(introduction 2)

COPYRIGHT'S ORBIT ROUND PRIVATE -, COMMERCIAL - AND ECONOMIC LAW.[1]

The system of copyright and the place of the user

Does modern copyright sufficiently accommodate the interests of users and consumers? This article submits that the system of copyright is composed as a legal balance of different interest spheres. From a systematic viewpoint, interests of users and consumers have not been ignored (I). However, other forces are at work which threaten the balance to the detriment of these groups (II).

INTRODUCTION. IRRITATION ABOUT COPYRIGHT.

Nobody is happy with copyright anymore, or at least that is how it seems. A growing number of incidents express consumers' discontent and even exasperation with increasing demands and claims of copyright (and neighboring rights). Private consumers resent *inter alia* remunerations for reprography and blank tape levies, and interference with their freedoms on the Internet. They also feel that they are 'merely' *users* of copyrighted material, and that such (private) *use* should be free. Copyright should be limited to the *commercial* sphere, to acts committed by *competitors* of the copyright-holder. But 'commercial' consumers also raise their voice. Multi-media producers pretend that all pre-existing copyrighted material should be freely accessible for them, subject to, at most, (modest) reasonable compensation. The feeling is universal that copyright's demands increase and that public space - *free* space - vanishes.

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[1] Article based on a speech held at the occasion of the 10th anniversary of the Center for Intellectual Property and Advertisement Law (Dutch title: CIER) in Utrecht.

Copyright circles should not disregard the present irritations. A negative press can do a lot of harm. Irritation can turn political goodwill away from copyright. It can also change the attitude of the courts to a less benevolent one.[2] The same applies to the legal doctrine. Highly distinguished legal authors have expressed, in recent times, their concerns with the ever growing proportions of the copyright domain.[3]

We are, however, dealing with a dilemma. *Users* may feel that the rightholders invade their private life, but the producers and publishers find that the private use of copyrighted materials has started to encroach upon the commercial field. Increasingly easy and perfect means of copying and communicating information pose realistic threats to their markets. Therefore, private copying activities *are* commercially relevant and they *do*, in a way, constitute competitive activities. This is the central problem. As Paul Geller remarks, copyright laws were initially intended to govern *market* use; however, in the twentieth century, market mechanisms have failed to cover *mass* uses made of creative works.[4] The problem is exacerbated in the face of the approaching Information Superhighway: "... the entire concept of 'private copying' makes little sense in a world where the work is predominantly marketed directly to the end user.[5]"

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2 Cf. two recent decisions of the Dutch Supreme Court: Hoge Raad 20 October 1995, Dior/Evora, NJ 1996, 628 note Spoor, 29 IIC 43 (1998), Informatierecht AMI 1996, 3, p. 51, IER 1995, 6, 223, extension of quotation right to allow for commercial advertising; see also Grosheide, "De Commercialisering van het Auteursrecht", Informatierecht AMI 1996, p. 43-50. Hoge Raad 10 november 1995, Stichting Reprorecht/NBLC en Noord Brabant, NJ 1996, 177 note Verkade; IER 1996, 20, note Hugenholtz; Informatierecht AMI 1996, p. 55, note Quaedvlieg, Mediaforum 1996, 1, B 7-8, extension of permitted reproduction by the press (art. 10 bis, under 1 B.C.) to also cover press digests.

3 Justice Laddie, Copyright: Over-strength, Over-regulated, Over-rated?, [1996] 5 EIPR 253-260. In the Netherlands, the subject has been brought up frequently: Donner, 'Babes in the Wood'?, R.M. Themis 1975, 225-226; Koopmans, Redactionele Kanttekeningen, R.M. Themis 1983, 342; H. Drion, in: *Auteursrechtbeleid in de informatiemaatschappij*, 's Gravenhage 1987, p. 85; Spoor, *De Gestage Groei van Merk, Werk en Uitvinding*, Zwolle 1990; Verkade, *Intellectuele Eigendom, Mededinging en Informatievrijheid*, Deventer 1990.

4 Paul Edward Geller, "Reprography and other processes of mass use", RIDA 153, juillet 1992, p. 3-73, at 11.

5 Jane C. Ginsburg, Putting Cars on the Information Superhighway: Authors, Exploiters and Copyright in Cyberspace, in: P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, p. 199; also published in Columbia Law Review, Vol. 95 (November 1995).

This article will follow copyright's orbit as it accompanies the work through different legal spheres as private law, commercial law and economic law. In this analysis copyright appears, not as a self-contained, stubborn logic of protection, but as a legal course striking a subtle balance between the mighty competing bodies or sets of rules.

I. COPYRIGHT AS A LEGAL BALANCE

1. PRIVATE LAW-PERSPECTIVE

Copyright is, to employ the terminology of the WIPO-Treaty, a form of intellectual *property*. Intellectual property is a property which can be explained by a Lockean approach - the reward for the author's labour - or by a Kantian approach - the protection of the author's personality. Both lead to a concept of copyright that is primarily shaped by a *private law* 'protocol'. This does not prejudice the question, which is under discussion, whether the "property" concept of intellectual property is also appropriate.[6]

The foundations of Copyright, at least as far as based on natural law considerations, are under attack nowadays.[7] But even if our conception of what intellectual property really is, and of what forms its ultimate justification, is subject to evolution, one may safely assume that at all times, authors have been entitled to *some* reward for their work: admiration and public honor, or bread from a patron, or money from a merchant.

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6 For an overview, see A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, Paris 1994, p. 28-34; Eugen Ulmer, *Urheber- und Verlagsrecht*, 3rd ed., Berlin/Heidelberg/New York 1980, p. 107. The use of the word 'property' in intellectual property discussions is sometimes inspired by the concern to reinforce the prerogatives of the author: Alain Strowel, Droit d'Auteur and Copyright: Between History and Nature, in: Sherman and Strowel (eds.), *Of Authors and Origins*, Oxford 1994, p. 240; Verkade, RM Themis 1995, 3, 119. The philosophic notions lying at the root of the general (civil law) 'property' are too rich and complex as to impose certain solutions: cf. Strowel, *Droit d'Auteur et Copyright*, Bruxelles/Paris 1993, p. 92-97.

7 Grosheide, *Auteursrecht op Maat*, Deventer 1986, p. 269, 294, 312. David Saunders, Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright, in: Sherman/Strowel (eds.), *Of Authors and Origins*, Oxford 1994, p. 93-110.

Historical indications are abundant that even in a pre-copyright situation[8], there is a moral claim from the author with regard to the work, no matter what precise form those claims take in terms of legal rights.

It is also difficult to imagine what might prevent an author who has written a manuscript from asking payment from the patron or principal to whom he makes it available. What the author offers to the market, he may offer under his conditions. It has rarely been expressed so well as in the historical English case of Millar v. Taylor (1769):

> "It is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and corrections of the impression; in whose honesty he will confide, not to foist in additions: with other reasoning of the same effect.[9]"

Therefore, copyright contains a *nucleus* which is formed by an attachment of the work to the author which results from considerations of natural law and equity, largely independent of any legal or economic policy. The imperatives of the protection of the author's labor and personality are dominated by a private law logic. The role and rights of users and consumers are of little consequence as yet: no one has an a priori right to someone else's labor or personality. Private law logic rather resists users' claims, and should so from its viewpoint. But the work does not stay forever in the private atmosphere of the author. It is bound to leave: it is going to be published.

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8 Marie-Claude Dock, The origin and development of the literary property concept, RIDA LXXIX 1974, p. 126 - 205; Goldstein, *Copyright's Highway*, New York 1994, p. 39 calls it "the moral impulse to protect authors".

9 Citation from Mark Rose, The Author as Proprietor, Donaldson v. Becket and the genealogy of Modern Authorship, in: *Of Authors and Origins*, p. 39-40.

2. COMMERCIAL LAW - PERSPECTIVE

The author who wants to offer his work to his public, must offer it to the market. By his own will and choice, he subjects it to a commercial transaction. This can happen at a very early stage, even during the creation of the work, if the work is made in the course of a labor contract.[10] In other cases, commercial law logic will enter in the equation when the work will be sold or licensed and become the object of commercial agreements. The author's creation embarks on a journey through a commercial zone, to a non-private, public zone. At this stage, the *enterprise* will replace the *artist* as the principal actor.[11] It is only natural that, the moment that the work 'enters the marketplace', another set of rules with its own logic will replace, or at least complement, the purely private-law inspired perspective.

One might argue that this is not so obvious. The general distinction between private and commercial law plays no role in some systems[12] and may be vague in others, or devoid of well defined legal consequences. What's more, a first test yields examples of natural law enforcing its logic against commercial thinking, rather than of commercial logic overriding natural law. For example, no one can call the *droit de repentir* a triumph of *commercial* logic; still it applies in market conditions. The same applies to certain restrictions on the transferability of rights. But although basically, the private/natural law vocabulary of copyright's etiquette (and some of its rules) remains in place, there are clear indications that the private law logic will eventually give place to commercial law policy, inspired by a different spirit. Commercial law policy does not put aside copyright's private law legacy, but starts an interactive game with it, seeking to introduce more *simplicity, security and efficiency* (including efficiency of scale[13]).

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10 It depends on the different national legislations how to balance authors' rights and market constraints in this case. Ghislain Roussel, « Le droit d'auteur des auteurs salariés et employés: étude comparative de législations nationales, » DdA 1990, 232-244; Limperg, « Employees rights in their capacity of Authors », Copyright 1980, 293-300.

11 René Savatier, "L'Exercice libre de l'Art et des Lettres au regard du Droit Economique", 55 Ufita 1970, p. 1-42.

12 Nevertheless, in such systems, as in the Netherlands, it is significant that abolished 'commercial law' has a successor in the form of 'business law' - no official legal classification, but indeniably a field with its own legal culture.

13 Increase in scale is a problem which, more in general, poses highly interesting questions in the traditional private law doctrine. A remarkable contribution about the adoption of commercial law logic in traditionally private law relations was published in 1988 in the

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Commercial law logic will be hostile towards moral rights claims from the original author, as merchants will fear unpredictable claims following their copyright-merchandise. From a purely private law perspective, such claims are not easy to avoid. The moral claims of the author are 'absolute rights' which continue to cling to the work and cannot be separated from it. But commercial law logic will see that if moral rights have to be inalienable, they can at least be waived.[14] Even in French, Italian or Spanish laws, for example, which take a strict approach towards the inalienability of the moral right, one has to come to terms with the needs of the practice, as is demonstrated by the very provisions concerning adaptation right and adaptation contract.[15]. Apart from this, the exercise of a moral right will often be reduced in, *inter alia*, employment relationships and similar situations.

Therefore, even if the moral right of the author can pursue the work far into the stratosphere of its commercial exploitation - and lead to more or less spectacular effects like the French *Cour de Cassation* decision in the *Huston v. Turner* colorized films case[16] - in many cases commercial law logic will temper application of the right.

Netherlands by Vranken: "De verhandelsrechtelijking van het privaatrecht. Over differentiatie en schaalvergroting" *in*: Raaijmakers, Schoordijk, Wachter (eds.), *Handelsrecht tussen 'koophandel' en Nieuw BW, Opstellen van de vakgroep Privaatrecht van de Katholieke Universiteit Brabant bij het 150-jarig bestaan van het WvK*, Deventer 1988.

14 Spoor/Verkade, *Auteursrecht*, no. 206 p.305.

15 Dietz, Legal Principles of Moral Rights (Civil Law), General Report at the ALAI Congress of Antwerp 1993, published in: *Le droit moral de l'Auteur/The moral right of the Author*, ALAI 1994, ISBN 90-800602-3, p. 46 (français), p. 74 (english).

16 In Huston/Turner, the Cour de Cassation forbids the colorization of the black and white version of Huston/s film 'Asphalt Jungle': Cass. 1re Civ., 28 mai 1992, RIDA 1991, nr. 149, p. 197; JCP 1991, Ed. G, II, 21731 note Françon; Ed. E, II, 220 note Ginsburg and Sirinelli; Rev. Crit. Dr. Int. Privé 1991, 752, note Gautier; JDI 1992, 133 note Edelman; D.S. 1993, 177 note Raynard. Also see J. Ginsburg and P. Sirinelli, Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy, in: 15 Columbia VLA Journal of Law and the Arts 135-159 (1991); B. Edelman, Applicable Legislation regarding Exploitation of Colourized U.S. Films in France: The "John Huston" case, in: [1992] 1 IIC vol. 23, p. 629-642.

From the same perspective of security, commercial law logic will favor requirements of (copyright) notice and registration. Merchants want to have easy access to information about what is protected and who is the rightholder. Here again, the opposite, private law-inspired Berne Convention principle of *absence* of formalities seems to 'follow' and to dominate the work even after it has entered the market. Nevertheless, commercial law correctives may enter the field at one stage or another. In U.S. legislation, registration still provides significant advantages with respect to proof and remedies in infringement actions.[17] But also in Europe, it is sometimes sustained that 'full' liability despite absence of registration may be questionable.[18]

Efficiency and Simplicity

The commercial law logic of efficiency leads to collective licensing organisations where the negotiaton of individual licenses becomes illusory. Sometimes the terms of these organisations are declared generally applicable: in case of such "extended collective licenses", the individual right character shrinks even further.[19] Peeperkorn submits that collective administration in copyright is a legal formula sui generis, which cannot be understood by using notions which are exclusively derived from individual copyright - although the individual, personal copyright remains the basis.[20]

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17 Jane C. Ginsburg and John M. Kernochan, "One hundred and two years later: the U.S. joins the Berne Convention", (1989) RIDA no. 141, p. 56-197, V. p. 77-113; Jon A. Baumgarten and Christopher A. Meyer, "Die Bedeutung des Beitritts der USA zur Berner Übereinkunft", GRUR Int. 1989, 620-627, under D.; A. Nordemann and A. Scheuermann, "Adherence of the United States to the Berne Convention, Report on a Berlin Conference", [1992] 1 IIC vol. 23, 70-92 = Der Beitritt der USA zur revidierten Berner Übereinkunft - Bericht über ein Berliner Urheberrechts-Symposium, GRUR Int. 1990, 12, p. 945-955.

18 Deurvorst, *Schadevergoeding, voldoening van een redelijke gebruiksvergoeding en winstafdracht bij inbreuk op intellectuele eigendomsrechten*, Deventer 1994, Summary in English p.229-238, V. p. 229: "... courts tend to conclude from the fact *that* an infringement has been made that it is due to the infringer's fault. Such inflation of the requirement of fault constitutes a threat to innovation *and ordinary business activity*. (italics AQ)

19 Gunnar Karnell, "Individual Right in Wholesale Trading?" (1993) RIDA nr. 157, p.2-49.

20 David H.M. Peeperkorn, "Collectief beheer van auteurs- en naburige rechten", CIER-Publicaties J1-2 en 12-14. The fact that the individual right remains the starting point of copyright is worked out in a number of principles, the first of which is that the authors are free to participate or not (p. J12-14).

Commercial Law and the User

The benefit for the *user* in copyright's commercial fase is that it softens some of the hard edges of 'private' copyright. More important is that users' rights will mostly be provided for by exceptions to copyright; and that such exceptions constitute government interference which is much more easy to conceive in a commercial field than in a field of 'private property'. The commercial phase could, therefore, be no less than an *essential* element to create space for the users. We will elaborate on this in Part II, under 1.

3. ECONOMIC LAW-PERSPECTIVE

Economic law can be understood as "the law enacted by the authorities, which has as its goal to influence directly or indirectly the establishment or the functioning of the market".[21] It is unusual to present copyright, even partially, as a branch of economic law.[22] Nonetheless, the economic law aspect of copyright can hardly be underestimated. Copyright contains obvious elements of market regulation. Neither private nor commercial law logic will perfectly cope with these: economic law elements call for an economic law approach.

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21 O. VerLoren van Themaat, *Het coördinatiebeginsel als coördinerend beginsel van het sociaal economisch recht*, Rede Utrecht 1968.

22 With exceptions: Gerhard Schricker, "Urheberrecht zwischen Industrie- und Kulturpolitik", GRUR 1992, 242-247; id, *Urheberrecht Kommentar*, München 1987, p.55. *See also infra* note 37 (Grosheide and Deurvorst) as well as Alfredo dos Santos Gil, "De Interne en Externe Eenheid van het Intellectuele Eigendomsrecht", NTBR 1995, p.221 note 4. Interesting observations and/or further references in M. van Hoecke (ed.), *De sociaal-economische rol van intellectuele rechten*, Brussel 1991, see: Gotzen, "Juridische systematiek en functie van de intellectuele rechten" (p.67, underlining the differences with industrial property right); Grosheide, Economische aspecten van intellectuele rechten, in het bijzonder van auteursrechten (p. 67); Alain Strowel, "L'Analyse économique du doit d'auteur. Une revue critique des arguments invoqués" (see references on p. 105 note 2).

a. Copyright as economic law

The essential step for an economic law perspective on copyright is the understanding that in the *market*, the principal actors are not the individual creators but the 'copyright industries' - publishers and producers. It is *their* position which is copyright's primary concern in this phase. As copyright history[23] very clearly shows, the origin of copyright law is the regulation, by the authorities, of competition, not between authors[24], but between publishers.[25] The ancient printing privileges were, as the name reveals, a protection for *entrepreneurs*; "in all of this, the role and the status of the author was minimal".[26] When it came to the creation of modern copyright acts in the 18th century, the driving force behind this were still the publishers[27], despite the insistance with which the natural rights of the author were invoked.[28] The circumstance that during the 19th century, the

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23 Overview of the literature about copyright's history with many references in: Kathy Bowrey, Who's Writing Copyright's History?, [1996] 6 EIPR, p. 322-329.

24 Copyright's economic law element must however not lead to an irrealistic view of the *author* as an entrepreneur: Herman Cohen Jehoram, "The Author's Place in Society and Legal Relations between Authors and those responsible for distributing their Works", Copyright 1978, 385-393.

25 With a certain endearment for publishers, Van Krevelen reassures us that "authors will always be writing and creating, under almost all social conditions - as we see demonstrated so poignantly in countries without free publishing", but complains that "the existence and the survival of a good publishers' community in any country is much more vulnerable; it can be ruined by insufficient or unjust legislation..." : Van Krevelen, "The Information Society and the Right of the Publisher", in: International Publisher's Association/Börsenverein des Deutschen buchhandels (ed.), *International Copyright Symposium Heidelberg 1986*, p.104.

26 Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, London/Kluwer 1987, p.3.

27 Ulmer, *Urheber- und Verlagsrecht*, 3rd ed. 1980, p.58; France: Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America", RIDA 147, janvier 1991, p. 125-289, at 171 (*also* in: *Of Authors and Origins*, p.131 et seq.); André Kerever, "The French Revolution and Authors' Right", RIDA 141, juillet 1989, p.9; England: Rose, *Authors and Owners, The Invention of Copyright*, Cambridge Massachusetts/London 1993, p. 60; id., "The Author as Proprietor: Donaldson v. Becket and the genealogy of Modern Authorship", in: *Of Authors and Origins*, p. 23 ff.; Netherlands: Hirsch Ballin, "Auteursrecht in Wording", in: *Auteursrechtelijke Opstellen*, Deventer 1970, p. 9-42; De Beaufort, *Het Auteursrecht in het Nederlandse en Internationale Recht*, Diss. Utrecht 1909, p. 39-52; Soetenhorst, *De Bescherming van de Uitgeefprestatie*, Diss. Utrecht 1993, p.12-15.

28 The natural rights of the author invoked around the French revolution may have been more like a new legal basis for the ancient privilege than a real change of paradigm: André Kerever, "The French Revolution and Authors' Rights", RIDA 141, juillet 1989, p. 9 ff; DdA 1990, 139. "Utilitarian and pragmatic considerations have contributed just as much to the shaping of the provisions of successive French laws as has natural law":

author emerged increasingly as copyright's central player[29] never changed the fact that the publishing industry was still there in the background, and that the rationales for the protection of that industry had not changed.[30] Copyright is enacted by the authorities. Instead of the freedom of competition, the state subjects competitors to other rules. The exclusive right provides a legal monopoly,[31] the aim of which is to stimulate cultural (and scientific) innovation.[32] Copyright in an economic law perspective is thus a restriction on competition on the lower level of production in furtherance of competition on the higher level of (cultural) innovation.[33] This striving to stimulate innovation allows economic law to extend copyright further than commercial law is able to within the context of its limited aim of ensuring good trade practices.

Importance of the economic law-perspective

Solutions which are appropriate from a private law perspective can prove to be erroneous and anomalous from the perspective of economic law. The long duration of copyright is good for authors, but too long for publishers. Encouragement of enterpreneurs calls for separate treatment

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Strowel, "Droit d'Auteur and Copyright: Between History and Nature", in: Sherman and Strowel (eds,), *Of Authors and Origins*, Oxford 1994, p. 248; also see A. Lucas/H.J. Lucas, *Traité de la Propriété Littéraire et Artistique*, p. 40.

29 Grosheide, *Auteursrecht op Maat*, p.312.

30 The publishers nowadays raise a claim again to an exclusive right of their own: Grosheide, "Copyright and Publishers' rights: Exploitation of Information by a Proprietary Right", *in*: Korthals Altes/Dommering/Hugenholtz/Kabel (eds.), *Information Law towards the 21st Century*, Deventer/Boston 1992, p. 295-307; Harald Heker, "The Publisher in the Electronic Age: Caught in the Area of Conflict of Copyright and Competition Law", [1995] 2 EIPR p. 75-80. The reason might as well be to enforce their 'political' position: David Ladd, "The Utility of a Publisher's Right", In: International Publishers Association/Börsenverein des Deutschen Buchhandels (Hrsg.), *International Copyright Symposium Heidelberg 1986*, p.93; L. van Krevelen, "Toekomstig Uitgeversrecht", CIER Publicaties B11-12) as their legal position, which is not that unsatisfactory: Soetenhorst, *De Bescherming van de Uitgeefprestatie*, Zwolle 1993 (Summary in German).

31 Not an economic monopoly: Strowel 1993, at 211 with reference to E.W. Kitch's same observation about the patent right.

32 The United States constitution: Article I, section 8, clause 8 of the Constitution gives to Congress the 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".

33 Von Weizsäcker, "Rechte und Verhältnisse in der modernen Wirtschaftslehre", Kyklos 1981, 345; Lehmann, "Property and Intellectual Property: Property Rights as Restrictions on Competition in Furtherance of Competition", 20 IIC 1 (1989).

vis-à-vis the reward of authors.[34] Also, if the economic law aspect of copyright had been more in mind, functional innovations like computersoftware would not have been considered eligible for copyright.[35] It is clear that functional works obey to categorically different considerations regarding the degree in which they should be available or protected. Instead, there now is copyright protection for computer programs, lasting until 70 years after the death of the author[36], possibly enriched by a moral right remaining with the employee-author.[37] Finally, the outcome of the famous *Magill*-case of the European Court of Justice, subjecting copyright protection to the rules of competition law[38], is not surprising from an economic law point of view.[39] Television program listings are functionally different from operas and sculptures.[40]

Relativity and limits of the economic law character

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34 Cornish, *Intellectual Property*, 2nd ed. 1989, p. 259, with reference to Plant's proposal to reduce the period in which a publisher could enjoy exclusive rights: Plant, (1934) 1 Economica 167, at 194-195; id, "The new commerce in Ideas and Intellectual Property" (1953) p. 15-18; also see Kanwal Puri, [1990] 1 EIPR p.17.

35 Protection of software is not compatible either with copyright's private law objective of protection of the personality of the maker: André Françon, "L'Avenir du droit d'auteur", RIDA No. 132, Avril 1987, p.9.

36 Rightly qualified by Ullrich as "a complete and utter perversion of Copyright" ("eine völlige Perversion des Urheberrechts"). Ullrich, "Die Gemeinschaftliche Gestaltung des Wettbewerbrechts und des Rechts des geistigen Eigentums - eine Skizze", in: Müller-Graff (Hrsg.), *Gemeinsames Privatrecht in der Europäische Gemeinschaft*, p. 369 note 212.

37 Gillian Davies calls it a "questionable proposition": Davies, "The Convergence of Copyright and Authors' Rights - Reality or Chimera?" [1995] 6 IIC Vol. 26 p. 986.

38 In the Netherlands, Grosheide (in Bijblad Industriële Eigendom 1986, p.187-188; also: *Auteursrecht op Maat*, p. 51 and p. 295) and Deurvorst (*op. cit.* 1994, p. 29) have touched on copyright's character as competition law before.

39 In this case, the refusal of broadcasting organizations to grant Magill a licence to publish their weekly programme listings was considered an act of abuse of a dominant position on the ground of art. 86 EC Treaty. Each television station published a television guide covering exclusively its own programs. Magill wanted to publish a comprehensive weekly TV guide in Ireland. ECJ, 6 april 1995, Joint cases No. C-241/91 P and 242/91 P, RIDA No. 165, juillet 1995, p. 173; [1996] IIC vol. 27 p.78-98, Comment by D.W. Feer Verkade.

40 Carine Doutrelepont, "Missbräuchliche Ausübung von Urheberrechten?", GRUR Int 1994, 307; Cohen Jehoram and Mortelmans, Ars Aequi 44 (1995) 10 811-822; Calvet et Desurmont, RIDA No. 167, janvier 1996, p.2-67. *Contra*: Feenstra, Informatierecht AMI 1996, p. 34.

Important as the economic law elements of copyright may be, copyright is not *only* economic law; the relativity of the economic law character of copyright must be emphasized. As solidly as can be maintained that *aspects* of copyright have an economic law-character, it can be maintained that other aspects do not. Moral rights have a natural, not an economic law character. And where policy reasons lead to the creation of a right to a fair remuneration (in the case of cable-retransmission[41], audio/video home copying, or reprography), commercial logic still has to be relied upon in order to see what fair trade practices allow each party to ask and to receive. Legislatures seem to resign to this development. In more than one country one might wonder whether consensus among competing interest groups has become the dominant legislative method for secundary use. This is a sign that trade practices override, or at least restrict, government dirigisme in this field.

The same applies with regard to the very foundation of copyright. Copyright is more than a privilege granted by the authorities and having its sole basis in the statute, although perhaps public law theorists might still like to regard it that way. The fact that the authorities enact a copyright law eclipses for a moment its other foundations, but does not efface them. It does not efface the private law/natural law justification, finding its most concise expression in the *droit de divulgation*. But it does not efface an autonomous *commercial* law logic leading to protection either. Publishers and producers are merchants[42], and their legal relations are governed by the legal framework applying to merchants. Would it serve honest trade practices to forbid imitation and piracy? In an impulse almost as primary as natural law dogmas, commercial law considers wild and easy copying as 'unfair'. After all, the merchant has *paid* the author to make the work available to him; in many cases, he has done further investments. He feels that he deserves a fair return on his investments before the innovation becomes freely available to his competitors, who have incurred no costs and are hence able to alone, produce at a lower price. He is not impressed

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41 *See* Council Directive 93/83/EEC of 27 September 1993 on satellite broadcasting and cable retransmission, OJL 248/15, article 9.

42 *"Tous les éditeurs sont commerçants, qu'ils éditent des livres, de la musique, des disques ou des films cinématographiques"* (Georges Ripert & René Roblot, *Traité de Droit Commercial*, Vol. I, 13th ed. Paris 1989.

by the fact that from a strict viewpoint of (private) competition law[43], the maxim of free competition should apply. Indeed, many national systems of competition law basically will consider imitation *unfair* only under special circumstances: for example, in case of confusion, industrial espionage, bribery, slavish imitation, systematic imitation, or similar accompanying circumstances.[44] Such additional conditions can be bypassed by bringing the object under copyright protection. And indeed, this is widely practiced.

A strong indication for such commercial morals is that in many areas of the information industry, "spontaneous" forms of protection emerge, even *despite* the fact that the official legal doctrine *denies* protection. Competitors in a certain branches are found to respect 'rights' which legally are nonexistent! Even more amazing is that when judges feel that protection is fair, they will help find ways to protect the unprotected (often by stretching the domain of copyright). Rights in sporting events and T.V.-formats are examples of spontaneously respected claims which may have been legalized by ad hoc legislation in some countries, or semi-legalized by case law in others.
The fact that protection is created without a basis in a specific statute unveils elements of private commercial law (and equity) in the mosaic sustaining intellectual property rights.

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43 Characterizing unfair competition law as private law is a matter of degree rather than of principle; moreover, the degree can vary according to different national systems and their way to legislate and to police in this field. As is submitted hereafter, private and public law elements intermingle in the commercial field. *See also* Hanns Ullrich, "Die Gemeinschaftliche Gestaltung des Wettbewerbsrechts und des Rechts des Geistigen Eigentums - Eine Skizze", in: *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (1992), p. 326/327.

44 Reichman (94 Columbia Law Review 2432-2558 (1994) rightly poses the problem, whether the fact that copying is becoming ever easier does not take away the premise on which the existing regimes of trade secret law and related laws protecting confidential information are based. Although Reichman's observation applies to the intellectual property field in general, it could easily be adapted to copyright law more specifically. Here also, a need for different rules becomes clear as the lead-time of the first publisher loses ever more significance. Thus, the meaning what is *unfair* in relation to a competitor can also change: as copying becomes cheaper and easier everyday, the laws of unfair competition will reflect a more benevolent attitude towards the protection against too *easy copying*. The same reasoning appears from Ginsburg's remark that the premise underlying private copying exemptions is that private copying would be laborious and economically insignificant ("Putting Cars on the 'Information Superhighway", supra note 5, p. 200.

4. PUBLIC INTERESTS: AUTHORS, USERS AND CONSUMERS

In granting copyrights, the public authorities are inspired by utilitarian objectives. But the authorities will (have to) be guided by *all* the objectives the state has to take care of. This means, in the first place, that the legislator must protect the author in his weaker position. The persisting natural law claim of the author to a just reward will find itself joined by the social objectives public law takes care of.[45] Legislators who create an exclusive right in the orchard, which is often occupied by the publisher, should see to it that the picker's wage for the author is secured.

But the interests of users and consumers also have to be taken into account. They are central issues in every copyright law. The case of users and consumers in a copyright context is not the self-centered interest of yet another consumers' lobby. It concerns informational freedoms, educational interests, the spreading and availability of knowledge. The interests mentioned touch on essential issues of a free and democratic society. It is of paramount importance for authorities to be aware that this belongs to their explicit assignment in framing copyright policy, and that copyright is not merely economic law in a narrow sense.

Issues of freedom of information belong to the public sphere. There is no institutional lobby to defend them except the legislator or the peoples' representatives themselves. Therefore, authorities *must* take them into account. The impression is that this task is presently underestimated. There is too much confidence that the old legal framework still satisfies present needs. There seems to be little careful consideration before reducing users' rights to make room for industrial progress. There is little

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[45] Legal reasonings parallel to labor law or social law may apply, thus making copyright an even more complex structure: Dietz, "The Social Endeavors of Writers and Artists and the Copyright Law", IIC 1972, p. 451 = "Die sozialen Bestrebungen der Urheber und Künstler und das Urheberrecht", GRUR 1972, 11; *see also* RIDA 1988, No. 138, p. 22-75.

awareness that it concerns an issue as fundamental[46] as protection itself. We will elaborate on this in part II.

5. COPYRIGHT AS A LEGAL BALANCE: CONCLUSION

Copyright is a system built on a subtle balance of interests, in which private-law, commercial-law and economic-law logics and concerns are surprisingly well combined. This system of balances is not made explicit in the statutes; what *is* explicit however is the place which the system reserves for the public domain, for carefully forged *exceptions* to copyright. Yet it is precisely here that negligence appears and the balance threatens to be disturbed.

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[46] D.W.F. Verkade, *Intellectuele Eigendom, Mededinging en Informatievrijheid*, Inaugural Lecture Leyden 1990, with special attention for the relation with article 10 European Convention on Human Rights, *see* 37-40.

II. THE BALANCE DISTURBED

1. SHIFT TO PRIVATE LAW LOGIC? PUBLISHER MOVES FROM 'MERCHANT' TO 'AUTHOR'

Publishers and producers used to be intermediaries. They were the merchants, buying the intellectual product as raw material with the author and selling it as a finished product on a support. They could afford to take towards the protection of the work a less jealous attitude as the author. For the author, every use of the work forms a trespass on his private property; for the publisher as a merchant, profit counted more than property.

But the role of publisher and producer changes.[47] The former intermediary more and more becomes an *author* himself. For more and more products, publishers and producers themselves take the initiative, select the persons able to realize the product, organize the schemes and facilities for the production. Even the *creation* of the work more and more becomes the concern of the publisher and producer: they are involved in the creative phase.

Moreover, the publisher's/producer's traditional field of manufacturing and distribution, will to all probabilities lose much of its importance in the digital society. The digital manufacturing of copies hardly is a specialised job. The commercial efforts and know-how involved in keeping up a distribution-network will become less important, as the market where producers hunt for consumers will change into one where consumers seek direct on line-contact with their providers. Instead of being just an anonymous 'market', consumers could grow into a kind of commercial 'audience'. Three factors thus place the publisher/producer in a position more similar to that of an author: more creation-oriented, less manufacturing-oriented, more audience-oriented.

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47 Laurens van Krevelen, *op. cit.* 1986, p. 100: "Publishing has, in fact, evolved from a business into a profession. Nowadays the book publisher is far more active in the three essential fields of his profession: editorial, production and distribution."; Soetenhorst, *op. cit.* 1993 p. 20-21.

As a consequence, the publishers and producers take on the psychological position of the author. The result can be that the basis of their claims will shift from commercial law to private law-based thinking, from 'merchandise' to 'property'. There is a difference: the wood-merchant will only charge you when you cut the tree, but the tree-owner will also charge you for sitting in the shade. Finally, publishers will not welcome government (or authors' societies[48]) to interfere in the contact between them and their 'own' audience.[49] To the contrary, both the author and the authors' societies will gradually be pushed to the sidelines.[50] Because the contact between the online-information provider and his customer is individualized, information can be sold piecemeal and subject to any contractual provision, including provisions which put aside legal exceptions. Publishers who feel that their work is their property, will not have the State dictate them at what conditions it must be put at the disposal of the public.

The publishers are well-organised and well informed. They can exert strong economic and political pressure. That is their good right. But the parties in the copyright field who have the task to watch other interests, should be alert. Are they?

2. DECLINE OF THE COMMERCIAL LAW BUFFER ZONE

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48 The "rightholders, particularly the publishers, are quite openly reluctant to entrust collecting societies with the administration of the rights for digital uses": Ferdinand Melichar, "Collective Administration of Electronic Rights: A Realistic Option?", in: P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, The Hague/London/Boston 1996, p. 147-152.

49 "One of the serious threats of the new technology is that it could give to the right owners a dominant position to control the flow of information from the input in the databases, through the network to the site of the end users": Dommering, "Copyright being Washed Away through the Electronic Sieve. Some Thoughts on the Impending Copyright Crisis", in: Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, p. 1-11, at 10.

50 Barbara Ringer, "Copyright and the future of Authorship", Copyright 1976, 155-158 = Le Droit d'Auteur 1976, 158 *et seq.*; Gunnar W.G. Karnell, "The Berne Convention between Authors' Rights and Copyright Economics - An International Dilemma", [1995] 2 IIC vol. 26 p. 193-213.

The retreat of the publisher to an author's position causes moreover a decline of the intermediary "commercial field" which is of paramount importance to the system of balances in copyright.

The "commercial law-zone" plays a vital role in the coexistence of the three copyright spheres.It is clear that private law and economic law will not get along very well. Property law thinking keeps state interference down to a minimum, whereas economic law consists in its very essence of state interference. Economic law considers copyright as a tool, not as a right, even if it tries to accommodate the author. Economic law and private law, therefore, conflict as to the ultimate rationales for copyright: justice or utility.

Instead, the commercial law logic goes along well with both of the abovementioned approaches. It leaves private law pride intact until the rightholder, by his own will and choice, decides to offer the work to the market and to subject it to the rules of the market. Economic law and commercial law also go along well together. Government intervention in the field of market and commerce is an age-old phenomenon.[51] Close - sometimes too close - relations between the publishers and the authorities date back to the time before the dawn of authors' rights.

As the commercial law layer in the copyright-structure declines, the field which is governed by commercial law logic and which absorbs the shocks of conflicting logics of the private law (author's interests) and the economic law (societies' interests) perspective on copyright, becomes more limited.

3. EMPHASIS ON ECONOMIC LAW POLICIES IN FAVOUR OF MORE PROTECTION

In the face of growing business pressure for more rights, one would expect, a determined reaction from the authorities' side in order to secure

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[51] How much the fields are related is exemplified in the literature dating from before the term "economic law". Molengraaff, the most distinguished Dutch expert on commercial law at the turn of the century, opposes 'private commercial law' and 'public commercial law', the last being what is presently called economic law. W.L.P.A. Molengraaff, *Leidraad bij de beoefening van het Nederlandsche Handelsrecht*, 6th ed. 1930, Part I, p. 39-40.

the interests of consumers and society as a whole. But the contrary is true. When economic figures revealed a surprising participation of the copyright industries in the GNP of the industrialized nations[52], and when copyright emerged ever more as the key regime for information technology[53], copyright policy became identified with the sole concern for (more) copyright protection. The documents announcing the guidelines for the future development of copyright, like the U.S. White Paper, the Green Paper of the European Commission and the European Directives, all reflect an extremely protective attitude.

The European Software Directive[54] considers computer program technology "as of fundamental importance for the Community's industrial development." The legislature understood its mission: the scope of the reproduction right was extended to cover aspects which had never been covered by copyright before, like the pure *use* of the program, in particular the running of the program and screen display.[55] A similar extension is discussed in the frame of the electronic highway.[56] In 1992, rental and

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52 H. Cohen Jehoram, "Critical Reflections on the Economic Importance of Copyright", [1989] 4 IIC vol. 20, p. 485-497; Olsson, "Copyright in the National Economy", Copyright 1982, 130-131; Uchtenhagen, "The Economic Significance of Copyright", Copyright 1989, 280-282; Hummel, "The Economic Importance of Copyright", Copyright Bulletin 1990, 2, p. 14-21.

53 Cornish, "Copyright across the Quarter-Century", [1995] 6 IIC vol. 26 p. 812.

54 Council Directive 91/250/EEC of 14 May 1991, OJL 122, 42.

55 A result which was vividly discussed. Doubts are emitted amongst many others by Andrew Christie, "Designing appropriate protection for Computer programs", [1994] 11 EIPR 486-493, V. 488/89; Jan Berkvens, "Data regulation in Copyright Law: Will the Problem ever be Solved?" [1993] 3 EIPR 79-82; P. Bernt Hugenholtz, "Convergence and Divergence in Intellectual Property Law: The Case of the Software Directive", in: Korthals Altes/Dommering/Hugenholtz/Kabel (eds.), *Information Law Towards the 21st Century*, Deventer/Boston 1992, p. 319-323; Ullrich/Körner, *Der Internationale Softwarevertrag*, Heidelberg 1995, p.67/68, with further references to the discussions in Germany.

56 Various opinions in: P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, The Hague/London/Boston 1996, Hugenholtz (p. 81-102); Ficsor (p. 125-126); Spoor (p. 75, 78). Violently criticized by Jessica Litman, "The Exclusive Right to Read", 13 Cardozo Arts & Entertainment Law Review 1994, p. 29-54; also see Thomas Richard, NJB 1996, 957-962. The WIPO Copyright Treaty adopted at the Diplomatic Conference on December 20, 1996 does not contain such an extended reproduction right, although it appeared in Art. 7 of the original proposal. Defying and original - and worth more attention - is Paul Geller's remark that " ... a sign-wealth norm would allow for increased use of sign materials from completed works, and indeed increased use of the works themselves, as they are released into increasingly accessible

lending rights and related rights[57] likewise were considered as of fundamental importance for the Community's *economic* (italics AQ) and cultural development. And again, rights were introduced and/or reinforced where information used to flow freely. Recital 10 of the *copyright term*-directive[58] stresses the interests of not only authors and cultural industries, but also of consumers and society as a whole. However, it fails to explain what interest these last two categories in particular have in a copyright which lasts 20 years longer than the quite generous term in force in most countries.[59] Anyway, what emerged was a *stronger* copyright. The directive also introduced a 50-year (!) term for related rights. The same term was upheld on 20 December 1996, in the WIPO Performances and Phonograms Treaty. A protective attitude also prevailed when the Commission came to legislate on the protection of databases[60], although there was a notably sensitive aspect of freedom of information. Despite this[61], protection was intensified by adding a new 'sui generis' intellectual property regime. The 1992 draft[62] provisions for compulsory licensing have been dropped. The present text is user-unfriendly.[63]

The above enumeration is not exhaustive. It does not need to be in order to show that despite irritations about copyright, the tendency is to extend its domain and scope. The reasons are the phenomenal economic interests concerned and the huge investments made.

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communication networks". Paul Edward Geller, "Must Copyright be For Ever Caught between Marketplace and Authorship Norms?", in: Sherman and Strowel (ed.), *Of Authors and Origins*, p. 193; RIDA 159, janvier 1994, p.3-109.

57 Council Directive 92/100/EEC of 19 November 1992, OJL 346/61.

58 Council Directive 93/98/EEC of 29 October 1993, OJL 290/9.

59 Cf. Patrick Parrinder, "The Dead Hand of European Copyright", [1993] 11 EIPR 391-393.

60 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJL 77/20.

61 According to the recitals, databases are not sufficiently protected (1); they require investment of considerable resources (7); they are a vital tool in the development of an information market within the Community (9); investment will not take place within the Community unless a stable and uniform protection regime is introduced (12).

62 Draft 92/C 156/03 COM (92) 24 def. - SYN 393, presented by the Commission on 15 April 1992, OJC 156/4.

63 P.B. Hugenholtz, "De Databankrichtlijn eindelijk aanvaard: een zeer kritisch commentaar", Computerrecht 1996, 131-138; H.M.H. Speyart, "De databank-richtlijn en haar gevolgen voor Nederland", Informatierecht AMI 1996, V. p. 175, 179.

V CONCLUSION: THE BALANCE DISTURBED

It is an exceptional moment indeed to look at copyright. A momentary constellation makes all the forces move in the direction of stronger protection. The publisher uses private law concepts to enforce commercial law positions. Politicians and legislators pretend that economic law objectives satisfy all public law concerns. While they were not so long ago still concerned with the rights and needs of society as a whole, economic arguments have turned them into zealous supporters of heavy armored literary property.[64] Only a ship without a single leak, so trained lobbyists tell them, can defy the waves of international competition. So legislatures have turned into entrepreneurs, trading off legal protection against (the hope for) investments in information technology and creativity. Information industries and legislators concur in a *force de dissuasion* against the user.[65]

It is an economic choice which will have economic consequences. Plump rights risk creating and upholding plump market positions. One could ask how useful this all is from a long term policy perspective. The day will most certainly come when other interests will surface: interests of smaller entrepeneurs, who are able to act more flexibly than the mega-marketoperators' or interests of society at large or of libraries and educational services. 'The digital challenge we have to face' is more than just the race for who can provide maximum protection. Copyright was, by its very essence, crafted to fulfill the role of a mediator between different interests and market forces. One *cannot* reduce copyright to the legal vehicle of a triumphalist information-economy without disturbing its underlying system of legal balances.

In the long run, the inevitable outcome will be a re-balancing of copyright policy, but at the expense of having been degraded in the meantime from a

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64 Gunnar W.G. Karnell, "The Berne Convention Between Authors' Rights and Copyright Economics - An International Dilemma", [1995] 2 IIC Vol. 26, p. 195/196.

65 And sometimes, by the way, against the author: Kerever, "Le droit d'auteur: acquis et conditions de la culture juridique Européenne", DdA 1990, p.145.

fundamental institution to a political tool which can take on a different form any moment the winds change.

Copyright is built on a geological structure composed of several legal earth layers which move. Tensions are inevitable. Earthquakes and volcanic eruptions will occur. But the legislators who build its structures will have to take into account *all* the hidden forces under the surface into account. At the moment, the bulk of industry is left to its own idiosyncratic tendencies. This can hardly be copyright's vocation.

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