

Kluwer Copyright Blog

Limitation-Based Remuneration Rights: An Underexplored Approach to Balancing Copyright Interests in the EU

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This blogpost is part of a series marking the publication of the fourth edition of the book [Collective Management of Copyright and Related Rights](#), edited by Daniel Gervais and João Pedro Quintais. The blogpost provides a short presentation of the authors' chapter (with Franciska Schönherr): "Limitation-based remuneration rights as a compromise between access and remuneration interests in copyright law: what role for collective rights management?"



The European copyright landscape is characterized by a long-standing [tension between access to creative works and the exclusive rights of authors and other right holders](#). A potential compromise to this issue lies in ‘limitation-based remuneration rights’—a regulatory model that allows for certain uses of copyrighted works without prior authorization in exchange for fair remuneration. This long-established approach which has already been implemented, within the margin of discretion offered by EU copyright harmonization, in many European jurisdictions and in relation to specific uses, offers a promising avenue for an efficient and access- and [innovation](#)-promoting copyright harmonization, with a prominent role for collective rights management (CRM) at the EU level. It also offers a fairer bargain for authors as they can receive (often better) remuneration for the use of their works compared to direct exploitation or assignment of their rights. This regulatory tool has gained renewed attention in the current debate on Generative AI and the use of copyrighted works for training AI models (see [here](#), [here](#), and [here](#)). A remuneration-based approach that permits the use of protected subject matter ensures a fair remuneration to creators for the commercial use of their work by Generative AI companies, while it decreases the burden for innovators by reducing transaction costs for rights negotiations and clearance.

The Shortcomings of the Current EU Framework

Despite attempts to harmonize copyright exceptions and limitations, EU law remains fragmented. Article 5 of the 2001 InfoSoc Directive contains an exhaustive list of optional limitations and exceptions that Member States may choose to implement. However, national implementations vary widely. Even the introduction of specific and obligatory exceptions in 2019 continues to create legal uncertainty (see [here](#)). This state of disharmonization undermines the fundamental goals of the EU internal market and puts EU-based innovators at a strong competitive disadvantage with regard to other jurisdictions, as 27 different national legal frameworks create significant legal uncertainty for users and market players.

One important and well-established regulatory mechanism to balance the interest of rightholders and those of users and the wider public interest foreseen in EU but also international copyright law is to couple the limitation with a remuneration right – a “limitation-based remuneration right”. Pan-European mandatory remuneration rights provide thus a higher level of legal certainty and have several advantages for market players and users; however, they have been so far underexploited as a regulatory tool by policy makers.

The Case for ‘Limitation-Based Remuneration Rights’

Introducing a set of mandatory ‘limitation-based remuneration rights’ across the EU would indeed have several benefits. This system would involve statutory licenses that grant users permission to perform specific uses of copyrighted works, while ensuring that right holders (and, notably, in particular authors) receive equitable remuneration. Such a model offers several advantages:

1. **Promoting Creativity and Innovation:** By clarifying the scope of permissible uses, a limitation-based system encourages the creation of derivative works, research, and educational uses, which currently face legal uncertainty.
2. **Fair Compensation for Authors:** Unlike exclusive rights, which are often transferred to producers or publishers, remuneration rights can remain inalienable, ensuring that creators receive continuous financial rewards. Copyright contract law, the traditional mechanism applied to protect the remuneration interests of creators, has not yet shown much effectiveness due to the asymmetry of power between authors and derivative rightholders.
3. **Reducing Legal Barriers:** The current complexity of securing licenses for certain uses (e.g., research, education, or digital reuse) acts as a barrier to innovation and creativity. A statutory remuneration scheme simplifies necessary access while maintaining an income stream for authors.
4. **Enhancing Legal Certainty:** A harmonized EU-wide approach to remuneration-based limitations would eliminate discrepancies between national copyright laws, fostering a more predictable legal framework.

Addressing Legal and Constitutional Concerns

The introduction of ‘limitation-based remuneration rights’ must be assessed from a constitutional perspective. Decreasing exclusive control for right holders over their property-like positions protected under the EU Charter of Fundamental Rights (art 17(2)) must be based on strong competing rationales. However, the [social function of right to property](#) can justify the imposition of limitations to the exclusive control to ensure the effective realization of competing interests,

including other fundamental rights. Already in 1971, the German Constitutional Court ruled that justified limitations to exclusive rights must not necessarily mean that access is provided free of charge. Accordingly, the constitutional imperatives deriving from the right to property are very likely to be met when a remuneration is foreseen for certain permitted uses. Moreover, both EU and international law allow for such a transformation of rights positions provided that authors receive fair remuneration.

In particular, the so-called ‘three-step test’ under the Berne Convention (art. 9(2)) and the InfoSoc Directive (art 5(5)) requires that copyright limitations apply only in ‘certain special cases’ and do not interfere with the ‘normal exploitation’ of the work. A remuneration-based approach can meet these criteria by ensuring that authors still derive economic benefit from their works, even if they lose the ability to withhold permission for specific uses. ‘Normal’ exploitation does not necessarily mean exploitation via exclusive mechanism, in particular when the exercise of exclusivity is impracticable or very difficult. Moreover, the three-step test does not apply to mandatory or extended collective management mechanisms (as they are not technically a “copyright limitation”).

Alternative Solutions: Mandatory and Extended Collective Management

EU-wide statutory remuneration rights often meet resistance from big right holders who insist on exclusive control over their rights-portfolios. An alternative solution could be a broader application of collective rights management. Many Member States already utilize collective management organizations (CMOs) to administer licensing schemes for certain uses (e.g., retransmission rights, private copying levies). Expanding these mechanisms could provide a pragmatic alternative to outright statutory licensing.

One such mechanism is Extended Collective Licensing (ECL), where agreements negotiated by CMOs apply not only to their members but also to non-members, unless they explicitly opt out. The 2019 CDSM Directive has encouraged Member States to explore this model, particularly for mass uses that are difficult to license individually. In certain contexts, such as orphan works or out-of-commerce works, mandatory collective management ensures both access and fair remuneration.

Conclusion: A Way Forward for Copyright Reform

The current EU copyright framework is ill-equipped to balance the needs of users and right holders in the digital age. A system of ‘limitation-based remuneration rights’ can offer a compelling compromise that enhances access to works while ensuring that authors receive a fair share for the use of their works. Remunerated rights are viable alternatives for uses in commercial contexts to overcome transaction cost problems, or for proportionate limitations of exclusive rights justified, in principle, by fundamental rights or other overriding interests. If direct statutory remuneration rights are deemed too controversial, expanded collective management schemes could serve as a viable alternative.

Ultimately, any meaningful reform must move beyond the ‘false’ harmonization of optional exceptions and create a more coherent system that serves the interests of both creators and the broader public. As the EU continues to grapple with copyright reform and the challenges of new technologies, including artificial intelligence (see also [here](#) and [here](#)), embracing a remuneration-

based approach may be the key to achieving a fairer, more efficient copyright regime in the 21st century and securing eventually the realization of a competitive Digital Single Market.

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