (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law...
- Art. 9 Exceptions to the sui generis right
- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
  - (b) in the case of extraction for the purposes of illustration for teaching or scientific research
  - (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

- (End User) License Contract



- Consequence for TDM under sec. 29A UK Copyright Act on “Copies for text and data analysis for non-commercial research”
  - (1) The making of a copy of a work by a person **who has lawful access to the work** does not infringe copyright in the work provided that (a) the copy is made in order that a person **who has lawful access to the work** may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose

...

- The limits of protection at levels 2-5
  - See A. Peukert, [A Doctrine of the Public Domain](#)

- Limitations on level 2 (database right)

- Limitations on level 3 (technology)

- Limitations on level 4 (anti-circumvention laws)



- Limitations on level 5 (contract law)

