

# Copyright in the information age

Author: Amalia Drosou

The transition from the age, where the expression of the intellectual product as a physical form, such as a book, to today's world of rapid technological change, challenges the European copyright rules like never before. Their adaption to the information age seems to be a necessity even if the depth of the Internet Technology makes it quite a difficult task. The Managing Director of the Max Planck Institute for Innovation and Competition, **Professor Dr. Reto M. Hilty**, enlightens through his views the rather complex issue of copyright law in modern Europe, he underlines the need of Europe to create new rules so that it can be more competitive in the global environment and gives insight into the issue of the balance between the copyright holder and the copyright user.

**Professor Hilty, you have dedicated the biggest part of your professional life to copyright law and patent law. What motivated you to get involved in this field?**

Before I studied law, I had studied mechanical engineering for two years. My interest in technical questions first led me to patent law. At that time – in the 1980s – this was still a rather exotic field of law, but I felt that it would become important. Later I started to deal with copyright law – still before it became a very political domain. Today I am glad to have invested early in this area, which today is one of the most relevant fields of law in terms of value creation.

**The Max Planck Institute for Innovation and Competition has coordinated an international group of world-renowned copyright experts to produce a legal instrument containing a nucleus of indispensable copyright-permitted uses that States should be obliged to implement in their legislation. What was the need that led you to take this initiative?**

The first step was an internationally broad-based project relating to the so-called three-stage test. This test is a provision of international law. It is invoked again and again to claim that legal permissions to use works without the consent of the copyright holder are not allowed at all or that existing exceptions and limitations must be interpreted narrowly. The outcome of this project was a Declaration explaining how the three-step test should be interpreted and applied correctly.

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This Declaration has attracted considerable attention worldwide – but has also triggered criticism. The copyright industries obviously do not agree on the substance. Representatives of countries with less developed legal cultures were of the opinion that the approach was

correct, but that the Declaration was too abstract to show a national legislature what it could do. Instead, more specific guidance was needed. At the same time, many of these countries commit themselves, through free trade agreements, not to include exceptions and limitation – although permitted by international law – in their national laws. This obviously lies in the interest of the cultural industries, often located in the United States, but not in the interest of the countries concerned.

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Against this background, the purpose of the “international instrument” – the completion of which is in the final phase – is, on the one hand, to show in concrete terms how far national legislators may (and should) go in terms of legally permitted uses. On the other hand, an international treaty aims at strengthening the negotiating position of the countries concerned in order not to waive through free trade agreements the flexibility they need in order to promote the interests of their own population.

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**Professor Hilty, the European Union Directive on Copyright in the Digital Single Market raised concerns about its controversial content. Articles 11(link tax) and 13 (upload filter) are under the spotlight. Those in favor say they’re fighting for content creators, on the other side critics claim the new laws will be “catastrophic”. How would you rate the controversy?**

The two most controversial provisions are quite different in their effect. But behind them is the same concern: Europe is lagging dramatically behind the USA (and now also China) with regard to the Internet economy. Virtually all major corporations are based there, and there is a feeling that they are earning a lot of money at the expense of European rights holders. Instead of asking why Europe is not competitive here, new rules should now be created.

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Regrettably, Article 11 in particular – the neighboring right for press publishers, which is a prime example of perfect lobbying by an interest group – ignores the basic principles of a market economy. Both sides benefit from each other. The press publishers produce the content, but they benefit from being provided with occasional readers by major search engines. Under these circumstances, it would be up to them to design their digital content in such a way that they can generate the necessary revenues through their own advertising. If, on the other hand, they don’t want to attract such readers – for example because they only want to sell their products to subscribers – then they could prevent this today by simple technical measures.

But the attempt to force a remuneration obligation here is also anachronistic because powerful companies like Google could afford it – but a small European provider could not.

However, it is doubtful whether Google will be prepared to do so. With products other than the news service, the company earns far more money. Should it discontinue the product, not only the European press publishers would be the losers, but above all the European consumers.

With regard to Article 13, there are basically two contradictory objectives. On the one hand, the providers (e.g. Youtube) should prevent unauthorized content from being disseminated via their platforms. On the other hand, they should obtain licenses from the rights holders – well understood, not the creators, but the copyright industries – in order to provide content legally. This may work with regard to commercial offers (like songs or movies). But for so-called “user-generated” content – i.e. creative activities by users who want to distribute content on social networks (e.g. memes) on the basis of preexisting works – licenses will not be granted. This inevitably leads to a need to filter out such works – even though they do not harm any rights holder. Today’s common user behavior is thus criminalized and contemporary forms of social exchange of information are prevented.

### **But, how realistic is a balance between the copyright holder and the copyright user?**

The interests do not only have to be balanced between two parties. In particular, it is important to understand that protection of right holders does not automatically lead to protection of those who actually generate creativity. But also users today are not simply users; digital technology allows many of them to be creative themselves. A real balance of all interests is therefore a complex undertaking. It would mean that all interests could be equally well represented in legislative processes – because the legislature does not understand these complex correlations and tends to favour the party that best represents its position.

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### **Professor Hilty, the ever-increasing pace of technological development and more specifically the increased use of AI advancements in a variety of fields, brings with it the issue of a kind of computational inventorship. A lack of clarity around the inventorship of AI inventions could become an area of contention. To which degree has the European patent law to evolve regarding this issue?**

In fact, a lot is happening at the moment and AI is on everyone’s lips. However, many ideas about what AI can do today and for the time being belong in the world of science fiction. But questions do indeed arise with regard to patent law, even if at the moment there is no apparent reason to hastily adapt existing legislation. Rather, it may be appropriate for the time being that court practice deals with such questions. An example would be what knowledge and skills the hypothetical “person skilled in the art” disposes of when something new is developed with the help of AI. On the basis of this concept, which is of decisive importance in patent law, it is decided whether such a development is inventive and thus patentable.

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**How does an ideal intellectual property law look like according to you, in terms of technological development and economic growth?**

IP rights per se do not promote technological development and thus prosperity. Incentives to invest in something new originate from markets. A good example is the case of “orphan diseases” from which only a few people suffer. Since such a market is too small, the pharmaceutical industry does not conduct research in this area – no matter how strong the patent; there is no point in investing in such drugs. At the same time, it is clear that nobody invests if he has to assume that someone else will benefit from it in the first instance.

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IP rights therefore create an exclusive market position for a limited period of time. They aim, so to speak, at a correction of market mechanisms that would not lead to the desired results without such legal interventions. But it also means that IP rights must not go beyond what is necessary to prevent this so-called “market failure”. If protection goes beyond what is necessary, unnecessary impediments to competition arise, which in return can lead to a lack of potentially possible innovation.

The necessary balance is of course very unstable and difficult to maintain. It is not possible to achieve it at the legislative level alone. Therefore, it is of crucial importance that sufficient flexibility exists while applying the law in order to limit dysfunctional effects of excessive protection. Very important are therefore exceptions in order to allow certain uses of the subject matter of protection by third parties. But it may also be important that right holders can be forced to grant licenses under certain conditions.

**About Reto**

Reto was born in Zurich in 1958. After his studies in mechanical engineering at the Swiss Federal Institute of Technology Zurich and law at the University of Zurich, he completed his Doctorate in 1989. From 1994-1997 he became Member of Board of the Swiss Federal Institute of Intellectual Property, Bern. Three years later, in 2000, he completed his postdoctoral lecture qualification in civil, intellectual property, competition and media law at the University of Zurich, while at the same year he obtained a full professorship in the field of technology and information law at the ETH Zurich. Since 2002 he is scientific member of the Max Planck Society and Director of the Max Planck Institute for Innovation and Competition as well as Full Professor (ad personam) at the University of Zurich and Honorary Professor at the Ludwig Maximilians University, Munich.