

Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change

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As the jurisprudence of the European Court of Justice and ongoing discussions in the EU legislature illustrate, the economic rights granted to right holders under EU copyright law – the rights of reproduction, communication to the public and distribution – have become increasingly unpredictable. While the right of reproduction already covers almost every direct or indirect, temporary or permanent, partial or integral act of (digital) copying imaginable, the right of communication to the public is being extended well beyond its originally intended scope and purpose, to include acts of hyperlinking, facilitating file sharing and possibly even large-scale content aggregation. Recent CJEU decisions have also stretched the right of distribution to include acts of online dissemination of software, thus extending the exhaustion rule to digital resale of software licences. By contrast, the European Court has decided to narrowly construe the right of communication to the public in recent cases of cable retransmission of broadcast television. In the pending Renckhoff (or 'Cordoba' case), Advocate-General Campos Sánchez-Bordona even suggests that posting a photograph that was copied from the web on a school website does not amount to the making available of a work.

As a consequence of these rulings, the scope of copyright protection in the EU has become increasingly difficult to predict, at the expense of legal certainty, and EU copyright law's delicate structure of rights and exceptions is becoming gradually unbalanced. Another critique is that in the digital environment the rights of communication to the public and of reproduction increasingly overlap, requiring providers of digital content services to negotiate multiple permissions from concurrent right holders for acts that – seen from an economic perspective – amount to single acts of usage (e.g. content streaming).

Concerns over the proper scope of the economic rights protected under EU law have inspired a large-scale collaborative academic research project, 'Reconstructing Rights', which ran from 2014 to 2017. The aim of the project was to 'reconstruct' the economic rights protected under EU copyright law, by bringing these rights more in line with economic and technological realities. The project – designed as a thinking exercise – brought together a group of leading scholars in the field of European copyright law and economics. Each member of the group was charged with drafting an ideal model of economic rights. The proposed models make fascinating reading, and attempt to 'reconstruct' in different ways, by combining economic analysis with insights from competition law, trademark law, unfair competition law or communication sciences. The results of the project, which also includes an elaborate study on the economics of copyright in 'borderline cases', such as hyperlinking and text and data mining, have now been published in book form in Wolters Kluwer's Information Law Series. The introductory chapter of the book, which summarizes the models and main findings of the project, is available here.