**Teil 4 – Dogmatische „Wildwüchse“**

**Prof. Reto M. Hilty**

Ich freue mich, dass Sie sich alle wieder eingefunden haben zum vierten Teil dieser Tagung.

Wir haben gestern mit einem sehr anstrengenden Tag einen Punkt erreicht, der nicht ganz unkritisch ist, weil wir doch eine extrem breite Perspektive haben. Es dürfte Sinn machen, dass wir uns heute noch Zeit nehmen, um die vorhandenen Punkte vernünftig zu gruppieren, damit wir nicht allzu ratlos von dannen ziehen müssen.

Heute haben wir aber zunächst eine Art Highlight, das wir uns aufgespart haben aufgrund einer Diskussion während der Tagung im letzten Jahr. In diesem Highlight wollen wir die dogmatischen „Wildwüchse“ des Urheberrechts, wie es so schön heißt, hinterfragen. Es kann durchaus sein, dass uns hier noch wichtige Inputs zu Gute kommen, die wir dann in einem Gesamtüberblick nutzten können. Mit diesem Halbtag wollen wir auch gleich starten. Nach der Pause werden wir in die Schlussdiskussionsrunde einsteigen; dann haben wir sozusagen die letzte Chance, die Dinge noch in den Griff zu kriegen.

**Dr. Christophe Geiger**
Ich möchte kurz mitteilen, dass ich gleich etwas austeilen werde. Es handelt sich dabei um einige Ideen von Herrn Vivant auf Englisch, weil er seinen Kommentar nachher auf Französisch abgeben wird. So können Sie nachher die wesentlichen Punkte auf diesem Hand-out ablesen. Deswegen gebe ich das jetzt weiter.

**1te Thesenpräsentation – Dr. Kamiel Koelman**

I will speak in English, because my German is just not good enough. Fortunately, I can understand it, so I was able to follow the interesting discussions going on in the past two days. Before I start my presentation I would like to thank the organisers for having me as a speaker here. Until now it has been a very successful and interesting meeting. In fact, it has been so interesting that many of the ideas that I wanted to put forward here today, have been discussed already in the previous days. Of course you cannot expect anything else from a conference where so many distinguished speakers talk before you.

Nevertheless, I hope that I can add something to the discussions. My German is good enough to have an Idea what “Dogmatische Wildwüchse” are. This means, for those of you who don’t speak German, something like “wild growth of ideas in copyright law”. I called Christophe (Geiger) to ask him what exactly was expected of me and he said: well, you can speak of anything you like, as long it is “wild”. This is exactly what I intend to do: I will pose some theses, which may be a somewhat wild. I am not sure whether they are defendable, but I will just pose these ideas and perhaps together we can scrutinise them and see whether they are viable.

Thesis: to know what is good copyright law, one first has to determine what copyright law should achieve.

First of all, I must say that I agree with what has been said before. I think on the first day this has been discussed, that in order to determine what is “good” copyright law, one first has to determine what one wants to achieve with copyright law. Once that

is determined, then one can judge whether copyright, or whether proposals to change it, are desirable and "good".

I would say that copyright law should not be analysed by itself, but should be viewed as a form of information policy. By introducing copyright laws, legislators try to have some effect on the flow of information, on the production of information. If you look at the current literature, two main criteria are distinguished for determining what is a "good" copyright law. The first is the criterion of the "robust public discourse": copyright law should serve democracy by ensuring that as much different information products are available as is possible and that people are free to express themselves. I will not speak about this, because Christophe will speak about it in half an hour or so. I want to limit myself to economic arguments, that is, to arguments, which determine what is good copyright law from an economic point of view.

The second, the economic criterion is that of "maximum social welfare". The legislator, by drafting copyright laws, should pursue maximum social welfare, both in the information market and in information production. I think there are some links between the criterion of robust public discourse and maximum social welfare. I will highlight these links, when I get there.

The third goal that legislators should pursue is, of course, "justice". It hasn't been mentioned too often here in the last days, but perhaps it should be the primary goal of the law: it should simply be "just". The idea of copyright as a natural right has very much to do with the idea of providing mere justice: it is just right that the author can harvest what he has sown. I think this idea is at the root of what Mireille Buydens expressed on the first day of this conference, the idea that material should only be protected, if it is created in freedom. Only if the author was free while creating his work, only then is it possible that he put something of himself, of his personality, in the work and only under those circumstances would it be "just" that he receives reward for his created labour. But I don't want to speak about justice either. I will limit myself to economic theory.

Thesis: copyright cannot be said to promote innovation. Rather, it should be viewed to enhance variety.

Fist of all, I would like to say that there is a common misconception in the debate on the economics of copyright law. This is the view that the economic purpose of copyright would be to promote innovation, which, in my opinion, is a misconception. The idea that copyright law has to promote innovation has its roots in the literature on the economics of patent law, that started off a little bit earlier than the literature on the economics of copyright law and that influenced the discussions on copyright. If one speaks about patent law, it is clearly about innovation. It is about the development of better and more efficient technologies that improve society's productivity. But if one thinks of copyright law, about the protection of "literary and artistic" works, which copyright initially was about, I think it is very hard to argue that a new novel or painting really promotes innovation. What copyright, in fact, is about is the promotion of diversity: the variety of available works should be as large as is possible. Thus, consumer choice is enhanced. One can view this aspect from an economic point of view, but there is also a link with the freedom of expression, the idea of copyright as a tool to promote a robust public discourse. From an economic point of view one would promote diversity to enhance consumer choice, and from a democratic, public discourse point of view, one would do the same but now in order to promote democratic values.

Thesis: the economic approach to copyright cannot provide an absolute answer to the question what is the optimal level of copyright protection.

The main theories on the economics of copyright law imply a balancing process. The factors that have to be balanced have been named differently by the various scholars, but in my view, they are, in fact, more or less the same.

Some authors say it is all about balancing dynamic efficiency and static efficiency. Dynamic efficiency in innovation and static efficiency in prices. I think Beatriz Conde Gallego explained that very well yesterday.

Another way to put it is that a balance has to be found between efficiency in production and efficiency in distribution. Efficiency in production requires that the creator receives a positive price, whereas efficiency in distribution requires that information usage is free. One needs to balance both policy goals.

Yet another way to put it, which is famously done by Landes and Posner, is to say that one has to balance the incentive to create against the free access to information. Information has to be as accessible as is possible, but there also has to be as much information as is possible. So these policy goals have to balanced.

Yet, a further way to put it is the classic public good explanation. One needs to balance exclusivity, copyright law, if you want, with non-rivalry. Information products are considered to be public goods. The usage of such goods should be free, because usage of public goods is without additional costs. It does not cost extra to have an extra user. Excluding such use results in a social loss. But then again, you would need maximum diversity, so you need to provide some exclusivity as an incentive to create.

And, again, another way to put it is to balance the market power granted to the copyright holder for him to be able to recoup his investments, against the social loss that market power inevitably has. Under market power prices will be too high and consumption will lay at too low a level. Market power goes at the cost of perfect competition. But market power for right holders is needed to provide an incentive to create. Again, these factors have to be balanced.

Here, there is another link with the public discourse idea. This balancing of various economic factors is very much comparable to the balancing of the property right of the copyright owner against the freedom of expression. Yesterday we talked about it, and I'm sure Christophe will speak about it in a couple of minutes as well.

My next point has also been mentioned before: where one speaks of balancing processes, there is no absolute answer to the question what is the "right" balance, the proper trade-off. Mister Rigamonti told us so yesterday, the day before Mister Leistner also told us so, and I think this is correct at least if one speaks of economic theory. Economic theory cannot provide an absolute answer on which trade-off is the optimal one. This is because economic theory relies on the price mechanism to signal demand and value to the various players. But with regard to public goods, which information to some extent goods are, the price mechanism doesn't function properly. So one cannot know how high demand is for information products, or for variety of information. And if one doesn't know how high demand is, one cannot know how much incentive should be provided to make sure that demand is fulfilled. So eco-

nomic theory by itself cannot show us what is the right trade-off, the just balance to be achieved, and therefore cannot by itself tell us what is “good” copyright law.

Often it is said that the more information there is, the better it is. But, of course, a moment may come where there may be too much information and we may be living in a timeframe, where this is the case. Currently, you often hear people speaking of “information overload” and things like that. So perhaps there is too much incentive at this moment and not enough non rivalrous usage. This is possible, we do not know and economic theory cannot provide the answer. It doesn’t provide normative guidance, unless if one assumes that the current balance, or the balance we had ten years ago before the internet took off, is the optimal one. Only if one assumes that at a certain point in time the balance is, or was, optimal, can one recommend a legislator whether to add some incentive, add some exclusivity, or perhaps take some away. Take for example the rise of peer-to-peer systems, clearly they caused the factual exclusivity over copyrighted works to decrease. Copyright owners have less control over what is being done with their works. On the other hand, there is much more free, non rivalrous usage. So perhaps, if one assumes that the balance was right before the internet or peer to peer took off, one can argue that the legislator should now step in order to restore it again, that is to say, to add some statutory exclusivity.

Another economic approach, which I don’t want to go into deeply, is the so-called “transaction costs approach”. According to this approach, information usage of which the value is larger than the transaction costs regarding such usage, should be subject of an exclusive right. If the value of usage is larger than the transaction cost, these costs will not hinder market formation for the usage concerned. Some economics believe that one should then let the market sort things out; confer an enforceable exclusive right and subsequently leave all to the market. In this approach the non-rival nature of information usage is not taken into account and there is no balancing process involved. But this is a very limited approach to the economics of copyright law. And, indeed, many economists feel the public good aspect of information goods should not be neglected. One cannot just rely on transaction costs reasoning.

Thesis: the most important copyright limitation is the limitation of the subject matter of the right.

Summing up, economic theory requires a balancing of various, differently named factors, but cannot provide an absolute answer to the question which trade-off is the optimal one. There is one instance, however, where more absolute statements can be made on the efficiency of exclusivity in information products. This is when enhanced exclusivity, or more market power, does not enhance information production or does not enhance the variety of the available information products. Clearly, if a right holder or an information seller could exclude usage without this ability to exclude usage providing an extra incentive for creation, that cannot be efficient. Then there is the social loss of less non-rivalrous usage without the social benefit of more information being produced. In these circumstances, enhanced market power, statutory exclusivity over information usage, must be inefficient.

In my view, the most important copyright limitation to keep the market power of the copyright holder within boundaries and to keep copyright in balance is the limitation of the subject matter of copyright. So, it is not the exceptions, for instance the exception allowing private copying etc., but really the most important limitation to keep copyright in balance is the limitation of the subject matter. And what does this

limitation do? It ensures that the copyright holder can not keep reasonable substitutes of the market.

To put it simply: if not enough similarity is found between an original and an allegedly infringing work, a copyright infringement claim will not succeed. This mechanism ensures that copyright holders cannot keep reasonable substitutes of the market. Therefore, prices remain reasonably low, they are a little bit higher than they would have been if the copyright holder were not granted some market power, but the prices remain reasonably low. If prices remain low, copyrighted works are accessible to many.

An example for illustrating this could be the market for thrillers. If one goes to the airport, but the plane is delayed, one might want to buy a thriller just to fill some time. And of course one can chose between 50 or 100 titles in the airport bookshop. None of the writers, or none of the publishers, of any of these thrillers was able to, on the basis of copyright, keep other thrillers off the market. All therefore have to take account of the prices that other publishers set. So there still is some competition, even though copyright law allows to hinder market entry with exact copies. Clearly, therefore, copyright does not confer a real monopoly. The monopoly is very much limited and the limitation of the subject matter of copyright law ensures that it remains limited.

There are other aspects of the subject matter of copyright law, which ensure the same thing. This was mentioned yesterday as well: ideas and facts are not copyrightable. Imagine that ideas would be copyrightable. Imagine, for example, that the idea to publish a novel that plays in the future were copyrightable, science fiction, than the heirs of Jules Verne could probably block market entry of any other science fiction novel. If ideas were copyrightable, the market power of the copyright owner, the level of exclusivity that the law would provide, would be substantially larger. Similarly, there are no reasonable substitutes for factual statements. Factual statements are either right or wrong. So, if facts were copyrightable, if the first person who published a factual statement could prevent others from publishing the same fact, right holders would have a real monopoly.

Thesis: copyright protection for standards should be limited.

The fact that functional aspects are not copyrightable has a similar function. Yesterday it has been said by Bernt Hugenholtz that it can be argued that standards should not be copyrightable. If a copyrighted work has become a standard, which implies that others cannot enter the market if they cannot use the work which has become the standard, the copyright owner has a real monopoly. A good example for this are user interfaces, dealt with in the famous US "look and feel" cases about the Lotus software user interface. Many computer programs have the same menus, the same symbols on the buttons, signalling that this or that will happen when one pushes the button. There was this case in the US about such interfaces, where Lotus claimed that they are copyrightable. Others wanted to use them, but the judges held that they could not copyrightable, because others could not have competed on the market, if they could not have used the same icons. I'm not sure if standards should not be the subject matter of copyright law at all. Perhaps there should be some kind of copyright exemption allowing others to use standards freely, if they need them to be able to offer reasonable substitutes for other products. Perhaps a compulsory licensing scheme should be applicable. In any case, now that functional technology, computer programs are the best example, are becoming the subject matter of copyright

law, a good argument could be made to exclude standards from the scope of copyright law.

Thesis: DRMs may hinder exempted usage, but the most important issue is that they allow to control the usage of non-copyrightable material.

Yesterday, we talked about DRM quite a lot. But I think that the most important problem of DRM systems has not yet been dealt with. This is the issue that DRM systems may enable copyright holders not only to exclude, to block usage, which is covered by a copyright exception, but they may also allow copyright owners to control usage of information which is not the subject matter of copyright. To explain this I can best compare the situation, which is likely to come into existence, with the situation which exists if there is a know-how licensor. A know-how licensor can factually control access to secret information. Because he can control access to the secret information, he has the leverage to impose on others who want to access or use the information, a contract which controls the usage of this information, even though it may not be copyrightable or the subject matter of any other IP right. DRM may result in a similar situation. If there is strong access control, strong DRM, the copyright owner - or better: the information seller, because the information protected by the DRM system needs not to be necessarily copyrightable - could, like a know-how licensor, impose contractual obligations on anyone who wants to access and use that information. The information concerned therefore does not have to be copyrightable information, nor secret, for the licensor to set conditions on its usage. Thus, on the basis of a combination of contracts and DRM, information that is not the subject matter of copyright can be controlled. It would be as if the subject matter of copyright broadens which may be an undesirable development. The market power could grow.

It has been said yesterday that perhaps the market will resolve this problem on its own. The example of the fairytales of the brothers Grimm was used. Imagine that someone puts the fairytales of the brothers Grimm behind a DRM system. Of course, there are many free copies around, many free sources of these public domain fairytales would still be available and others will bring them on the market cheaper or against better, more competitive license terms. But if new information products are considered, which are only available in a DRM protected form, then indeed the danger may exist that a combination of DRM and contracts will allow information sellers to control the usage of non-copyrightable information. Arguably, something should be done about that in copyright law. Provisions should be inserted in copyright law - this is one of my “Wildwüchse”, one of my wild ideas - provisions, which disallow to contractually control usage of information that is not the subject matter of copyright law or any other IP-right.

The problem, however, in designing such a provision is to distinguish it from know-how licenses. If one disallows to contractually control information which is not the subject matter of copyright law, one would at the same time disallow the current practice of know-how licensing and presumably one wouldn’t want to do that. One criterion, that I came up with, which could perhaps be used to distinguish prohibited copyright licenses form allowed know-how licenses is the intended audience. If the information is not secret, is not intended to remain secret, but aimed at a larger audience, perhaps it should be prohibited to contract away usage of that information.

Thesis: copyright does not only confer market power to creators, it may also result in market power for distributors. This should be included in the analysis.

Another wild idea: as I just explained, there are some mechanisms in copyright law which keep the market power of the copyright owner, of the creator, within boundaries. But in fact, if you look at the situation in practice, copyrights are not owned by creators, but by distributors, by publishers, by record labels, whose core business is not creating, but distributing. They provide the service to authors of ensuring that their works reach the public and that the moneys flow in the opposite direction, although, of course, not all the money flows in the other direction. These distributors may try to apply copyrights in order to prevent market entry by competing distributors, by competing distribution services. And due to the so-called "network effects" that may arise in these markets, they may succeed in achieving this. Particularly, if one thinks of online-distribution of copyrighted works. For artists, the most attractive network is the one which has most users, which has the largest user base, the largest public or the most customers. For users, the most attractive network is the one, which offers the most works and represents the most authors. So, there is a feedback mechanism here: the more authors there are the more users there are, and the more users there are the more attractive is the means of distribution to authors. Thus, market entry by new networks that have to start out small, may be very difficult. If market entry is thus hindered, this may result in monopoly power for the incumbent. This market power which results from the network effects, makes it impossible for newcomers to obtain a considerable share of the market. Even if the newcomer offers a better service to users or to authors, or both, it may be impossible for him to obtain considerable market share.

One way to prevent this is by introducing a remuneration right. In fact, there is a precedent for this. When early in the last century piano rolls replaced sheet music as the main form of distributing music, it was feared that the sheet music publishers would be able to extend their market power in the area of publishing sheet music, to the area of publishing records, that is, publishing recorded music or, at first, piano rolls. However, in the US this problem was solved by imposing a compulsory licensing scheme as regards the usage of compositions. So anyone who wanted to do so, could publish a record of a certain composition, as long as he paid the set price. Thus, competition in the area of making and selling of records was achieved.

Arguably, something like this is desirable now in the online environment. The record companies are for a large part trying to prevent online distribution; they are slowly licensing online rights, but these are not very broad licenses. Of course, the record companies were best at publishing music offline, but they are not necessarily the best at distributing music online. If they can apply copyright to extend their offline market power in the area of distributing music to the online environment, competition would be forestalled. A remuneration right, a compulsory licensing scheme in this area could perhaps enhance competition as regards distribution services.

Thesis: copyright should not hinder technological development.

Yet another, perhaps "wild" idea: copyright law or the interests of copyright owners should never hinder the development of technology. In fact, until very recently, copyright never did this. Every time a new technology came up, a way was found to balance the need for technological development with the need to reward authors. Mostly, this was done by granting remuneration rights. Of course, this was done when home taping came up, when VCRs came into existence, and also when the photocopier was made available. The advantage of the remuneration right in these cases is that it serves two policy goals: it leaves technological development free, technology developers need not fear liability for infringements performed by those using

their technology, and at the same time it ensures that authors are rewarded for their creative labour. So, until now, technology was never regulated. Of course, copyright adapted to technology, but it was never the other way around. The law it never said: you have to design this or that technology in this or that way, or implement this or that technological measure.

Until recently, copyright never regulated technology. This was the case until copyright prohibited the usage, making and distribution of circumvention devices. Like, for example, VCRs, circumvention devices have both infringing and non infringing uses. For instance, one could use circumvention devices to access DRM protected public domain fairytales of the brothers Grimm, which would clearly be a non infringing use. But devices that are specifically intended to circumvent, are nevertheless prohibited, regardless of whether they may also be applied for non-infringing uses. This is the first time that copyright directly outlaws certain technology.

In the United States the copyright industries are trying to outlaw peer-to-peer systems, to have judges state that the offering of such systems constitutes an act of contributory infringement. Until now, they didn't succeed. But imagine that they would succeed: all of a sudden it would be prohibited on the basis of copyright law to provide a technology which has many potentially efficient and a lot of socially beneficial uses. Is it desirable that peer-to-peer systems would be disallowed? I would say: probably not. Again, this has been proposed by an article by Netanel, which many of you may my have read, again a solution could be a remuneration right. If a compulsory license for distributing files over the internet were introduced, two policy goals would be served: one, authors would then be rewarded, which they, of course, are not currently for distribution via peer-to-peer systems, and two, technology could develop freely. Authors and the copyright industries then cannot dictate how technology should be built. This might indeed serve dynamic efficiency, or innovation, in the distribution of copyrighted works.

Thesis: consumer protection is necessary. However, it should not be inspired by existing copyright exceptions, but, instead, by existing consumer law.

Finally, an idea, which has also come up before during this conference, is that we need copyright specific consumer protection. In the last decade, copyright has begun to impinge on the private sphere, has begun to concern activities performed by consumers. Before that, copyright was about keeping competitors from entering the market with too near substitutes. They could not print the work and they could not distribute it. But now, due to the right of temporary reproduction and the protection of technological access control, copyright is about activities performed by consumers.

At least, therefore, we have to think about whether we need limitations for the benefit of mere end-users, apart from the private copying exception. We have to think about copyright specific consumer protection. From an economic point of view, this has nothing to do with the increasing exclusivity that technological measures, DRM, may provide, the increasing possibilities to control usage, but rather with the information asymmetries that may occur in information transactions.

We should look at regulation on unfair terms in consumer contracts. These regulations stipulate which terms are unfair in consumer contracts. The rationale behind them is that it is expected that consumers would never take the time to read long and complicated standard form contracts. They would just buy the product and if

they are bound by the contract, they may have bought something that in fact has less value then they thought it would have. If the terms of the contract are very disadvantageous for consumers, the value of the good should be low. But if the consumer doesn't read the contract, he can not ascertain that value and may therefore pay too much.

In fact, in copyright law we have a precedent for similar legislation. This is the provision of the Software Directive, which allows a lawful user to copy a work if it is necessary for the normal use of a software product. This limitation of copyright law cannot be overridden by contract. Imagine, that it could be set aside by way of contract, it would then be possible to sell to a consumer a software product with an accompanying license stating: you bought it, but you can never use the product. Of course, a consumer, who had read the license, would never have bought a product under such conditions. But because consumers cannot be expected to read and study complicated licenses, such provisions which combat information asymmetries are necessary.

Thesis: a solution for many of the problems discussed here would be to transform copyright into some kind of "copytax".

So, to round up, copyright is about information policy. It implies many checks and balances. We need to limit the freedom of contract as regards productive usage of non-copyrightable elements in copyright itself. We should not rely on anti-trust-law. We need to limit the possibilities to hinder market entry in the area of distribution. We could do that by inserting a remuneration right. We need to limit the freedom to control consumptive usage, either contractually or technologically. We need to make sure that copyright does not interfere with technology. Many of these problems could be resolved by introducing a remuneration right or a "copytax"; of course, remuneration rights are not true copyrights. They can also be compared to taxes.

In this context one may pose the question: should we transform copyright to some kind of "copytax" altogether? Should we do away with the exclusive rights? I saw that recently the name the Max-Planck-Institute that organised this meeting has changed. It appears that they had some foresight in this regard. No longer is it just about intellectual property law, but now it is called the "Max Planck Institute for Intellectual Property, Competition and Tax law". So they, at least, seem to be ready for transforming copyright to a "copytax".

Thank you very much.

**Prof. Reto M. Hilty**
Vielen Dank, Herr Koelman, da haben Sie uns sozusagen in den Rücken geschossen mit diesem Argument. Wir sind „unschuldig" daran, dass wir heute auch Steuerrecht machen, das machen auch nicht wir, sondern das macht eine andere Abteilung. Ich werde das wohl bis an mein Lebensende erklären müssen.

Herzlichen Dank für diesen ökonomisch geprägten Ansatz. Ich darf gleich an Christophe Geiger übergeben, der einen anderen Schwerpunkt setzen wird und dadurch das Feld noch erweitert und dann mit den Diskutanten zusammen mit einzelnen Fragen noch tiefer einzusteigen.

[1] Zu den Ideen von Thomas von Aquin siehe Decker, Urheberecht und Naturrecht – Grundfragen zum UrhG 1965, in: Scheuermann und Strittmatter (Hrsg.), Urheberrechtliche Probleme der Gegenwart, Festschrift für E. Reichardt, 1990, 23.
[2] von Gierke, Die soziale Aufgabe des Privatrechts, Berlin, 1889; Kohler, Das Autorrecht, eine zivilrechtliche Abhandlung, 1880, 41: „Das Eigenthum ist nicht die Burg des Egoismus, sondern das Vehikel des Gemeinverkehrs".
[3] Siehe Kohler, 40. Die erstmalige Verwendung dieses Begriffes wird allerdings Julius Kopsch zugeschrieben (Kopsch, Zur Frage der gesetzlichen Lizenz, ArchFunkR 1928, 201).
[4] du Pasquier, Introduction à la théorie générale et à la philosophie du Droit, 4. Aufl., 1967, 19.
[5] Siehe Gaudrat, Droit des auteurs, Droit moraux. Théorie générale du droit moral, Juris-Classeur P.L.A., Fasc. 1210, 2001, Nr. 8 ff.
[6] Der Satz stammt von Le Chapelier, Berichterstatter des ersten französischen Urheberrechtsgesetzes (Le Moniteur universel, 15. Januar 1791, 116 ff.). Allerdings wurde dieser Satz später immer außerhalb seines Kontextes zitiert. Le Chapelier hatte nämlich seine Aussage lediglich auf unveröffentlichte Texte bezogen.
[7] Siehe z.B. Lamartines Plädoyer für ein ewiges Urheberrecht, zitiert in Strowel, Droit d'auteur et Copyright, 1993, 597. Hierzu auch Götz von Olenhusen, « Ewiges geistiges Eigentum » und « Sozialbindung » des Urheberrechts in der Rechtsentwicklung und Diskussion im 19. Jahrhundert in Frankreich und Deutschland, Festschrift für Georg Roeber zum 10. Dezember 1981, 1982, 88.
[8] So z.B. Renouard, Traité des droits d'auteurs, dans la littérature, les sciences et les beaux arts, Band 1, 1838, 454.
[9] Siehe Art. L. 113-2 und L. 113-5 Code de la propriété intellectuelle (CPI).
[10] Siehe Art. 3 der Richtlinie vom 14. Mai 1991 über den Rechtsschutz von Computerprogrammen (ABl. Nr. L. 122 vom 17.05.1991); § 69 b UrhG; Art. L. 113-9 CPI.
[11] So z.B. Goldstein v. California, 412 U.S. 546 (1973). Zu dem Begriff im Copyright System, siehe Sterling, Harmonisation of the Terms 'Copyright', 'Author's right' and 'Neighbouring Rights', EIPR 1989, 17.
[12] Landes and Posner, An Economic Analysis of Copyright Law, Journal of Legal Studies 1989, XVIII, 327.
[13] Article 1, Section 8, Clause 8 of the United States Constitution: „Congress shall have Power: To Promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries".
[14] Siehe Diderot, Lettre historique et politique adressée à un magistrat sur le commerce de la Librairie, 1767 (abgedruckt in : Œuvres complètes de Diderot, Band 18, 1876, 30).
[15] BGBl. 1973 II 1570.
[16] Art 15 I des Sozialpaktes: „Die Vertragsstaaten erkennen das Recht eines jeden an, a) am kulturellen Leben teilzunehmen; b) an den Errungenschaften des wissenschaftlichen Fortschritts und seiner Anwendung teilzuhaben; c) den Schutz der geistigen und materiellen Interessen zu genießen, die ihm als Urheber von Werken der Wissenschaft, Literatur oder Kunst erwachsen".
[17] BGBl. Nr. 210/1958.
[18] Artikel 10 EMRK: (1) Jedermann hat Anspruch auf freie Meinungsäußerung. Dieses Recht schließt die Freiheit der Meinung und die Freiheit zum Empfang und zur Mitteilung von Nachrichten oder Ideen ohne Eingriffe öffentlicher Behörden und ohne Rücksicht auf Landesgrenzen ein. Dieser Artikel schließt nicht aus, dass die Staaten Rundfunk-, Lichtspiel- oder Fernsehunternehmen einem Genehmigungsverfahren unterwerfen.
(2) Da die Ausübung dieser Freiheiten Pflichten und Verantwortung mit sich bringt, kann sie bestimmten, vom Gesetz vorgesehenen Einschränkungen unterworfen werden, wie sie in einer demokratischen Gesellschaft im Interesse (...) des Schutzes der Rechte anderer unentbehrlich sind.
[19] Siehe z.B. Dock, Les conventions internationales sur le droit d'auteur et la Déclaration universelle des droits de l'homme, in: INPI (Hrsg.), Droit d'auteur et droits de l'homme, 1990, 90 ; Bécourt, Copyright and human rights, Copyright bulletin 1998, Nr. 32, 14 ; Telec, The Human Rights dimension of Authors' Rights and Neighbouring Rights from the Czech Constitutional Perspective, in: P. Ganea, C. Heath, G. Schricker (Hrsg.), Festschrift für A. Dietz, 2001, 76.
[20] Siehe z.B. TGI Paris, 29. April 1959, RIDA 1960, Nr. 28, 133; TGI Paris, 23. Nov. 1988, RIDA 1989, Nr. 139, 205; J.D.I. 1989, 67, Anmerkung Edelman; Cour d'appel de Paris, 1. Febr. 1989, RIDA 1989, Nr. 142, 301, Anmerkung Sirinelli; J.D.I. 1989, 1005, Anmerkung Edelman.
[21] Die Rechte aus der EMRK gelten als allgemeine Grundsätze des Gemeinschaftsrechts und haben daher höheren Rang in der europäischen Normenhierarchie als die Richtlinie (so auch Scheer, The Interaction between the ECHR and EC Law, A Case Study in the Field of EC Competition Law, ZEuS 2004, 690, wonach die EMRK „as the highest binding source of law within the Community concerning human rights so that both primary and secondary EC Law must comply with the EHCR. As this results in a hierarchic subordination of EC law to the ECHR, the EC institutions should be considered to be bound by the ECHR"). Siehe auch Art. I-7 Abs. 3 der europäischen Verfassung (vorläufige konsolidierte Fassung vom 25. Juni 2004, CIG 86/04): „Die Grundrechte, wie sie in der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten gewährleistet sind (...) gehören zu den allgemeinen Grundsätzen des Unionsrecht"; Art. II-51, Abs. 1 der Charta für Menschrechte, welche in der Verfassung aufgenommen wurde: „Diese Charta gilt für Organe, Einrichtungen und sonstige Stellen der Union (...). Art. II- 52: „Die Bestimmungen dieser Charta, in denen Grundsätze festgelegt sind, können durch Akte der Gesetzgebung und der Ausführung der Organe, Einrichtungen und sonstigen Stellen der Union (...) umgesetzt werden. Sie können vor Gericht nur bei Auslegung dieser Akte und bei Entscheidungen über deren Rechtmäßigkeit herangezogen werden".
[22] „Die vorgeschlagene Harmonisierung trägt zur Verwirklichung der vier Freiheiten des Binnenmarkts bei und steht im Zusammenhang mit der Beachtung der tragenden Grundsätze des Rechts, insbesondere des Eigentums einschließlich des geistigen Eigentums, der freien Meinungsäußerung und des Gemeinwohls".
[23] ABl. 2001 Nr. L 167/10.
[24] Erwägungsgrund 2: „Der Schutz geistigen Eigentums soll Erfinder und Schöpfer in die Lage versetzen, einen rechtmäßigen Gewinn aus ihren Erfindungen und Werkschöpfungen zu ziehen. Er soll auch weitestgehende Verbreitung der Werke, Ideen und neuen Erkenntnisse ermöglichen. Andererseits soll er weder die freie Meinungsäußerung noch den freien Informationsverkehr, noch den Schutz personenbezogener Daten behindern; dies gilt auch für das Internet"; Erwägungsgrund 32: „Diese Richtlinie steht im Einklang mit den Grundrechten und Grundsätzen, die insbesondere mit der Charta der Grundrechte der Europäischen Union anerkannt wurden".
[25] ABl. 2004 Nr. L 157/45.

[26] Zu diesen Entscheidungen siehe den Beitrag von Prof. Hugenholtz als Diskutant zu dem Thema „externe Schranken" in diesem Band.
[27] Senftleben, Copyright, Limitations and the Three-Step Test, 2004, 193.
[28] Ein ähnlicher Grundansatz lässt sich auch im Patentrecht bei der sog. Zwangslizenz wegen Abhängigkeit (§ 24 Abs. 2 PatG) oder „licence de dépendance" (Art. L. 613-15 CPI) wieder finden, die allerdings vom Richter angeordnet werden muss. Hauptfall einer solchen Abhängigkeit, die zur Erteilung einer Zwangslizenz führen kann, ist die Weiterentwicklung einer durch ein älteres Patent geschützten Erfindung mit erfinderischer Kraft. Die Erteilung von Zwanglizenzen ist auch nach Art. 31 TRIPS ausdrücklich zulässig und die WTO-Mitglieder haben bei der Festlegung der Erteilungsgründe einen weiten Spielraum. Vgl. auch Art. 12 der Richtlinie 98/44/EG über den rechtlichen Schutz biotechnologischer Erfindungen, welcher auch eine solche Zwanglizenz vorsieht.
[29] EUGH, 29. April 2004, GRUR 2004, 524.
[30] BVerfG, 7. Juli 1971, GRUR 1972, 481.
[31] BGH, 11. Juli 2002, GRUR 2002, 963.
[32] Siehe z.B. Dietz, Urheberrecht im Wandel: Paradigmenwechsel im Urheberrecht?, in: Dittrich (Hrsg.), Woher kommt das Urheberrecht und wohin geht es?, 1988, 200.
[33] Thoreau, Über die Pflicht zum Ungehorsam gegen den Staat, Diogenes, 2004, 9.