

Table of contents

List of abbreviations.....XIX

PART I COPYRIGHT AND DIGITISATION 1

1. Introduction 3

1.1. The research question 3

1.2. Terminology 4

1.3. The value of transformative and non-transformative uses in the
copyright system 6

1.4. New kinds of transformative use 9

1.5. Non-transformative use..... 10

1.6. The structure of the book 12

2. The impact of digitisation on the desirability of copyright exceptions 15

2.1. An economics-based introduction to the book problem..... 15

2.1.1. Works of intellect as public goods 15

2.1.2. From imperfect to perfect excludability 17

2.1.3. Perfect lock-up of copyrighted information 20

2.2. Legal consequences 22

2.2.1. In search of a public policy without free access to copyrighted
works..... 23

2.2.2. DRM and the economics of copyright exceptions 27

2.2.2.1. Transaction costs and the market failure behind private
copying..... 27

2.2.2.2. Why the market failure rationale behind private copying
is losing its significance 28

2.2.2.3. The persistence of “bargaining breakdown” problems 30

2.2.2.4. Which justifications are affected by the implementation
of DRM? 33

2.2.3. Privacy concerns 34

2.3. The legal framework: copyright exceptions under EU law..... 36

2.4. Summary 38

PART II EU DIGITAL COPYRIGHT LAW FROM THE END-USER PERSPECTIVE.....	41
3. Copyright harmonisation according to technological dictates	43
3.1. Introduction	43
3.2. Legal basis and objectives of copyright harmonisation in the EU	43
3.2.1. The progressive development of a Community copyright policy ...	44
3.2.1.1. Free movement of goods and the exhaustion principle.....	44
3.2.1.2. National copyright protection under Article 30 of the EC Treaty.....	45
3.2.1.3. Copyright legislation as a tool fostering market integration	46
3.2.2. Legal basis and specific objectives of the InfoSoc Directive.....	49
3.2.2.1. The legal basis of Article 95 of the EC Treaty.....	49
3.2.2.2. The objectives of the 1995 Green Paper	50
3.2.2.3. The objective to implement the 1996 WIPO Copyright Treaty	51
3.3. The re-definition of the copyright scope.....	52
3.3.1. The national dimension of copyright's subject matter	52
3.3.1.1. The absence of a single standard of originality	53
3.3.2. Territorial restrictions in copyright management.....	54
3.3.3. The overstretched exclusive right of digital reproduction	58
3.3.3.1. The notion of reproduction under the EC Software Directive	58
3.3.3.2. Exemption of certain software reproductions from copyright protection.....	60
3.3.3.3. The exclusive right of reproduction under the InfoSoc Directive	61
3.3.4. The exclusive right of communication to the public.....	65
3.3.5. The right of distribution of tangible copyrighted goods	66
3.3.6. Intangible copyrighted goods as services.....	67
3.4. Anti-circumvention law in defence of technological protection measures	69
3.4.1. The provisions of Articles 6 and 7 of the InfoSoc Directive	69
3.4.2. What “access right” in the EU?.....	71
3.4.3. Discrepancies in the national implementation of anti-circumvention law	74
3.5. Summary.....	76
4. The legal treatment of copyright exceptions under secondary EU law	77
4.1. Introduction: from vertical to horizontal exceptions.....	77
4.2. The introduction of the three-step test under EU law	80
4.2.1. The three-step test under international law	80
4.2.2. The transposition of the test into EU law.....	84
4.3. The new requirement of <i>legal access</i> at the expense of <i>lawful use</i>	86
4.4. The InfoSoc Directive's exhaustive list of copyright exceptions	89

4.4.1. Non-transformative use: private copying.....	89
4.4.2. Transformative uses.....	93
4.5. Safety nets for copyright exceptions against DRM systems.....	94
4.5.1. Obligations created by Article 6(4).....	95
4.5.2. The narrow scope of Member States' obligations.....	96
4.5.3. Consequences of the Article 6(4) system.....	98
4.5.4. The model interface between copyright, contract and technical measures of the Software Directive.....	100
4.5.5. Monitoring systems on the effective enforcement of exceptions..	102
4.6. National exceptions after the InfoSoc Directive: a brief overview	104
4.6.1. Preliminary remarks.....	104
4.6.2. What national exceptions, in the concrete?.....	105
4.6.2.1. Private copying	105
4.6.2.2. Transformative use.....	107
4.6.2.3. A few examples of extension of the statutory protection of copyright exceptions.....	108
4.7. Summary.....	109
5. Digital copyright law: general policy issues under the EC Treaty.....	111
5.1. Introduction	111
5.2. The failure of the InfoSoc Directive in the pursuit of market integration	113
5.2.1. Fragmentation on markets for tangible and intangible goods	114
5.2.2. Inconsistency with Article 95 of the EC Treaty	115
5.3. The clash with Member States' cultural policies	118
5.3.1. The deadlock of national copyright exceptions.....	119
5.3.2. Article 151(4) of the EC Treaty and national copyright exceptions	119
5.4. End-use licences and EU consumer contract law: a neglected intersection.....	120
5.4.1. The absence of consumer protection measures under digital copyright law	121
5.4.2. Consumer protection under EU private international law	121
5.4.3. Consumer contract law.....	123
5.4.3.1. A brief comparison between U.S. and EU contract laws .	123
5.4.3.2. Duties of transparency in the EU Distance Contract Directive.....	126
5.4.3.3. Overriding copyright exceptions as an unfair commercial practice?	129
5.4.3.4. The end-user's information right against technical restrictions.....	130
5.4.3.5. Conclusive remarks on consumer protection	132
5.5. Summary.....	133

PART III UNSETTLED ISSUES.....	135
6. Implications of sharing copyrighted works on the Internet	137
6.1. Introduction	137
6.2. End-user liability: the United States	138
6.2.1. The birth of file-sharing technologies	138
6.2.2. File-sharing under the U.S. fair use doctrine	139
6.2.2.1. Purpose and character of file-sharing.....	140
6.2.2.2. Nature and portion of the work used.....	142
6.2.2.3. Effect of file-sharing on the market for copyrighted works.....	142
6.3. End-user liability: the European Union	143
6.3.1. Peer-to-peer downloads under the exception of private copying ..	143
6.3.2. Peer-to-peer networks as a lawful source of unauthorised copyrighted works?.....	147
6.3.3. Unauthorised downloads under the three-step test.....	149
6.4. Peer-to-peer software providers' liability: the United States	152
6.4.1. The U.S. case law.....	153
6.4.1.1. The Napster case.....	154
6.4.1.2. The Aimster case	155
6.4.1.3. The Grokster case	156
6.4.2. How consideration of non-infringing uses has an impact on indirect liability.....	158
6.4.3. Findings from the U.S. case law	162
6.5. Peer-to-peer software providers' liability: the European Union	162
6.5.1. Copyright liability in the <i>Kazaa</i> and <i>BitTorrent</i> cases	163
6.5.1.1. Direct liability	164
6.5.1.2. Indirect liability.....	164
6.5.2. Possible technology's restrictions under Article 8 of the EU Intellectual Property Rights Enforcement Directive.....	166
6.5.3. Indirect liability under the principle of due care	168
6.5.3.1. Duties of care on the Internet after the E-Commerce Directive	168
6.5.3.2. Duties of care upon ISPs and network operators	169
6.5.3.3. Duties of care upon peer-to-peer software providers	172
6.5.4. Findings from EU law and from the national case law	174
6.6. Summary.....	175
7. Freedom of use vs. DRM Technology	179
7.1. Introduction	179
7.2. DRM technology under EU law	180
7.2.1. Legal basis for the protection of DRM technology	180
7.2.2. From an <i>ex post</i> to an <i>ex ante</i> determination of fairness	181
7.2.3. DRM and the EU ambiguous system of copyright exceptions.....	182
7.2.4. Consequences of the condition of <i>legal access</i> to DRM-protected works	183

7.3. The European Commission's view of DRM technology	186
7.3.1. The 2004 Communication on copyright management	186
7.3.2. The main Commission's objectives	187
7.4. Specific issues raised by DRM technology: Interoperability	189
7.4.1. DRM systems as copyright-protected computer programmes	190
7.4.2. Copyright vs. interoperability: the case of Apple's DRM system	190
7.4.3. The example of new pro-interoperability legislation in France.....	193
7.4.4. Copyright protection and EU interoperability policy	196
7.5. Restriction of private copying.....	200
7.5.1. The policy option of preserving private copying notwithstanding DRM.....	200
7.5.2. The <i>Mulholland Drive</i> case in France: does a <i>right</i> of private copying exist?	201
7.5.3. May private copying of copy-protected works be compatible with the three-step test?	205
7.5.4. The role of national law in the preservation of digital private copying	210
7.6. Restriction of transformative uses.....	215
7.6.1. May DRM technology address cumulative creativity and innovation?.....	215
7.6.2. Policy options for the accommodation of cumulative creativity ...	219
7.6.2.1. Creating an exception of fair circumvention.....	220
7.6.2.2. Creating a user rights management infrastructure.....	224
7.7. Summary.....	227

PART IV WORKING SOLUTIONS IN THE EU COPYRIGHT SYSTEM.....231

8. Copyright policy alternatives for preserving end-user freedom of expression and information.....	233
8.1. Addressing the conflict between copyright and freedom of expression..	233
8.1.1. The legal value of Article 10 of the ECHR.....	233
8.1.2. Copyright vs. free expression	235
8.2. Restrictions on freedom of communication over peer-to-peer networks.....	239
8.2.1. Peer-to-peer networking and free communication	239
8.2.2. How copyleft licences increase the magnitude of <i>free</i> information.....	241
8.3. EU copyright enforcement policy in respect of file-sharing	245
8.3.1. Targeting copyright enforcement at individuals.....	246
8.3.1.1. The United States	246
8.3.1.2. The European Union	248
8.3.1.3. Why this option would be cost-ineffective and short-sighted.....	251
8.3.2. Copyright levies to compensate creators.....	252

8.3.2.1. The ‘Fisher-Netanel’ proposal of a non-commercial use levy system	253
8.3.2.2. Costs and benefits of a copyright levy system	256
8.3.2.3. Why this policy option does not fit EU digital copyright law	258
8.3.3. Mandatory collective administration of online exclusive rights ...	260
8.3.3.1. Is mandatory collective management a legitimate policy option?	261
8.3.3.2. Mandatory collective management, international law and the <i>acquis communautaire</i> on copyright entitlements	263
8.3.4. Seeking complementarity between file-sharing and copyright-protecting technologies	268
8.3.4.1. Mandating the adoption of copyright-protecting technologies	269
8.3.4.1.1. Re-design of peer-to-peer technology	269
8.3.4.1.2. Adoption of filtering technologies	271
8.3.4.1.3. On the suitable function of DRM systems and fingerprints	272
8.3.4.2. Advantages of this policy option	274
8.4. The adverse impact of current DRM technology on free uses	276
8.4.1. Collision with the principle of freedom of expression	277
8.4.2. Chilling effects on follow-on uses: a user rights management infrastructure as a possible way out	278
8.5. Summary	282
9. Conclusion: towards a better EU copyright law	285
9.1. Introduction	285
9.2. Creating a user rights infrastructure	285
9.2.1. Legal protection of technical measures should follow copyright law	286
9.2.2. Replacing copyright exceptions by a law of users’ rights	287
9.3. Elements of a user rights management infrastructure	292
9.3.1. Implementation of the ‘fair use by design’ requirement	292
9.3.2. Implementation of a mixed user rights infrastructure	293
9.3.3. A single EU interoperability policy for DRM technology	297
9.4. Re-adjusting the three-step test	302
9.4.1. The flawed function of Article 5(5) under the InfoSoc Directive ..	303
9.4.2. Suitable revision of the function of the test inside the InfoSoc Directive	305
9.5. Summary	307

APPENDIX311

Appendix I - Digital Rights Management: The Technological Scenario313

**Appendix II - Examples of National Transposition of Article 6(4) of the
InfoSoc Directive325**

**Appendix III - Directive 2001/29/EC of the European Parliament and
of the Council of 22 May 2001 on the harmonisation of certain aspects
of copyright and related rights in the information society
(Official Journal L 167, 22.06.2001, p.10).....333**

Reference List349

Index367