Kluwer Copyright Blog

Copyright as an Access Right: Concretizing Positive Obligations for Rightholders to Ensure the Exercise of User Rights

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The purpose of copyright, at its very basic level, finds its normative implementation in the interplay between access to protected works and the protection of the moral and material interest of creators (see Geiger, 2017). The social contract of copyright, which main purpose is to realize a broader collective concern, the access of citizens to science and culture (Geiger, 2013), lies in the approximation of the interests of rightholders and users. Unfortunately, this perspective has been long overshadowed in the EU by a traditional understanding of copyright as a system that grants exclusive 'rights', and under which important legitimate uses can only be performed in limited circumstances if covered by an 'exception'. This misguided understanding of a hierarchy of rights has had a significantly negative influence on the exercise of the rights of copyright users. While rightholders enjoy broad rights to defend their interests, users must rely on exceptions with limited scope. More crucially, rightholders can instrumentalize their exclusive right to control initial access to their works, making the exercise of user rights increasingly difficult if not impossible (Kretschmer & Margoni, 2024). This is particularly true in a digital environment where access and subsequent use of protected works is further complicated by technological protection measures and paywalls.

Copyright as vehicle for access: User rights are pillars of copyright's societal bargain

To counter this imbalance, courts worldwide have in recent times stepped-in to clarify that 'exceptions' are not mere exceptions to a rule but instead define positive, enforceable rights to use copyrighted works in certain circumstances (for the EU see e.g. *Funke Medien v Bundesrepublik Deutschland*). A hierarchy between rights and exceptions would be contrary to national and regional constitutional orders, in particular to the imperatives of fundamental rights (Geiger & Jütte, 2022). From this constitutional dimension of copyright emerged the notion of 'user rights' (Geiger, 2020).

This crucial development, which restores copyright as an access right (see Geiger, 2016; Efroni, 2010) provides a normative foundation to reinforce the societal bargain that creates incentives for authors, but also creates room for downstream creativity and innovation. However, it is only a first step towards making user's rights a reality. Looking forward, it is essential to ensure that legitimate

uses expressly foreseen by copyright law are enabled through better access to protected works. Here, it is the legal framework that is lagging behind, in particular in creating a congruence of lawful uses in analogue and digital environments. For this purpose, copyright must establish concrete obligations for rightholders to provide access for specific purposes. In the absence of positive norms, courts can support the exercise of user rights through an access-friendly interpretation of the existing framework. Spelling out these positive obligations should, however, also be a priority for future legislative reform.

Particularly in relation to digital embodiments of works and due to the changing nature of content consumption (digital access via tethered devices, streaming and cloud services), access has become easier and more convenient. At the same time, rightholders have tools and can develop strategies to tailor 'spheres of access'. Not only can rightholders prevent certain uses by employing technological protection measures, rightholders can choose to whom, or to which institutions they grant digital access rights (i.e. licenses for specific uses). Rightholders can, for example, choose whether to license an e-book or an e-journal to a library, or whether to provide licenses to educational establishment to play music and audio-visual works for educational purposes. However, making available books or articles in digital format in institutions such as public and university libraries is needed to enable access to works, which is a necessary precondition to exercise user rights: illustrating teaching with images and sounds is itself protected by an exception (Priora, Jütte & Mezei, 2022), and researchers rely on access to information in a multitude of formats. For example, in order to text and data mine scientific publications, a researcher needs to have access to these copyrighted works, which can be restricted by licensing and pricing policies of publishers (as only very few institutions are able to afford broad and comprehensive licenses to access to digital works across all areas of science). Added to the already established arsenal of technological protection measures and restrictive terms in online contracts, rightholders can therefore control initial access points and thereby decide whether users can benefit from their rights. The purpose of copyright, its social and innovation function, is thereby seriously undermined.

Current mechanisms to enforce User Rights are insufficient and often ineffective

To some extent, copyright already offers mechanisms that can serve as shields against private ordering. However, these are limited to cases in which the user already enjoys lawful access to a specific work. For example, art. 6(4) of the InfoSoc Directive obliges Member States to 'take appropriate measures to ensure' that users of specific exceptions can exercise these if technological protection measures (TMPs) applied by rightholders prevent such exercise. This obligation is extended to the exceptions introduced by the CDSM Directive by virtue of art. 7(2). Another mechanism to ensure the proper exercise of user rights is contained in art. 7(1) CDSM Directive which prohibits the contractual override of the exceptions for non-commercial text and data mining performed by research organizations and cultural heritage institutions, for digital and cross-border teaching activities and for the preservation of cultural heritage.

In the context of the moderation practices of online platforms of the activities of their users, art. 17(9) CDSM Directive even goes one step further, explicitly recognizing for users a 'right to exercise exceptions' (Geiger & Jütte, 2021). To ensure that users can exercise their rights, specific online platforms are required to make users aware of this right by including a relevant reference in their terms of use. Furthermore, procedural safeguards (Quintais et al., 2019) must be established

by platforms with the right to users to have recourse to the ordinary courts or other judicial authorities to 'assert the use of an exception or limitation'.

These legal mechanisms, which are effectively tools to ensure the exercise of user rights and to shield them from the overreach of rightholders, are well-intended, but in practice difficult to enforce. Moreover, most EU member States have failed to implement express reference to these access-friendly provisions in their national laws.

Rightholders can prevent access to works through tailored distribution models

But even if these user safeguards (prohibition of contractual override as an ex-ante measure and lawful access to content protected by TPMs) were properly implemented, rightholders can still apply distribution (or access) strategies to prevent the proper exercise of user rights. At least implicitly, most of the exceptions which enjoy protection under art. 6(4) of the InfoSoc Directive and 7(1) CDSM Directive require lawful access. A general 'lawfulness' (of access) requirement hangs the Sword of Damocles over the heads of users. In certain situations, it may not be easy to determine if the content used in exercise of a user right has been made available lawfully. For example, arts 3 and 4 CDSM Directive require lawful access as a condition for the lawful performance of text and data mining. Already the ambiguity to the 'lawfulness' requirement can constitute an effective barrier to the exercise of user rights (Geiger, Frosio and Bulayenko, 2019; Margoni, 2022).

Even more restrictive effects can unfold when certain uses are not subject to an exception but to a full exclusive right. For example, public lending is, by default, subject to an exclusive right under art. 2 of the Rental and Lending Rights Directive. While Member States can derogate from this right and establish and remunerated exception under art. 6(1), and even exclude certain institutions from the remuneration requirement (art. 6(3)), rightholders retain full control over the availability and modalities of licenses for public lending. Even art. 6 can require that libraries must have obtained prior lawful access in the sense of a prior transfer of ownership (*VOB v Stichting Leenrecht*). However, public lending through publicly funded institutions is essential for vulnerable and marginalized groups and their ability to access information and participate in cultural life, and to exercise exceptions to copyright for the purpose of self-study. While there is a good argument to be made that rightholders should be obliged to offer appropriate licenses, a stronger argument can be made that the imperatives of fundamental rights suggest that the public lending right should instead be understood, and legislatively anchored as a user right, *viz.* an exception or, according to art 6(1) at least a statutory remuneration right (Geiger & Bulayenko, 2022). More radically, the right to control the public lending of certain works could be eliminated (IFLA, 2016). At a minimum, in the absence of immediate legislative intervention, rightholders should be obliged to offer licenses that cater to the needs of public lending institutions on their mission to provide access to diverse collections of information

Private ordering must be countered by positive obligations to grant access

An obligation to grant a specific license for a specific use, or rather to enable a specific use under an exception, can be derived from the *ratios* of the relevant exceptions – and these would include de lege lata *at least* those mentioned expressly in art. 6(4) InfoSoc Directive and those shielded

from contractual override under art. 7(1) and art. 17(7) CDSM Directive. The purpose of these exceptions lies at the heart of copyright's *raison d'être*, to create and provide access to information that will generate creativity and innovation. These objectives are also reflective of fundamental rights as protected under the EU Charter of Fundamental Rights and the European Convention on Human Rights. Chief amongst them is the right to freedom of expression, including the right to receive information, the right to education as well as the freedom of the arts and sciences, and as its derivate the right to research (Geiger & Jütte, 2021).

However, fundamental rights provide convincing arguments that access should be facilitated for certain users and privileged user groups. At a minimum, access should be facilitated for institutions which allow the realization of user's rights: for example, libraries, public archives, educational establishments and research organizations, as well as other public interest institutions must be put in a position to function as access points for a broader public and thus to enable user's rights. In particular, in cases where rightholders prevent digital access to specific works, which are necessary to undertake a use privileged by an exception that derive their existence from fundamental rights rationale, an obligation to provide access can be construed directly out of these fundamental rights. This obligation must, however, be subject to the condition that the work in question is already lawfully available, albeit under different conditions and possibly in different formats. In such a scenario, the relevant rightholder would be obliged to offer access to the protected work on reasonable terms.

If such an obligation were not to exist, rightholders could render user's rights absolutely ineffective. Through contractual and technological conditions, as part of their digital distribution systems, publishers and other rightholders can tailor and segment the relevant markets around areas in which copyright exceptions normally apply. The privileging uses of protected works offered by so called 'exceptions' thereby fall victim to private ordering and generate societal costs of a copyright system deprived of the balancing effects of exceptions limitations (European Copyright Society, 2017). Such an obligation that directly derives from fundamental rights would be subject to the principle of proportionality, to avoid that rightholders face excessive 'obligations to license' and would have to incur the resulting transaction costs.

A copyright institution as a guarantor of access under fair conditions

An institutional framework that administers access to works for specific purposes, and potentially supports the negotiations for reasonable and fair licensing arrangements, would be instrumental in 'administering proportionality' for an access right under copyright law. An EU copyright institution (Geiger & Mangal, 2022, also Frosio & Geiger, 2021) equipped with quasi-judicial competences could be key in resolving negotiation deadlocks between users and rightholders and in ensuring the exercise of user rights in practice. Such an institution could also negotiate best practices for providing access (either by suitable licenses, or by facilitating the provision of appropriate format copies) and help to formulate proposals for legislative reforms. It could also be tasked with conducting studies and research on the economic parameters that determine the conditions attached to an obligation to provide access. For example, fair conditions for access could, in terms of value and process, be determined by standards inspired from FRAND-obligations in patent law or the essential facilities doctrine in competition law. Furthermore, it could reflect and provide policy guidance when remuneration-based limitation systems ensuring access for research, teaching and cultural participation would be a workable solution to the access-

problem (Geiger, Schönherr & Jütte, 2024).

Without access to copyrighted work there can be no creativity and where there is no creativity, the social contract behind copyright is broken. “With great powers comes great responsibilities”, as the biblical saying goes. It is time to enforce this social bargain so that copyright can benefit creators and the broader society at the same time and to make the EU a vibrant space for cultural participation and creativity (European Copyright Society, 2023).

This post summarizes the preliminary findings of a study conducted by the authors, which has been commissioned by COMMUNIA and the IFLA Foundation. The post was first published on the COMMUNIA blog.

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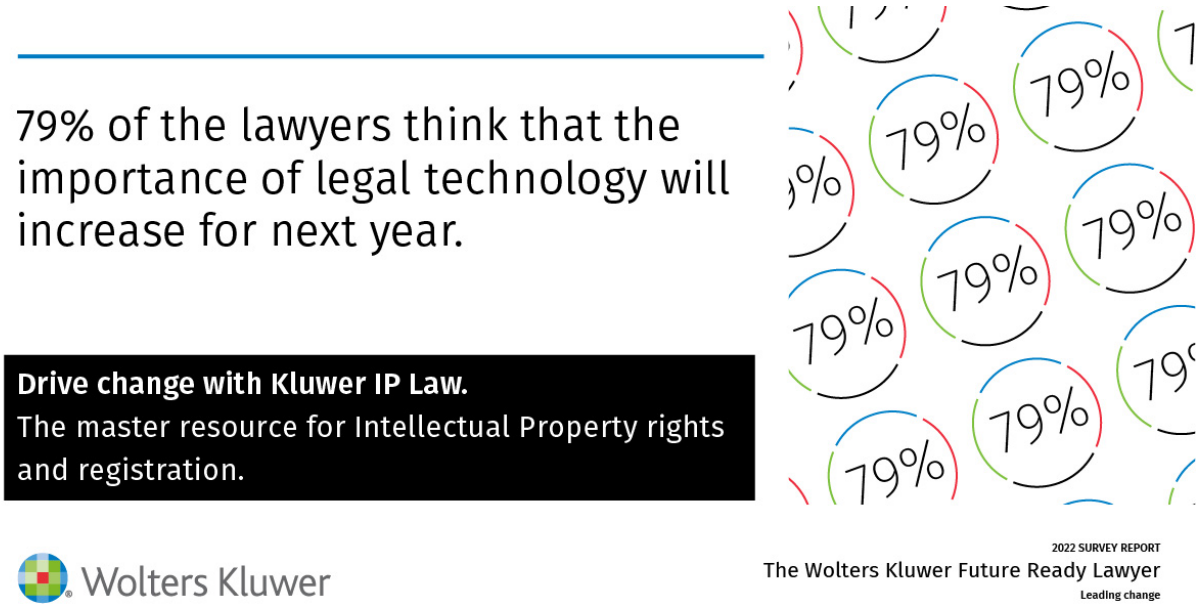

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