Copyright in the age of online access

Alternative compensation systems in EU copyright law

de Miranda Branco Tomé Quintais, J.P.

Publication date
2017

Document Version
Other version

License
Other

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
Copyright in the Age of Online Access
Alternative Compensation Systems in EU Copyright Law

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. ir. K.I.J. Maex
ten overstaan van een door het College voor Promoties ingestelde
commissie, in het openbaar te verdedigen in de Agnietenkapel
op donderdag 12 januari 2017, te 10:00 uur door

João Pedro de Miranda Branco Tomé Quintais

geboren te Oeiras – São Julião da Barra, Portugal
Promotiecommissie:

Promotor: Prof. dr. P.B. Hugenholtz, Universiteit van Amsterdam

Co-promotor: Dr. L. Guibault, Universiteit van Amsterdam

Overige leden: Prof. dr. M.M.M. van Eechoud, Universiteit van Amsterdam
Prof. dr. C. Geiger, University of Strasbourg
Prof. dr. D. Gervais, Law School, Vanderbilt University
Prof. dr. N. Helberger, Universiteit van Amsterdam
Dr. Joost Poort, Universiteit van Amsterdam

Faculteit der Rechtsgeleerdheid
Concise Table of Contents

LISTS OF FIGURES AND TABLES ........................................................................................................................................... 8
LIST OF ABBREVIATIONS ........................................................................................................................................................ 9
ACKNOWLEDGEMENTS ......................................................................................................................................................... 10
1 INTRODUCTION: CHALLENGES FOR COPYRIGHT IN THE ONLINE ENVIRONMENT ........................................ 12
2 COPYRIGHT REWIND: PRECEDENTS FOR COMPENSATION SYSTEMS ............................................................. 28
3 ALTERNATIVE COMPENSATION SYSTEMS: TAXONOMY OF LEGALISATION PROPOSALS .................. 83
4 BETWEEN RIGHTS AND LIMITATIONS: MAPPING THE SPACE FOR THE LEGALISATION OF THE ONLINE USE OF COPYRIGHT WORKS ........................................................................................................ 138
5 COPYRIGHT REFORM: ADMISSIBILITY OF LEGALISATION UNDER THE THREE-STEP TEST AND THE OBJECTIVES OF EU COPYRIGHT LAW ........................................................................................................ 211
6 SUMMARY AND CONCLUSIONS: TOWARDS ACCESS AND REMUNERATION ........................................ 309
ANNEX 1. LIST OF PROPOSALS FOR ALTERNATIVE COMPENSATION SYSTEMS ........................................ 343
REFERENCES .......................................................................................................................................................................... 354
SHORT SUMMARY ................................................................................................................................................................ 397
SAMENVATTING ................................................................................................................................................................... 402
3.3.4 Mandatory Collective Management ................................................................. 107
    3.3.4.1 Characterisation and Legal Framework .................................................... 107
    3.3.4.2 Theories on Mandatory Collective Management ....................................... 110
        3.3.4.2.1 Limited Applicability to Exclusive Rights ............................................. 111
        3.3.4.2.2 Broader Applicability to Exclusive Rights ............................................. 112
    3.3.4.3 Legalisation Proposals ............................................................................... 115
3.3.5 Legal Licences: Statutory and Compulsory ................................................................. 116
    3.3.5.1 Characterisation and Legal Framework .................................................... 116
    3.3.5.2 Legalisation Proposals ............................................................................... 119
3.3.6 State Systems .................................................................................................... 122
    3.3.6.1 Characterisation and Legal Framework .................................................... 122
    3.3.6.2 Legalisation Proposals ............................................................................... 125
3.4 Attributes of Alternative Compensation Systems ......................................................... 127
    3.4.1 Subject Matter Scope .................................................................................... 127
    3.4.2 Substantive Rights Scope: Authorised Use ..................................................... 128
    3.4.3 Compensation Type ..................................................................................... 131
    3.4.4 Management System ................................................................................... 131
    3.4.5 Compensation Targets ................................................................................ 133
    3.4.6 Burden of Compensation ............................................................................. 134
3.5 Conclusions .......................................................................................................... 135

4 BETWEEN RIGHTS AND LIMITATIONS: MAPPING THE SPACE FOR THE LEGALISATION OF THE
ONLINE USE OF COPYRIGHT WORKS ...................................................................................... 138

4.1 Introduction ............................................................................................................. 138
4.2 Typology of Online Uses ........................................................................................... 139
    4.2.1 Browsing ......................................................................................................... 139
    4.2.2 Downloading .................................................................................................. 140
    4.2.3 Streaming ........................................................................................................ 140
    4.2.4 Stream Capture or Ripping ............................................................................ 141
    4.2.5 Uploading ....................................................................................................... 141
    4.2.6 Hyperlinking ................................................................................................... 142
    4.2.7 Digital Adaptations ......................................................................................... 142
4.3 How Does the Bundle of Exclusive Rights in the Acquis Apply to Mass Online Use of Works by
Individuals? ....................................................................................................................... 144
    4.3.1 Uses Covered by the Right of Reproduction .................................................... 145
        4.3.1.1 Legal Framework ..................................................................................... 145
        4.3.1.2 Application to Activities of Internet users ................................................ 147
    4.3.2 Uses Covered by the Right of Communication to the Public ............................... 148
        4.3.2.1 Legal Framework ..................................................................................... 148
            4.3.2.1.1 An “Act of Communication” ................................................................. 151
            4.3.2.1.2 Communication to the “Public” ............................................................ 152
                New Public .................................................................................................. 154
                Specific Technical Means .......................................................................... 156
            4.3.2.1.3 Profit-Making Nature of the Communication ........................................... 157
        4.3.2.2 Application to Activities of Internet Users ................................................ 158
        4.3.2.3 Issues of Legal Certainty ......................................................................... 162
4.4 What Limitations Apply to Uses Covered by Exclusive Rights? ...................................... 167
    4.4.1 General Framework, Objectives and Interpretation of Copyright Limitations ........ 167
        4.4.1.1 General Framework .................................................................................. 167
        4.4.1.2 Relationship with Technological Protection Measures ............................. 169
        4.4.1.3 Objectives ................................................................................................ 172
        4.4.1.4 The Court’s Case Law: From Strict Interpretation to Restricted Flexibility 174
        4.4.1.5 Interim Conclusions ............................................................................... 179
        4.4.1.6 The Court’s Case Law: From Strict Interpretation to Restricted Flexibility 174
    4.4.2 Temporary and Transient Copying ...................................................................... 180
    4.4.3 Private Copying ................................................................................................ 185
        4.4.3.1 Private Use ................................................................................................ 185
        4.4.3.2 Non-Commercial ..................................................................................... 186
5 COPYRIGHT REFORM: ADMISSIBILITY OF LEGALISATION UNDER THE THREE-STEP TEST AND THE OBJECTIVES OF EU COPYRIGHT LAW

5.1 INTRODUCTION

5.2 ANALYTICAL FRAMEWORK OF THE THREE-STEP TEST

5.2.1 Variants and Interpretation

5.2.1.1 The Berne Convention and its Relationship to Other Treaties

5.2.1.2 The WIPO Treaties and the Agreed Statements

5.2.1.3 The Agreement on Trade-Related Aspects of Intellectual Property Law

5.2.1.4 EU Copyright Law and its Relationship to International Law

5.2.2 Spectrum of Readings

5.2.2.1 Strict Interpretation

5.2.2.2 Flexible Interpretation

5.3 THE SPACE FOR AN ALTERNATIVE COMPENSATION SYSTEM IN THE THREE-STEP TEST

5.3.1 Certain Special Cases

5.3.1.1 Certain Cases

5.3.1.2 Special Cases: Qualitative and Quantitative Considerations

5.3.2 Conflict with the Normal Exploitation of Works

5.3.2.1 The Traditional View of Normal Exploitation

5.3.2.2 Objections to the Traditional View of Normal Exploitation

5.3.2.3 A Flexible Interpretation of Normal Exploitation

5.3.2.3.1 Normal Exploitation and Non-Commercial Use of Works

5.3.2.3.2 Indirect Effect on Commercial Exploitation

5.3.2.3.3 Normal Exploitation and Compensation

5.3.3 Unreasonable Prejudice to Legitimate Interests

5.3.3.1 Unreasonable Prejudice

5.3.3.2 Legitimate Interests of Rights Holders and the Public Interest

5.3.3.3 The Interests of Rights Holders and Fair Compensation

5.3.3.4 The Conflicting Interests of Creators and Exploiters

5.3.3.5 Public Interest in the Respect of Fundamental Rights and Freedoms

5.3.3.6.1 Freedom of Expression and Information

5.3.3.6.2 Protection of Privacy and Personal Data

5.3.3.6.3 Intermediaries and Freedom to Conduct a Business

5.3.4 Summary: Application of the Three-Step Test to Alternative Compensation Systems

5.4 OVERCOMING CONFLICTS WITH THE NORMAL EXPLOITATION OF WORKS

5.4.1 Embargo Periods

5.4.2 Opt-Out Rules

5.4.2.1 Opt-Out Rules and Alternative Compensation Systems

5.4.2.2 Are Opt-Out Rules Prohibited Formalities?

5.5 THE NORMATIVE CHOICE BETWEEN EXCLUSIVITY AND REMUNERATED ACCESS

5.5.1 Copyright Theories, Exclusivity and Remuneration

5.5.1.1 Natural Rights

5.5.1.2 Utilitarianism

5.5.2 The Access and Remuneration Dimensions of Copyright

5.5.3 Normative Consistency with EU Copyright Law
6  SUMMARY AND CONCLUSIONS: TOWARDS ACCESS AND REMUNERATION ................................................................. 309

6.1  SUMMARY ................................................................................................................................................................. 309

6.1.1  The Case for Reform of EU Copyright Law .............................................................................................................. 309

6.1.2  Lessons from the Past .................................................................................................................................................. 312

6.1.3  A Taxonomy of Alternative Compensation Systems ................................................................................................. 314

6.1.4  The Legal Space for Non-Commercial Online Use of Works in EU Copyright Law ............................................ 316

6.1.5  The Admissibility of a Limitation-based Statutory Licence for Non-Commercial Online Use Under the Three-step Test and its Consistency with the Objectives of EU Copyright Law ................................................................................................. 319

6.2  A BLUEPRINT FOR REFORM: A LIMITATION-BASED STATUTORY LICENCE FOR NON-COMMERCIAL ONLINE USE OF WORKS BY INDIVIDUALS ............................................................................................................................................... 326

6.2.1  Beneficiaries (and Intermediaries) ................................................................................................................................. 326

6.2.2  Subject Matter Scope .......................................................................................................................................................... 326

6.2.3  Substantive Rights Scope: Authorised Non-Commercial Online Use of Works ............................................................. 329

6.2.4  Fair Compensation .......................................................................................................................................................... 332

6.2.5  Agreed Contractual Terms .............................................................................................................................................. 334

6.2.6  Basic Operation ............................................................................................................................................................... 335

6.2.7  Scaling Down Reform: Adaptability of the Proposal to Collective Licensing ............................................................. 339

6.3  A WAY FORWARD ............................................................................................................................................................ 342

ANNEX 1. LIST OF PROPOSALS FOR ALTERNATIVE COMPENSATION SYSTEMS ................................................................................. 343

REFERENCES ........................................................................................................................................................................... 354

BIBLIOGRAPHY .......................................................................................................................................................................... 354

PRIMARY SOURCES: LEGAL TEXTS .............................................................................................................................................. 380

International Treaties and Conventions ................................................................................................................................. 380

Council of Europe ......................................................................................................................................................................... 380

European Union: Treaties and Charter .................................................................................................................................. 380

European Union: Directives .......................................................................................................................................................... 381

European Union: Proposed Legislation ....................................................................................................................................... 382

National Legislation ........................................................................................................................................................................ 382

SECONDARY SOURCES ................................................................................................................................................................. 384

International Documents (Records of Treaties and Conventions) ........................................................................................ 384

EU: Proposals and Explanatory Memoranda ............................................................................................................................ 384

EU: Commission Recommendations ........................................................................................................................................ 385

EU: Public Consultations and Reports ........................................................................................................................................ 385

EU: Green Papers, White Papers, Working Papers, and Memos ............................................................................................ 386

EU: Communications of the Commission ................................................................................................................................ 387

EU: Council Decisions, Resolutions and Guidelines ............................................................................................................... 387

EU: European Parliament ............................................................................................................................................................. 387

Common Positions and Common Statements .......................................................................................................................... 388

Council of Europe Recommendations ........................................................................................................................................ 388

CASE LAW .................................................................................................................................................................................. 389

European Court of Human Rights (ECtHR) ............................................................................................................................. 389

Court of Justice of the European Union (CJEU): Judgements ............................................................................................... 389

Court of Justice of the European Union (CJEU): References for Preliminary Ruling .......................................................... 391

Court of Justice of the European Union (CJEU): Advocate General (AG) Opinions .............................................................. 392

Commission Decisions ............................................................................................................................................................... 393

World Trade Organization (WTO) Panel Reports ................................................................................................................... 393

National Cases ............................................................................................................................................................................... 393

ELECTRONIC SOURCES ............................................................................................................................................................ 395

SHORT SUMMARY ......................................................................................................................................................................... 397

SAMENVATTING ........................................................................................................................................................................... 402
Lists of Figures and Tables

List of Figures
Figure 1. Non-voluntary Licences ................................................................................................ 32
Figure 2. Alternative Compensation Systems: Axis of Gradual Restrictions on the Exclusive Right.............................................................................................................................................. 88
Figure 3. CMOs as Intermediaries in a Two-Sided Market...................................................... 94
Figure 4. Scope of Multi-Territorial Licensing Regime in the CRM Directive....................... 97
Figure 5. Mandatory Collective Management Rental Rights Directive .................................. 110
Figure 6. Embargo Period Alternative Compensation System ............................................. 268
Figure 7. Opt-Out Rule in Statutory Licence Alternative Compensation System.................. 272
Figure 8. Simplified Design for Alternative Compensation System ................................... 336

List of Tables
Table 1. Restrictions to Exclusivity.............................................................................................. 86
Table 2. *Acquis* Remuneration and Compensation Rights.................................................. 118
Table 3. Scope of Online Reproduction Right and Legal Certainty Issues.......................... 147
Table 4. Scope of Online Right of Communication to the Public and Legal Certainty Issues... 166
## List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACS</td>
<td>Alternative Compensation System(s)</td>
</tr>
<tr>
<td>ACTA</td>
<td>Anti-Counterfeiting Trade Agreement</td>
</tr>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>ALAI</td>
<td>Association Littéraire et Artistique Internationale (International Literary and Artistic Association)</td>
</tr>
<tr>
<td>BC</td>
<td>Berne Convention for the Protection of Artistic and Literary Works</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof (the German Federal Court of Justice)</td>
</tr>
<tr>
<td>BIRPI</td>
<td>Bureaux Internationaux Reunis pour la Protection de la Propriété Intellectuelle (United International Bureaux for the Protection of Intellectual Property)</td>
</tr>
<tr>
<td>Charter</td>
<td>Charter of Fundamental Rights of the EU</td>
</tr>
<tr>
<td>CMO(s)</td>
<td>Collective Rights Management Organisation(s)</td>
</tr>
<tr>
<td>CISAC</td>
<td>Confédération Internationale des Sociétés d’Auteurs et Compositeurs (International Confederation of Authors and Composers Societies)</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union (former European Court of Justice (ECJ))</td>
</tr>
<tr>
<td>DRM</td>
<td>Digital Rights Management</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>ECL</td>
<td>Extended Collective Licence (or Licensing)</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>GEMA</td>
<td>Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (German society for musical performing and mechanical reproduction rights)</td>
</tr>
<tr>
<td>HADOPI</td>
<td>Haute Autorité pour la Diffusion des œuvres et la Protection des droits d'auteur sur Internet. Also refers to the law that set up this authority, the Law No. 2009-669 of June 12, 2009, promoting the Dissemination and Protection of Creation on the Internet</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ISP</td>
<td>Internet Service Provider(s)</td>
</tr>
<tr>
<td>P2P</td>
<td>Peer-to-peer</td>
</tr>
<tr>
<td>RC</td>
<td>Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>TPM(s)</td>
<td>Technological Protection Measure(s)</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Law</td>
</tr>
<tr>
<td>UGC</td>
<td>User Created/Generated Content</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>WTO</td>
<td>World Intellectual Property Organization</td>
</tr>
<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
</tr>
<tr>
<td>WIPO Treaties</td>
<td>The WCT and WPPT</td>
</tr>
<tr>
<td>WPPT</td>
<td>WIPO Performances and Phonograms Treaty</td>
</tr>
</tbody>
</table>
Acknowledgements

Writing a doctoral dissertation is as much an academic journey as it is one of personal discovery. This dissertation would not have been possible without the support and encouragement of many people, who not only contributed to my research, but also to my academic and personal development during this period. It is not possible to mention them all, but I would like to single out a few.

First, I would like to thank my supervisor Bernt Hugenholtz and co-supervisor Lucie Guibault. Their supervision was outstanding, as was their availability, patience, constructive criticism, and friendship. It is a rare thing for a PhD candidate to have nothing but positive things to say about his supervisors, but this is truly the case. I am particularly indebted to Bernt for turning my career path away from law practice and towards academic research, which I am passionate about. As a master student in Munich, in the now distant years of 2010/2011, I was fortunate to have him as a professor and thesis supervisor. It was also Bernt who invited me to join the Institute for Information Law (IViR) in 2012 to do research in such an exciting project.

I was lucky to conduct most of my doctoral research at IViR, an institute with an exceptional intellectual and social ambiance. I am grateful to all past and current researchers and staff I have crossed paths, without exception. I would like to thank in particular the following colleagues for their generosity and availability in helping me think through my research ideas, concerns, and doubts: Christina Angelopoulos, Balázs Bodó, Kelly Breemen, Vicky Breemen, Annabel Brody, Marco Caspers, Christian Handke, Natali Helberger, Catherine Jasserand, Tarlach McGonagle, Joost Poort, Mireille van Eechoud, Nico van Eijk, Christiaan Alberdingk Thijm, Stef van Gompel, Joan-Josep Vallbé, and Frederik Borgesius. I also wish to leave particular thanks for the outstanding staff support provided by Anja Dobbelsteen and Rosanne van der Waal, without whom I would either be lost in a bureaucratic maze, or still in search of an obscure publication.

Part of this dissertation was written during a research stay in UC Berkeley, School of Law. In this inspiring academic environment I had the privilege to discuss my research with Pamela Samuelson, to whom I am thankful for the time and guidance provided. I also want to especially mention the following academics that manifested interest in my research and kindly shared some of their time, insights and patience to my great benefit: Philippe Aigrain, Christophe Geiger, Daniel Gervais, Volker Grassmuck, Séverine Dusollier, Neil Netanel, Alexander Peukert, Martin Senftleben, and Jacqueline Seignette.

This research would not have been possible without the financial assistance from the Nederlandse Organisatie voor Wetenschappelijk Onderzoek – The Netherlands Organisation for Scientific Research (Project number 407-11-050). My research stay in Berkeley was made possible by a grant from the Prof. Mr. E.A. van Nieuwenhoven Helbach Stichting.

To my friends (in Portugal, Amsterdam, and all over the world) and my family, I am thankful for all the support, encouragement and patience, especially during those times where you deserved more attention and presence than I was able to give. A special thanks to my parents, my younger brother Miguel, and my grandmother Gabriela; the distance that separates us is great, but you are always with me. Finally, I would like to express my appreciation and love to Melanie, my partner in life, crime, and academic research.

João Pedro Quintais
Amsterdam, 23 September 2016
Note: The research for this dissertation was completed on 31 March 2016. Subsequent developments in the relevant law are therefore not reflected in this study, with the exception of minor updates relating to judgments of the CJEU and AG Opinions cited in the text and published until 30 June 2016. This dissertation is written in UK English.