

Kluwer Copyright Blog

Implied consent, a natural digital mediator of copyright interests

Georgia Jenkins (Queen Mary University of London) · Monday, May 17th, 2021

Copyright law continues to confront an age-old question: how to best balance copyright interests?

This year marks the 20-year anniversary of the [Information Society Directive](#) meant to provide a harmonised framework for digital copyright in the EU. This balancing act has proved more complex as technology developed and inherent flaws within the framework became more apparent. In 2019, we saw the adoption of the [Digital Single Market Directive](#), a fresh attempt to respond to some of the challenges presented by technology. Unsurprisingly, the Directive is not without its own shortcomings and is subject to a [validity challenge](#) at the CJEU by Poland.

The time is ripe to consider whether alternative means are needed to better balance copyright interests. As the concept of access is paramount to the functioning of copyright law (end users wish to enjoy and interact with works and creators wish to be attributed and compensated adequately) implied licences present a likely candidate. Across the UK, EU, Germany, the US, and Australia, implied licences are relied upon to regulate the digital use of copyright works (see Jenkins, IIC, 2021).

The notion of implied consent has emerged as a fundamental legal principle that can



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be broadened to propose an extended doctrine of implied consent. Either through the lens of contractual interpretation or the ‘implied copyright authorisation’ approach evident in *Svensson*, the extended doctrine of implied consent would allow courts to strengthen users’ access to digital content. An extended doctrine of implied consent would focus on the impact of the use of the copyright work and the extent to which it balances copyright interests in the digital environment. These two factors would shift the focus in the copyright discussion from creeping copyright protectionism to a more reasonable and proportional evaluation.

Of course, recent cases indicate that the doctrine would face considerable challenges. Firstly, *Tom Kabinet* confirmed a cautionary approach to the resale of digital copies of works such as E-books, and ultimately restricted the application of the doctrine of exhaustion in a digital sense to computer programs pursuant to the Software Directive.

Secondly, *VG Kunst-Bild* re-enlivened the controversial status of contractual override and technological protection measures (TPMs). The CJEU’s finding that the communication right is infringed when, despite prior authorisation, a user embeds a copyright work in a third-party webpage which circumvents TPMs applied by the copyright holder is reminiscent of opt-in/opt-out copyright policy discussion. The former requires the copyright holder to explicitly bar all uses, and the latter requires aggregators to either have consent or an applicable exception or limitation (Jenkins, IIC, 2021). *VG Kunst-Bild* is clearly akin to opt-in measures as they also reflect the position that only rightsholders can determine the access and use of their works.

However, such a reductive approach to the dissemination of and access to digital content fails to effectively incentivise and support digital content markets and simultaneously ensure adequate access for users. A more holistic view suggests that the doctrine of exhaustion and the communication right are practically two sides of the same coin as in both copyright holders capitalize on the new transformation not yet contemplated and are appropriately rewarded for this new commercial exploitation (*Allposters* para 48).

Whether consent is required for every new transformation, new public, or resale should be the central focus of modern EU copyright law in the digital age. The question then becomes what does consent comprise: is it simply the act of initially putting the copy into circulation or is it more nuanced, requiring specific consent to certain actions? Perhaps the internal market and freedom of movement origins of exhaustion could support the fundamental status of the extended doctrine of implied consent to redefine the relationship between consent and TPMs.

For more discussion on these questions, see the first publication of this material by Springer Nature in the International Review of Intellectual Property and Competition Law as ‘An Extended Doctrine of Implied Consent – A Digital Mediator?’ on 23 March 2021 by Georgia Jenkins.

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