Teil 2 – Interne Beschränkungen

Diskussion

Prof. Reto M. Hilty
Ich darf sie einladen zu den Thesen der Diskutanten Stellung zu nehmen. Anschließend möchte ich die Gerneraldiskussion eröffnen.

Dr. Séverine Dusollier
I have many things to answer to what the disputants said, because I think it was really interesting and I agree with most of what they said.

I start with what Jacques de Werra said. I agree with you, that we should be flexible and not have definitive solutions for all the exceptions and particularly where technological measures are concerned. I would make a distinction here. Your approach was like the U.S. approach of anticircumvention provisions in the sense that you think that the exception should be taken into account to enable a user, who benefit from an exception, to circumvent technological measure without being liable for an infringement. I personally think that The matter should also be dealt with at the layer of the technological measure itself and the law should do something to limit the technological measures and should not wait that the user is pursued for anticircumvention provisions infringement to enable her, to use her exceptions.

That entails that at the layer of anticircumvention provision, the act of circumvention itself should not be illegal. By making it illegal we add a layer to copyright that is not necessary, because either you are infringing copyright and you can be sued for that reason or you are exercising a copyright exception. So why would you be liable under a law, if you are not liable in the copyright regime. Only circumvention devices should enter in the perimeter of anticircumvention provisions. Concerning the measures to be taken to preserve the exceptions, this is where the flexibility should be very broad. The example you take about backup copy for software is really relevant here. I remember one case law in France in the beginning of the nineties: there was a technical measure on a computer program and someone was claiming to be entitled to circumvent that technological measure, because he wanted to make a backup copy. But the judge said: you don't need to make a backup copy, because the computer company gives you one. When they sell to you the copy of the program they also give you a backup copy. Your interest in making a private copy is met by this policy of the computer company. So, you don't need anything else to be able to exercise your exceptions. In my opinion, there lies the interest of qualifying exceptions as interests; it is only where the interest is infringed or is threatened that the interest has a value or can be invoked against the person, who is infringing that interest. That makes some solution, which can be put in place by copyright holders, a valid solution. So, of course, the copyright holders can provide a backup copy for free. If they don't provide it for free, then, maybe, it is different. But they can provide a copy for free, because the interest is not at stake and we can have many examples of exceptions, which can have the same solution.

I had another comment to make to what Prof. Rigamonti said. When you said that we don't need external consideration for judging whether copyright exceptions should or should not trump contracted technological measures, you meant that they should prevail over technological measures. I agree, but I think that we really need external consideration, because there is a lot of reasoning from an external point of view, like law and economics, that argue that private ordering is better than keeping the copy-

right exceptions. We can't really miss all that reasoning outside of the mere copyright law and it is also very interesting. In your (vermutlich Rigamonti) conclusion was focused on interests, because you said we should focus on "interest, interest and interest". Or maybe, I mixed the order (vermutlich Rigamonti). So you ask for a sociological approach of copyright here. Isn't it contradictory with your refusal to consider viewpoints external to copyright ?

I also agree with most of what Raquel (Xalabarder) said. I think it is really important: It is true that here we talked only about copyright exceptions and I completely agree with you, we need a definition of the rights before talking to the exceptions. Because the extent of copyright has two faces, the first face is what I will call the positive faces is the definition and the limits of the rights themselves and then you have the negative face, that is the limitations by rules of exceptions. And I completely agree with you that exclusive rights and copyright are only defined by the notion of exploitation. By exploitation, I mean the fact that a work is or might be publicly disseminated; it might be communicated to a public. This is the criteria, that defines the public communication right, but it is also the criteria, which defines the reproduction right, because in most of the countries, reproduction right is defined as any copy, that can enable the work to be perceptible by the public. I think we don't have to choose the definition, because this is the definition of the reproduction right, so it has always been chosen for us. That implies that temporary reproduction right should not a matter covered by copyright, since it deals with the private access to works not with their public diffusion. And I agree with you, that the initial mistake was to cover computer programs by copyright. It brought a lot of mistakes with it that ultimately lead to some controversial provisions related to technological measures. They are just a logic consequence of this first mistake.

Prof. Mathias Schwarz
Ich werde etwas kürzer sein und nicht die vielen Punkte wiederholen, mit denen ich einverstanden bin. Ich finde die von Ihnen, Herr Dr. de Werra, zitierte australische Lösung im Bereich der technischen Schutzmaßnahmen sehr interessant, nach der ein Zugang und eine Durchbrechung der technischen Schutzmaßnahmen dann nicht gewährt werden sollen, wenn es alternative Zugangsmöglichkeiten zu nicht geschützten Werken gibt.

Bei dem Beitrag von Dr. Rigamonti, der mit dem Spruch endete: „we should focus on interests and interests", frage ich mich, ob das wirklich ein so grundlegend anderer Ansatz ist, als wenn wir auf verfassungsrechtliche Grundprinzipien zurückgehen. Denn auch diese sind natürlich Repräsentanz von Interessen, die sich in ihnen wieder finden. Sie haben vielleicht den Vorteil gegenüber der Entscheidung eines Richters, der seinerseits versucht, Interessen gegeneinander abzuwägen, dass bei ersteren ein gesetzlicher oder gar ein grundgesetzlicher Konsens über diese gewissen Interessen bereits erzielt wurde. Aber natürlich tun wir genau dasselbe wie ein case law Richter. Wenn wir aus der, in sich vielleicht wenig aussagekräftigen Verfassung gewisse Prinzipien entwickeln, dann bewerten wir die dahinter stehenden Interessen und wir geben, eben weil wir Interessenbewertung vornehmen, dem einen Grundsatz, der in der Verfassung zu Tage tritt, bei einer spezifischen Frage eine größere Bedeutung und bei einer anderen wiederum eine weniger große Bedeutung. Und jeder Richter, der über diese Frage zu entscheiden hat, wird dies nach seiner individuellen Interessenabwägung auch unterschiedlich vornehmen. Im Ergebnis ist das also kein grundlegend anderer Ansatz. Allenfalls gelingt es, sich eine gewisse Autorität zu Nutze zu machen, wenn man konstitutionelle Grundsätze heranzieht, aber im Ergebnis ist das im Wesentlichen eine ähnliche Herangehensweise.

Auch den letzten Beitrag von Frau Prof. Xalabarder fand ich hochinteressant. Ich teile insbesondere ihre Analyse, dass Urheberrechtsgesetzgebung natürlich auch Industriegesetzgebung ist. Sie hat die Ebene des Schutzes naturrechtlicher Werte lange verlassen. Etwa bei der Frage der Verlängerung der Urheberrechtsschutzdauer spielen natürlich sehr erhebliche Urheberrechtsindustrien eine Rolle. Bei der Diskussion um eine Verlängerung des amerikanischen Urheberrechtsschutzes von 50 auf 70 Jahre, die ja auch vor dem Supreme Court landete, der über die Frage zu entscheiden hatte, ob diese Verlängerung verfassungskonform war oder nicht, waren natürlich industriepolitische Interessen von großem Belang. Die Entscheidung darüber, ob die Mickey-Mouse-Figur nach mehr als 50 Jahren noch geschützt ist oder nicht, kommt dem Urheber selbst nur sehr bedingt zu Gute. Hier existieren vielmehr klare industriepolitische Interessen. Insoweit teile ich Ihre Auffassung, Frau Professor Xalabarder, vollumfänglich.

Vielen Dank.

Prof. Reto M. Hilty
Herzlichen Dank. Herr de Werra, möchten sie darauf erwidern?

Dr. Jacques de Werra
Ma remarque se réfère à ce qu'a dit le Dr. Rigamonti, qui a exprimé l'avis que les fondements constitutionnels ne sont pas nécessairement déterminants, mais qu'il faut plutôt se concentrer sur la question de la pondération des intérêts en présence pour tenter de résoudre la question de l'équilibre à trouver en droit d'auteur. A ce propos, dans une réflexion de droit suisse, il paraît important de rappeler que le principe est que les lois doivent s'interpréter de manière conforme à la Constitution. Pour reprendre l'exemple de la parodie, la disposition légale qui consacre la parodie dans la loi sur le droit d'auteur doit ainsi être interprétée à la lumière de la Constitution et des droits fondamentaux. Or, la Constitution consacre précisément la liberté d'expression. Dans cette perspective, une réflexion sur le plan constitutionnel me paraît nécessaire, voire indispensable.

Merci.

Prof. Reto M. Hilty
Bitte, Herr Rigamonti.

Dr. Cyrill Rigamonti
First, I would like to respond to what Dr. Dusollier just said. I do not think that what I said is at all contradictory, because I am not denying the importance of social sciences and of economics in telling us what the effect of legal rules is. I am not denying that at all, and they are important. What I do deny, however, is that it is possible to derive normatively binding rules from economic principles without them being tainted by specific value judgments made by parties interested in certain outcomes. This is a very basic objection, and it is essentially an objection against the is-to-ought move that underlies this kind of normative reasoning. This, and only this, is what I resist. When I say that we should focus on interests, I simply mean that external considerations and social sciences cannot tell us what the law ought to be. We have to focus on interests, not because interests tell us what the law should be, but because they tell us about the different normative projections among which we have to choose. There is no basis in economics or social sciences, however, that could tell us on what basis we have to choose. The same objection applies to the remark just

made by Prof. Schwarz. I agree that the judges on the German Constitutional Court balance the interests and decide on the basis of individual value judgements, but I believe it is an illusion to think that the constitution tells us what we should do. It is true that the judges in fact tell us what to do, but what they say does not come out of the constitution. This is the distinction I make. I can agree with the rest of what Prof. Schwarz just said.

Prof. Raquel Xalabarder
I'm not sure whether I understood all your points. But when I said copyright was meant to protect the industry, I meant it in a limited way: to the extent copyright focuses on exploitation. I didn't mean that it should be unlimited nor that it should cover all industry needs. On the contrary, my point was that copyright should only be limited to industry and exploitation of works.

I would like to make two comments: First, as I understand it, the first limit to copyright should be the definition of the exclusive rights. And we are not making any effort on that direction. Think about the communication to the public! We all agree on what is "communication"; But what is "public"? Even the EU Commission acknowledged that there is no harmonized definition of "public" (and that there was no need for it!). As a general rule, what happens in a domestic context is already excluded from most definitions of communication to the public in domestic copyright laws. But what about hotel rooms, bars and cafes, small retail stores … is that communication to the public? The solution varies from one country to another. And let's not forget that a WTO Panel[20] concluded that some of these acts were not communication to the public being lawfully covered by the three-step-test and the Berne Convention!

Second, the reproduction right... As I said before, private copies should not be considered reproduction in the sense of the exclusive right of reproduction. I'm worried when I see the German addition to the private copying exception saying that it will be a private copy as long it is made from a "non-obviously illegal source". This is done specifically to address a very specific and current problem (that is, peer-to-peer technologies), but it is going to have an effect on all other private copies! If I lend a book from a friend, can I make a private copy of it? I should first ask: did I have legal access to it? Did my friend obtain it from an obviously illegal source? Does it make a difference if I know he has a tendency to steal books, rather than paying for them? General provisions should not respond to specific (ephemeral) concerns.

In short, there is a lot of work to be done on the definition of rights and we are not paying attention. We just let the exclusive rights to expand and then wait for the exceptions to do the "dirty work". I don't think this is wise!

Prof. Reto M. Hilty
Vielen Dank. Sie sind alle gespannt, wann sie an der Reihe sind. Ich habe bereits einen Redner auf der Liste, das ist Herr Geiger; er hat natürlich auch das Privileg als Mitorganisator. Nun melden sich Frau Buydens, Frau Kur, Herr Gilliéron, Herr Kreutzer, Herr Seip, Herr Efroni, Herr Rosén, Herr Koelman, Herr Bechtold, Herr Senftleben sowie Herr Schmid.

Wir fangen an mit Herrn Geiger.

Dr. Christophe Geiger
I would like to make a comment on what Séverine Dusollier said, I told you, I would do so. I mostly agree with all what you said. I only disagree on your thesis according

to which exceptions are no rights, especially because last year, as some might remember, I said exactly the contrary during my speech (see Geiger, Die Schranken des Urheberrechts im Lichte der Grundrechte- Zur Rechtsnatur der Beschränkungen des Urheberrechts, in: Hilty/Peukert, Interessenausgleich im Urheberrecht, 2004, 143). So I have to respond on that thesis.

Actually I don't agree with you on both terms of your thesis. First, about the term "exceptions". In my opinion exceptions imply that there is a rule, which is exclusivity, and an exception, that would be freedom. I think that exactly the contrary is true. The principle is freedom and exclusivity is the exception. So I would prefer the term "limitation", where the exclusive right reaches only until its limits, which are defined by the limitations. Beyond the privileges attributed by the exclusive rights, the copyright owner should not have any control.

To the second term of the proposition: exceptions are no rights. Of course, as you said very well, pursuant to a classical conception there is no possibility to enforce exceptions, so that the classical definition of a subjective right is not met. But in the analogue environment there was no need to make exceptions enforceable. With the rise of technical measures, the situation is different. Some countries have already made exceptions enforceable. Since the implementation of the directive in Germany in 2003, beneficiaries of some exceptions are granted a right to request the key to the technical measure in order to make a use privileged by law. So here we have a subjective right, since the exception is enforceable. As we are not bound by any positive law during this conference, maybe we should accept that limitations must be rights and try to design a law in accordance. We have to grant users a strong, legal instrument, and only a subjective right can do that. It seems already very strange to me that the user has to go to court to claim a freedom already accorded by law to be respected. So this is the minimum we can do: to give a right to the user. Just for some exceptions, of course as not every exception has the same legitimacy. We can discuss that. But for the main exceptions, those that are based on fundamental rights such as freedom of expression, we have to give a right to the user. That is really the minimum.

There is one point I would like to say to Dr. Rigamonti´s presentation. I don't agree at all with your statement about the constitution and fundamental rights. I do believe that they give a lot of answers in view of having a balanced copyright, but that is my presentation of tomorrow, so I don't want to say too much. You told us they don't give any guidance at all, but you didn't really tell us what would be the guidance. Interests? Where do they come from, if not out of economic analysis or Fundamental rights? But I will talk about it tomorrow.

Thank you.

Prof. Mireille Buydens
Je n'ai pas vraiment un commentaire à faire mais plutôt une question à poser à Séverine Dusollier. Vous avez expliqué que les exceptions étaient fondées sur des libertés fondamentales ou des intérêts privés et ma question est alors: quel rôle concéder à la notion d'intérêt général ? Puisqu'il y a 2 possibilités, soit on en fait un référant abstrait, c.à.d une sorte de source d'inspiration pour le législateur lorsqu'il dessine les exceptions, ou pour le juge lorsqu'il effectue la balance des intérêts. Soit on lui donne un véritable rôle substantiel, on en fait une notion substantielle au même titre que l'intérêt privé. En d'autres termes, il y aurait l'exception fondée sur les libertés fon-

damentales, sur les intérêts privés et éventuellement sur l'intérêt général. Donc ma question est: comment voyez-vous les choses?

Dr. Séverine Dusollier
Je vais répondre en même temps aux critiques de Christophe (Geiger). Je vais commencer par la question de Mireille. C'est une question dont on a discuté pendant la pause, et c'est une question passionnante : quel est le rôle de l'intérêt général ? Je pense que ça doit être un peu entre les deux solutions, à la fois un référant abstrait, à la fois une notion substantielle mais quelle notion substantielle, comment on la remplit ? Je n'ai vraiment pas de réponse. C'est vrai que c'est un point que je n'ai pas du tout analysé parce que pour moi la question était de savoir quelles sont les différentes prérogatives qui entrent en conflit et comment est-ce qu'on va régler ces conflits en qualifiant ses différentes prérogatives , alors que l'intérêt général n'est porté par personne si ce n'est le législateur. Ce n'est pas véritablement une prérogative, il ne fonde pas une prérogative particulière.

Prof. Mireille Buydens
Mais l'intérêt général est évidemment plus que la somme des intérêts particuliers, donc il faut lui reconnaître un rôle en soi. La question est de savoir lequel.

Dr. Séverine Dusollier
Oui, effectivement c'est plus que la somme ou l'équation entre les différents intérêts particuliers, je suis bien d'accord.

Pour répondre à Christophe : Je suis tout à fait d'accord avec toi que la liberté de copie c'est la règle et les droits exclusifs, le droit d'auteur c'est l'exception. Donc l'exception n'est plus une limitation, on revient à la règle de liberté. Mais en même temps ça nous dit rien sur la nature juridique de l'exception, ce n'est pas en revenant à la liberté générale de copie qu'on tranche en faveur d'un droit ou pas. Alors tu dis que tu n'es pas d'accord de prendre comme critère de la qualification de l'exception en droit, le critère de l'existence d'une possibilité d'enforcement, d'une action en justice qui pourrait faire respecter l'exception. C'est vrai que c'est un des critères du droit subjectif qui est un critère essentiel mais je n'ai pas dit que ce critère ne se rencontrait pas pour l'exception. Mais ce n'est pas un critère suffisant. Je trouve que lorsqu'on regarde les commentaires des décisions sur les mesures techniques et l'exception de copie privée, c'est un peu un argument circulaire. Les utilisateurs viennent devant un juge pour faire respecter leur exception demande donc que leur soir reconnue la possibilité de la mettre en œuvre judiciairement mais on ne va pas leur accorder parce que la loi ne prévoit pas cette possibilité d'enforcement. Ce n'est pas un droit subjectif donc on ne leur donne pas l'enforcement. Je pense que sur la question de l'enforcement, la question est encore ouverte. C'est vrai que lorsqu'il y a des transpositions de la directive, du mécanisme de son article 6.4., qui reconnaissent à l'utilisateur une véritable action en justice pour faire reconnaître leur exception, on peut alors se demander si on n'est pas arrivé à un droit subjectif. C'est l'option que va peut-être prendre le législateur belge pour transposer la directive. Mais il y a quand même des conditions précises. Par exemple, il faut que l'utilisateur ait un accès légitime à l'œuvre. Dans ce cas seulement, il peut aller en justice pour récupérer la pleine jouissance de l'œuvre à laquelle il a un accès légitime. Peut-être que dans ce cas précis, on arrive en effet à la reconnaissance d'un droit subjectif, mais ce droit peut-il qualifier l'exception en elle-même ou simplement le fait que l'utilisateur, du fait de son accès à l'œuvre, a peut-être comme accessoire à cet accès une espèce de jouissance normale de l'œuvre qui inclut ces exceptions. J'avoue que je suis hésitante là-dessus. Si on peut dire qu'on est plus près d'un droit subjectif, est-ce que ça con-

cerne vraiment l'ensemble de l'exception qui se voit reconnaître comme droit subjectif ou juste l'exercice de certaines libertés dont jouit l'utilisateur qui a accès à l'œuvre. Mais je trouve aussi que c'est une évolution du droit communautaire très dangereuse – je suis d'accord avec Raquel (Xalabarder) – de mettre au centre des exceptions le personnage de l'utilisateur légitime ou de l'utilisateur qui a un accès à une copie de l'exception. Car dans ce cas là on confond le droit d'auteur sur l'œuvre dont découlent les exceptions et l'éventuel droit que l'on peut avoir sur une copie de l'œuvre ou sur le support de l'œuvre. en droit d'auteur, un des principes essentiels est la séparation entre le droit intellectuel et le droit qu'on peut avoir sur le support ou sur la copie digitale de l'œuvre. Ces deux aspects doivent être séparés et en disant que les exceptions ne pourront plus être exercées en matière de logiciel ou de base de données que par l'utilisateur légitime dont on ne donne aucune définition d'ailleurs ou ne peuvent plus être exercées quand il y a une mesure technique que lorsqu'on a un accès légitime á l'œuvre, on est en train d'introduire dans le droit d'auteur une logique de distribution des supports qui n'a rien à voir avec le droit d'auteur. Une logique qui peut être réglé par d'autres systèmes juridiques mais qui ne doit pas être réglé selon moi par le droit d'auteur parce que ça ne concerne pas l'œuvre.

Prof. Reto M. Hilty
Vielen Dank. Jetzt wollen wir mal das Plenum hören. Bitte Frau Annette Kur.

Prof. Annette Kur
First of all I have to say that I do regret I cannot speak French, at least not in a way that could be understood by everyone here, and I also regret that I have difficulties if French is spoken fast. Some new answers that may have been given in the previous exchange are lost on me. On the other hand I know that some in the panel understand English more easily than German. So I use English now.

First, I'm wondering whether the question of whether limitations can be called a subjective right or not is going a bit in the direction of – to use the German word – "Begriffsjurisprudenz". What matters is not the term, but the concept. The important thing is that we get away from the notion of there being the right as a rule, and then the limitations as an exemption, and the limitations having to be interpreted in a very narrow manner. If we could agree that there are two equally legitimate interests on both sides that have to be balanced against each other, without any of these interests having preference as such, we would already have come a long way, and discussions about terminology – whether something can be called a subjective right or not – would lose in importance.

But primarily I wanted to say something about Dr. Rigamonti's theses. They were, of course, quite provocative and I must say it was very refreshing to hear them. I certainly agree with those who have reacted by saying that it is not enough to point to interests, interests, and interests, but that one always must indicate where these interests come from – and there, of course, constitutional rights and economics and all these things do play a role. However, as you (Dr. Rigamonti) already said in your response, these aspects do not answer the question as to what the law should be; they are only something to be taken into account when the various interests are defined. And let me say this again – we discussed this already last year, and we will probably come back to it tomorrow – I believe that we make a mistake when we rely too much on the constitutional rights aspects, using these big words about freedom of expression and freedom of information and so on. Of course, these aspects do exist, but on the other hand, conflicts are very often about down-to-earth things like people wanting to make copies without payment, or wanting to make parodies that can be sold

on the market. Indeed, quite often, parodies are made out of purely commercial interests. If we insist that the discussion should be led on the elevated level of constitutional rights, we risk that the credibility of the arguments in favour of e.g. parodies is destroyed by someone pointing out that in the end, this is just about a guy who wants to make easy money. This might kill the discussion, because the interests underlying the limitation suddenly seem to be discredited, whereas I would say that even a more or less commercial interest in selling parodies etc. is legitimate. Why should it be automatically bad if a guy wants to make money?

I hope you see what I mean. If we try too hard to lift the discussion up to the level of constitutional rights, then it may easily happen that the argument collapses as soon as it is shown that commercial interests are actually involved. This is also a question of "Methodenehrlichkeit". We should be honest enough to realize that in most cases, there are indeed commercial interests on both sides, and we should take them into account exactly as they are, and should not overuse those big heavy concepts. Again, I do not mean to say that constitutional aspects do not play a role, but it would be good if we could do without too much hype in the discussion, on both sides.

Raquel (Xalabarder), you brought out very clearly the need for a balancing of interests, and then you addressed the question who should do the balancing – the legislator or the courts. This is something we come back to this afternoon, but I agree that in certain instances, if there is a critical mass of foreseeable conflicts of interests, then it is indeed a task for the legislator and should not be left to the courts. I like very much what Prof. Schwarz said about the way to make this sort of balancing manageable, stating that we need on the one hand an exemplary list of limitations, but on the other hand we need to open our limitation catalogues by inserting some sort of fair use clause. This is a concept I have tried to promote for many years, and in my opinion, this is indeed the only feasible way forward that should be adopted for the future.

Dr. Philippe Gilliéron
Je rejoins les remarques du Dr Geiger. 1ère remarque, sur laquelle je ne vais pas m'étendre : à partir du moment où l'on considère que le droit d'auteur n'est pas un droit naturel, ce que personne ne conteste, force est d'en déduire que le domaine public est alors la règle, et les droits exclusifs conférés par les législateurs nationaux sont par conséquent des exceptions.

La 2ème remarque concerne la mise en œuvre. Là j'irais même plus loin que le Dr Geiger. Sur un plan pratique, En droit suisse (je ne sais pas ce qu'il en est en droit français), je ne vois pas ce qui s'opposerait à l'ouverture d'une action en constatation, ce qu'on appelle une « Feststellungsklage », dont la recevabilité est subordonnée à la seule condition qu'il faut avoir un intérêt digne de protection. Or, à partir du moment où la loi confère une exception, qu'il s'agisse d'un droit subjectif ou d'une exception au sens propre, rien à mon avis n'interdit à l'utilisateur d'ouvrir action en constatation du fait qu'il ne viole pas le droit d'auteur du titulaire, en invoquant comme argument le fait qu'il est au bénéfice d'une exception. Autrement dit, s'il est à mon avis exact qu'il n'y a pas de droit subjectif privé à l'exception, cette discussion dogmatique ne présente guère d'intérêt sur le plan pratique, où l'utilisateur est quoi qu'il en soit en droit de faire reconnaître l'existence de son exception en justice sous la forme d'une action en constatation de droit tendant à faire constater l'impossibilité pour le titulaire de se prévaloir de son droit .

Herr Till Kreutzer
Ich möchte einen Punkt aufgreifen, den Frau Prof. Xalabarder angesprochen hat und möchte diesen in eine vielleicht etwas ketzerische, aber grundlegende Frage kleiden: sind die Schranken in der Systematik, wie wir sie heute haben, überhaupt geeignet den Interessenausgleich, den wir aus dem Ruder gelaufen sehen, wieder herzustellen? Ich meine, aufgrund der momentanen Ausrichtung des Gesetzes und des Verständnisses der Institutionen, die über die Ausgestaltung des Urheberrechts entscheiden, ist das nicht der Fall. Die Schranken werden heutzutage nicht als Beschränkung, nicht als limitations, des Rechts gehandhabt und allgemein angesehen, sondern als Ausnahmen. Das hat Herr Geiger auch schon angesprochen. Hierin liegt ein grundlegendes Problem, denn eine Ausnahme ist immer nur eine Ausnahme und noch lange kein durchsetzbares Recht. Wir haben gesehen, dass die EU sich dafür einsetzt, dass sehr weit gehende Durchsetzungsmöglichkeiten für das Urheberrecht und auch für andere geistige Schutzrechte geregelt werden. Die enforcement directive soll hierfür Gewähr leisten. Und wir diskutieren hier immer noch, ob die Schranken überhaupt Rechte sein können, die möglicherweise durchsetzbar sind. Während die Urheberrechte stetig gestärkt werden, werden die Nutzerbefugnisse vernachlässigt. Es existiert meines Erachtens ein elementares Ungleichgewicht zwischen den Schranken, den limitations, die sie eigentlich sein sollten, einerseits, und den Rechten der Urheber auf der anderen Seite. Die Frage ist: wie kann das geändert werden? Ich glaube, dass hierfür ein grundlegendes Umdenken von der rein individualrechtlichen Ausprägung des Urheberrechts erforderlich wäre. Die Ausrichtung des Urheberrechtsschutzes müsste insoweit geändert werden, als der Schutzauftrag nicht mehr auf den Schutz der Urheber oder Rechtsinhaber beschränkt ist, sondern das Recht um eine zweite Schutzdimension erweitert wird: der Ausgleichs- oder Balancefunktion als Schutzinstrument für den Nutzer vor einem zu weit gehenden Urheberrecht. Eine solche rechtstheoretische oder gar rechtsphilosophische Neuordnung des urheberrechtlichen Schutzauftrages halte ich für elementar, da bei einer rein individualrechtlichen Bestimmung des Urheberrechtsschutzes die Handhabung der Gerichte, der EU-Kommission, der EU und der deutschen Gesetzgeber, die Schranken als Ausnahmen vom Recht zu behandeln, vorbestimmt ist. Gleichrangige und durchsetzbare Rechte der Nutzer sind vor diesem Hintergrund nicht denkbar.

Prof. Bernt Hugenholtz
Several speakers tried to advocate some kind of compatibility or congruency between copyright limitations and technology protection measures. Dr. Rigamonti said so and you also implied that. But what does that congruency really mean?

I think of three things: First of all a right to circumvent for legitimate purposes to allow the users to exercise their exceptions. This has been advocated in the past and it might exist in the US-copyright law. But this is not entirely clear.

It might also mean what the European Union Copyright Directive provides for in obligation to facilitate users to make uses privileged by the law. Right owners would be obliged to make unprotected copies available to libraries for instance.

The third possibility is the most radical one. It would only really do justice to the idea that the copyright bargain should be reflected in the technological world would be a prohibition to actually apply technological measures. That is a beautiful pure approach, but of course totally unrealistic.

An added complexity in this context, which is often overlooked in the debate, is that technological protection measures are not necessarily or not even primarily applied

by copyright holders. This supposed link inferences the Copyright Directive, I think, is false. Just take a look at ring tones. This very successful service is actually distributed under a strict DRM policy, but not by copyright owners but by distributors that are licensed to intermediaries, that a licensed or sublicensed to do so. And in fact there is a lot of secured delivery of not copyright content matter that has been going on for many years. Look at the databases of legal texts or football results. What I'm saying is that this idea of a congruence system is actually a fallacy. Technological protection, digital rights management, conditional access are really phenomenal of a totally different world. At the most there is a link to unfair competition law. But it doesn't have that much to do with copyright in the first place.

My proposal (this is the day for radical proposals, although few years ago this was very normal to say) is to throw these technology measures out of our copyright system. They do not belong there, certainly not a legal protection of technological measures. They have no place in the copyright framework, except maybe a very distant one as a kind of contributory liability. And outside of copyright, I would just advocate to leave them alone. They provide sufficient protection by themselves, especially the more unbreakable varieties. If you want to protect legal protection to technological measures, do it applying again for competition law notions or possibly elements of communications law in general.

I would be interested in the reaction from Dr. Rigamonti, but the Panel already has been shut, and we don't have time, so I would leave it perhaps to the lunch.

Thank you.

Herr Fabian Seip
I have a comment to what Dr. Dusollier said. Dr. Dusollier, I you said that the exceptions are not written in such a way that we can read them as easily as the rights. However, exceptions do reflect private interests, fundamental rights and most importantly, the conditions we need for a working creative process. So how can they be enforced? You proposed a legal policy which would take into account these considerations. This might turn out it to be quite difficult, because in our legislation, fundamental rights are not as easily enforceable between private persons as rights under the civil code. So we need to open up a door through which these considerations can influence copyright and contract law and give users entitled to a certain use the means to claim their rights effectively. I think that is where Mister De Werra's proposal fits in very nicely: If certain exceptions or limitations were declared mandatory in contract law, then they could automatically become contractual rights. Such rights would certainly benefit only those users, who enter into contracts governing their use of a work. But in the digital context, this will be the majority of users.

Herr Zohar Efroni
I would like to make two short comments. The first is about the discussion whether copyright exceptions should be considered positive rights of users or not. Without resorting to constitutional and fundamental principles I would like to use the copyright exception to make derivative work for purpose of parody without the authority of the right holder. I would like to point out that such a parody exception to make a derivative work based on copyrighted work may create a private property right of the second author in the derivative parody work. Though it could be argued that the second author is granted property rights only in the original elements he has added to the first work, in practice the second author has copyright in the parody work that

is derived from his "right" to make parody. This could be another way to think about copyright exceptions as a source of "rights."

The second comment relates to the discussion about copyrightability and exclusive copyrights in computer programs – a development that was presented here in a negative light by several speakers. I would like to point out that computer programs (software) were acknowledged as having two aspects, one is utilitarian and the other is creative. As far as I understand the copyright law protection is given only to the creative element of the program, but copyright does not protect the set of commands that is giving a machine orders in order to achieve a certain task – i.e., its functionality. The idea/expression dichotomy may safeguard abuse and over-expansion of copyright if it were only employed reasonably. Therefore, I think that copyright protection to software is not bad per se, although in real-life circumstances drawing the line between non-protected (functional) and protected (creative) elements of a software may be very challenging; especially in light of copyrights commonly granted to compilations, where creative selection and arrangement of non-copyrightable elements that ultimately performs a task (=functional) commonly enjoys copyright protection.

I would like to draw on this in mentioning copyright protection given to digital rights management systems (DRMS) against circumvention. DRMS are themselves computer programs that are preventing unauthorized access and use of electronic data, for our purpose, digitised works. Hence, they are highly functional. The behaviour that anticircumvention laws are now prohibiting is the tampering with the function of those programs. This is a dangerous shift since copyright law, as we have seen, should not protect functional elements. There are two implications to what I've just said. First, by virtue of the idea/expression dichotomy DRMS, for the most part, should not be copyrightable, and in themselves, not subject to infringement liability or anticircumvention prohibitions. Second, anticircumvention laws must maintain a connection to infringement, that is, to traditional copyright protection of creative work they are fencing in order to prevent unauthorized access and use.

Prof. Jan Rosén
The disputants have already worked out a wonderful structure. We have the topics, and we have so many nuances.

But it seems we should not set aside the so called balancing of interests between two combatants, labelled authors' interests versus public interests. To know how that match would end we have to know something about the actors. That area seems a little bit vague to me. Our knowledge about how we conceive copyright values relative to those which are hiding behind a distinction of what we call public interests. I have a somewhat telling example from Scandinavia.

The Nordic Copyright Acts are structured in the same way and often word by word virtually identical, they are constituted in the same way. In this sense we are all following the same copyright rules in the Nordic context . But as a very important example, the Norwegians do not call statutory exceptions to copyright exclusive uses "exceptions", they call them "limitations". Thus, public interests are as much recognized as exclusive rights within the frames of private law. An exception to copyright, this is the attitude underlying this vocabulary, has a considerable impact on practice and the application of statutory rules. Hereby, considerable differences may occur between Swedish and Norwegian results of the courts applying exclusive rights and exception/limitation of virtually the very same wording. This is probably also a reflec-

tion of the fact that in Sweden, copyright is covered and recognized by constitutional law, what other IP-rights are not, something that is of importance, inter alia, for trademark law: these days, trademark owners would like to use their private law rights against freedom of speech as an instrument to protect their rights against, for example, defamation or trademark parody, but they get no support by the constitution, as would be the case if copyright was concerned. Thus, the reversed situation applies to copyright from a Swedish point of view. But not necessarily from a Norwegian aspect.

This means that no court could add a limitation or any kind of restriction to those rights basically granted. We could then consider copyright to be, in German, "ein absolutes Recht". Accordingly, a very strict instrument in the hands of the courts. Indeed, they have used precisely that attitude to copyright, thus as an instrument in concrete matters. This may seem very obvious to you, but we should still observe that there may exist vast differences also between neighbouring legal systems. The example I used concerning differences between Norway and Sweden is in this sense a very telling.

How do we look upon copyright? Is it about fundamental values to the whole of the society, authors included? Or is it rather founded on utilitarian, coarse and mundane practical aspects? I think that those are the two opposing positions in today's world of copyright. And, as we all have just heard, when the latter one, the utilitarian aspect was put in the front, the windows of this hall flew open - obviously moved when the ghost of Eugen Ulmer left the room in haste.

Dr. Kamiel Koelman
I have a few points to add.

First, an issue of positive law. We had some cases in Belgium and in France, making it clear that there is no right to make a private copy. In Holland, this is now also clear, because during the debates on implementing the Copyright Directive the minister of justice said it in so many words: there is no consumer right to make a private copy, which is another argument for saying that copyright exceptions do not confer rights.

Yet, another reason to view them as not being rights is that they cannot be traded. It would be interesting, of course, if you could sell your right to make a private copy to anyone else. Apparently, the right is bound to the work, it is connected to the work.

A further, more general point, I would like to make, is that it has been argued that the protection of technological measures should coincide in some way with the scope of copyright. But I think that this is technological impossible, and this is because of the inherent crudeness of technology. Technology cannot recognise whether an exception is applicable. Many of the exceptions depend upon the context of the use. Take as an example the exception allowing quotations, to quote the same part of the same work may be an infringement in one situation, and may be allowed in another situation. Probably, until we have automated judges, which won't happen in the near future, technological measures simply cannot recognise whether an exception is applicable or not, what the context of the usage is. Of course, another option would be to redesign the copyright exceptions, so that they can be accommodating by technology. But that would imply a complete rethinking of copyright.

Dr. Stefan Bechtold
I have two issues, one is related to what Kamiel (Koelman) was talking about right now.

There were quite a lot of comments on the relationship between technological protection measures and copyright exceptions. I agree with what Kamiel (Koelman) said. One of the fundamental problems when one talks about this issue is that lawyers are accustomed to assume a certain technological and also economic framework, in which these systems act and are organised. If you look at computer science research in this area right now, there is actually quite a lot going on, where computer scientists try to accommodate copyright limitations to a pretty fine-grained level in DRM systems. This depends on the design of rights expression languages and rights messaging protocols. It gets very technical at some points, so I won't go into the details. But the assumption that it is basically impossible to implement copyright limitations on a technical level is only true to some extent, but to some extent it is just false, because there is a lack of understanding what technology can do or cannot do in this area. There is a clear lack of communication between lawyers and technologists in this area. To some extent, this tension between DRM and copyright limitation can indeed be solved by technology. This is just one example where we can see that some of these problems, when we talk about internal limitations to copyright law, can indeed be solved by forces outside copyright law and not only outside copyright law, but even outside the law.

A further example, where you can think about this: it is not only technology which can solve these tensions, it is also the market. According to 95(d) Urheberrechtsgesetz, the user of a technological protection measure is required to provide the consumer with some information about what kind of technological protection measures he uses. This is basically a tool of the legislator to cure a market failure, to cure information asymmetries and enable the consumer to judge by himself whether he wants buy this protected content. There are actually a lot of different tools to cope with the tension between technological protection measures and copyright limitations outside of the traditional copyright law.

The second point, which has already been mentioned by Raquel (Xalabarder) and is a very important issue, is the idea of a remuneration right, a liability rule law, a content flat rate or however you may call it. I'm not necessarily arguing that this is the grand solution in the whole field. It has some advantages. One advantage may be that this kind of overprotection, which we experienced in this field, gets probably reduced by such a remuneration right. It may also enable some kind of creativity commons. A disadvantage from an economic perspective is, of course, that the content owner is not able to set the price for his content on his own. In my view, right now the concept of a remuneration right is not fully developed on a theoretical level, but I think it is really interesting to look into it as a possible solution for specific areas – not for the whole copyright area, perhaps also not for the whole Internet-related area, but for specific solutions. Thank you.

Dr. Martin Senftleben
I would like to bring into focus the distinction between productive and consumptive use. From my point of view, limitations serving the productive use of a work should be qualified as rights of authors just like exploitation rights. They rest on the defence of fundamental rights and freedoms, particularly freedom of expression, as emphasised by Christophe Geiger. The right to quote, the right to parody and the right to study existing works are instruments in the hands of creators which substantially

contribute to the creation of new works. They establish, as Raquel Xalabarder already said, a sphere beyond the regular consumptive use of a work because they are related to the creation of new works rather than the mere exploitation of existing material. On its merits, the right to make productive use of existing material for the purpose of creating a new work is a right which authors, who are in the process of creation, can assert against the holders of rights in already existing works. Particularly as regards this right to productive use, we should seek to establish a system of user rights management to respond to the threat flowing from digital rights management.

Dr. Gregor Schmid
My comment is addressed to Séverine Dusollier. I agree that exceptions are not merely corrections of market failures. We really have to look at each exception separately. But when you say that exceptions are not "rights" but "interests", I am wondering how this should be implemented: An exception could be an interest to be taken into account in a balancing exercise performed by a judge, or there could be a right of the judge to "invent" new exceptions, or the interest could merely be some sort of guidance, as an interest to be taken into account by the lawmaker .

Prof. Reto M. Hilty
My list is finished yet, so we… dann muss ich die Liste wieder öffnen.

Frau Helberger, Herr Leistner, Herr Jaeger.

Frau Natali Helberger
I would like to add another distinction to Martin (Senftleben). I think we should basically distinguish more precisely between two questions.

The first one is: how do we make controllers of the DRMs to obey copyright law and its limitations? With other words: how far should we support electronic self-regulation, or not? The whole question of exceptions formulated as rights or as limitations is basically a question of how to force the controllers of DRMs to obey what we fixed in the copyright law.

The second question is: the protection of the interest, the legitimate interest of the users of copyrighted works as benefitors of exceptions, or just call them what they really are, consumers. I think that the discussion of DRM in the context of limitation is a little bit misleading as Prof. Hugenholtz already indicated. Where is actually the problem? The exceptions in the copyright law do not necessarily reflect the real problems consumers have with DRMs. If you look: Fetscherin has conducted a study on online services and download services. He found that actually most private online or download services do allow private copying. The problems consumers have with exceptions, with DRMs is something else, which is not covered by exceptions anyway. That is first the access to information, a problem not covered by the copyright law. This is a problem that we do have in other sectors of law as well, for example media law. And secondly, consumers want to be mobile and to be able to play their CDs on different devices. This was actually the reason for the cases in Belgium and in France. They want to be able to rip music so that they can play it on their DVD-player. They want to be anonymous and they want to have access at affordable prices. If we simply focus on the discussion of DRMs and the effect on limitations then we tend to oversee this particular important aspect: What is the problem of users of copyrighted works, what prevents users to really benefit from the whole functionality and the exceptions copyright law gives them?

Thank you.

Dr. Matthias Leistner
I wanted to comment on the ongoing convergence between contracts and access rights against technological protection measures. The need for certain minimum access rights, which can balance user interests against one-sided technological protection measures, has been mentioned by Prof. Hugenholtz and Mr Seip.

However, as for positive law with regard to that issue, it has to be remarked that in a very crucial and certainly the economically most important constellation this kind of access right or justification solution would´nt be possible under the existing European InfoSoc-Directive. As Art. 6, 4 subsection 4 delivers: whenever a work is exploited on the basis of a contract – as will be usually the case, in particular regarding any kind of Internet exploitation – the possibility to grant mandatory access notwithstanding established technological protection measures does not exist any longer; on the contrary, in these situations the chosen contractual solution will subsist.

This leaves two possibilities: either, we change European law, what we probably should do in that particular respect but which does not seem a realistic perspective at the moment. Or, probably more realistic for the moment, we try to establish mandatory statutory limits to unconscionable contractual clauses in this field. This would be possible because the Directive does not impose any limits to statutory control of contracts; it just says whenever there is a contractual solution compliant with existing law this solution will subsist over any access rights provided for in national law. Hence, establishing certain statutory limits to exploitation contracts would be theoretically permitted under the Directive. Perhaps the existing European concept of certain minimum rights for the so called "rightful user" could be further developed in this field.

Dr. Till Jaeger
Ich möchte nochmals den Gedanken von Prof. Hugenholtz zu technischen Schutzmaßnahmen aufgreifen und ihn noch etwas ausweiten, weil ich das Problem als noch etwas weitergehend sehe. Denn der Schutz betrifft nicht nur die Umgehung von technischen Maßnahmen, sondern der Schutz betrifft auch die Verbreitung von Mitteln, die zur Umgehung dienen. Das heißt im Endeffekt heute zum Beispiel, dass es nicht möglich ist, irgendwelche Umgehungsmittel zu verbreiten, wenn nur ein einziges urheberrechtlich geschütztes Werk damit geschützt wird.

Außerdem habe ich nicht nur urheberrechtlich geschützte Werke in diesem Bereich technisch geschützter Werke, sondern auch gemeinfreie Werke oder auch nur Informationen. Wenn ich mit technischen Maßnahmen den Zugriff verhindern kann, ist eine Umgehung faktisch nicht mehr möglich.

Das führt mich zu dem weiteren Gedanken, dass wir unter Umständen eine Art Teilnahmerecht auf kulturellen Zugang benötigen. Wenn man sich folgendes Beispiel vorstellt: Ich habe eine Märchen-CD und dort ist auch nur ein neues Märchen enthalten, das urheberrechtlich geschützt ist, dann kann ich auf alle anderen nicht mehr zugreifen. Dasselbe gilt auch für andere, z.B. politische und wissenschaftliche Informationen. Wenn es hier kein Recht gibt, auf Werke oder solche Informationen zugreifen zu können und hier die technischen Maßnahmen aushebeln zu können, hat das den Effekt, dass viele Werke und Informationen für die Gemeinschaft schlicht ausgeschlossen sind.

Dr. Alexander Peukert
As far as I understood, participants and penalists both rely on the legislator or at least the courts to cure the problems we face. This approach, I think, is a little bit too limited, especially as regards the goal to achieve more flexibility in copyright law.

What I notice is a phenomenon that I would like to call a "bottom up" movement of authors. Consider the academic sphere, where you have many authors who say that they need more access to information and want their work being distributed as widely as possible. To get to that point, they do not ask the legislator to step in, but instead they publish with open access journals. Other similar examples are Creative Commons and the Open Source movement. These examples show that there is flexibility that is achieved by authors and not by legislative action. In my opinion, this is a general phenomenon that we should take a little bit more into account in talking about copyright. This is not to say that the market will cure everything because there are situations where these "bottom up" movements do not take place. In these cases, we should think about incentives that promote developments like Open Access, Creative Commons or Open Source. With that I mean that the government could - for example - fund Open Access platforms that will later become competitors to publishing houses.

In this context I want to mention a proposal I made for a so called Bipolar Copyright System for the digital network environment. According to this system, the government would establish a levy or tax on devices to compensate non-commercial peer to peer file sharing. However, copyright owners would not be obliged to accept a levy payment without being able to stop non-commercial file sharing. Instead, the right holder would still be free to apply digital rights management systems and to opt for a proprietary distribution on the net. The government would only establish a levy system where right holders could opt in by accepting uncontrolled non-commercial file sharing and indirect compensation. The whole system rests upon the idea to let the author decide which system of distribution (proprietary or open) he or she prefers. It thus does not start with a legislative action that aims at a perfect copyright law that works in each and every case.

Dr. Cyrill Rigamonti
I would like to respond very quickly to Prof. Kur's brilliant restatement of the core of my presentation. I agree with her, and I do not deny that constitutional law and practice is important. The only point I made is that, as a general matter, we cannot get any normative guidance from the constitution regarding the concrete scope of copyright protection.

As to Dr. Geiger's objection, let me clarify my concluding remark, as I realise it may have been somewhat imprecisely phrased. I did not mean to say that interests tell us what to do. This is exactly what I tried to avoid. What I meant as I said "interests" is that we have to consider them, and then comes the decision, but that decision is not determined by some interest one way or another. Therefore, when we talk about the "Interessenausgleich" or the "balancing of the interests", I think that these expressions are appropriate only if we describe a mode of legal reasoning in the sense that judges or lawyers or politicians "balance" interests prior to making a decision. That is fine. But once the decision is made, there is no balance anymore, because in making a decision, we have to select one or more interests while rejecting others. At the end, there is no balance left at all regarding the question that was decided. This is just for clarification. Again, I think there is no guidance in normative terms from the constitu-

tion or from other social sciences or from economics. But that does not mean that they are not important in other ways, as I conceded in my earlier response.

As to Prof. Hugenholtz: if you ask for my personal view on your comment, I can say that I agree that the legal protection of technological measures should be a species of contributory liability. That is all that it should be, and if we could, we should roll back DRM. I do not have anything more to add to your comment other than to say, as Dr. Jaeger just did, that I think the most important and most problematic rule in the framework of digital rights management is the anti-device prohibition.

Finally, as to Dr. Koelman's comment, I would like to clarify that I believe that the legal protection of technical measures should be co-extensive with the scope of copyright protection. I did not mean to say, however, and I do not think that I did, that the technological protection itself is or can be co-extensive with the scope of copyright protection as a factual matter. I am just saying that the legal protection of technical measures should end where the protection of copyright itself ends.

Thank you.

Dr. Séverine Dusollier
I would like to answer several comments, but I will try to keep it short. First, I need to clarify what I said by the legal strategy to develop. Of course, the primary intervention should be with the lawmaker; the legislator should make it clear whether all or some of the interests protected under copyright exceptions should be protected as "rights". They could hold hearings and consult with all the parties concerned. I agree with what Prof. Hugenholtz said: we have three options. But maybe there is fourth option. Maybe technological measures can be useful also to protect exceptions. Maybe this is what article 6.4 tried to say: let's wait to see what the copyright owners propose to ensure exceptions. For instance, the exceptions for disabled persons may be enforced by DRMs and TPMs. e-books have an option (usually disabled) to display the work in big letters. The legislator could oblige copyright owners to enable that option. Why don't we do that? The InfoSoc Directive has a recital which states that DRMs should comply with data protection laws. If we dare to say that in one recital, why shouldn't we dare to say the same about copyright protections? It is the same. We could say, okay, we have set the DRM system, but we want you to pay attention to some principles when designing it.

The other thing I would like to say is that a lot of people talk about the fact that we should make exceptions mandatory and that this could be the solution to the battle between DRMs and exceptions. This is the solution I favour but, in my opinion, it may not suffice, because making a rule mandatory means that once the contract is effective, a specific provision in it which is contradictory to a mandatory provision cannot be enforced. However, DRMs are self-enforced (no need to go to court and no way out of it). Therefore, making an exception mandatory does not help the user against a DRM, which is enforceable by itself.

Finally, another argument is that I fear the "contractualisation" of copyright. By saying that the exceptions are a contractual right of the user, we imply that only those users that have entered a contract can benefit from exception. The public should get access to a work without entering a contract with the right holder. This public access is an important feature of the copyright system. And if we move towards a world where exceptions can only be enjoyed by licensees (lawful users), as the EU regulatory framework puts forward, then we will loose an important part of the copyright

system. You enjoy exceptions, because you are part of a public and the work has been divulged to the public, not because you have entered a contract with a copyright holder. Otherwise, in the future, you will never be able to make a parody of a song you heard in the street, since you will not be able to prove that you had lawful access to it. Nowadays, you can make a parody out of a word regardless of how you accessed to it.

I think this is the danger we should pay attention to.

Prof. Mathias Schwarz
Ja, ich stimme mit dem Vorschlag überein, die DRM-Regelungen aus dem Urheberrecht herauszunehmen. Sie sind in der Tat eher ein Schutz von Geschäftsmodellen und könnten daher auch woanders stehen. Es gab ja auch bereits gesetzliche Vorläufer, mit denen ein bestimmtes Geschäftsmodell geschützt wurde.

Ich meine aber, Herr Jaeger, dass auch nichts dagegen spricht, das gemeinfreie Werk durch technische Vorkehrungen schützen zu können. Das wird der Markt regeln. Wenn ich das Märchen der Gebrüder Grimm auf einer CD nicht kopierfähig anbiete, ist nicht einzusehen, warum ich mir von dieser Vorlage, obwohl ich aus hundert anderen Büchern und auf hundert andere Möglichkeiten mir das Werk besorgen kann, eine weitere CD machen können soll. Der Anbieter muss doch die Möglichkeit haben zu sagen: kauf doch gleich drei Original CDs, wenn Du drei Orte hast, wo Du sie nutzen möchtest. Ich meine deshalb, dass die Gemeinfreiheit des Werkes dann kein Grund sein kann, diese technische Schutzmaßnahme zu umgehen.

Die Gewährung eines Zugangsrechts oder eines Recht auf Durchbrechung der technischen Schutzmaßnahme sagt meiner Meinung nach jedenfalls nichts darüber aus, ob die zugrunde liegende Schranke ein subjektives Recht ist oder ob es sie lediglich im öffentlichen Interesse gibt. Diese Frage kann man nur klären, wenn man sich die Schranke selbst anschaut und die dahinter stehenden Rechte und Rechtspositionen herausarbeitet. Dann kann es sein, dass zwar einem einzelnen ein prozessualer Weg eröffnet wird, eine Schranke durchzusetzen, die aber nur im öffentlichen Interesse besteht. So etwa bei der Durchbrechung einer Schranke für den schulischen Gebrauch.

Vielen Dank.

Prof. Reto M. Hilty
Danke schön.

Wenn Sie mir nicht sehr böse sind, möchte ich es gerne hierbei bewenden lassen und Sie zum Mittagessen einladen. Wir würden uns, wenn das zumutbar ist, um 14 Uhr hier wieder treffen damit wir abends nicht zu lange überziehen müssen.

Vielen Dank.

[20] See U.S. Section 110(5) U.S. Copyright Act, Report of the Panel of 15 June 2000 [WT/DS160/R] at http://www.wto.org