FAIR Works - Cornerstones for a Copyright in the Digital World

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(This article is an authorized translation of: Willi Egloff, FAIR Works – Eckpunkte eines Urheberrechts für die digitale Welt, published in: sic! 2022, pp. 405 – 424.)

Abstract

Copyright law has evolved from the local regulation of the creative industries sector to a regulation of the entire infrastructure of the digital society. With its beginnings in competition law regulation in Anglo-Saxon copyright and an author-related regulation based on the recognition of intellectual property in the European *droit d'auteur*, it has tended over time to become a law protecting producers. This development is having a significant dysfunctional effect in the digital world.

The present article traces this development and attempts to develop cornerstones of a copyright law better geared to the requirements of a digital world. It considers the acronym FAIR (findable, accessible, interoperable and reusable) in relation to the information science category of data, and points out the ways in which these socially desirable characteristics of data connect with the accessibility and re-usability of works and performances.

The study leads to the conclusion that copyright needs to be repositioned in the digital world. It advocates a return to the original focus of copyright on contributing to the "Encouragement of Learning" and promoting the "Progress of Science and useful Arts". In this context, collecting societies have a key role to play as mediators between rights holders on the one hand and users on the other, but also as trustees of the interests of the general public.

Content

I. Introduction

For a long time, copyright law was considered an exotic subject of interest to only a small minority of specialised legal experts and scholars. Its scope of application was limited to certain sectors of the creative industries and its practical relevance to everyday legal life was narrow. This has changed fundamentally with the digitisation of copyrighted works and performances, and especially with the possibility of transmitting these files worldwide via the internet. "Nolens volens, copyright law now regulates the entire infrastructure of the digital society in a significant way,"[1] Katharina de la Durantaye and Franz Hofmann correctly state in a recently published trend analysis. Thomas Hoeren spoke much earlier of the "Magna Charta of the information society"[2] or the "Magna Charta of the knowledge order of information law"[3]. Copyright has become a central factor in the law of communication on the internet, and it thus determines our private, economic and social existence to a considerable extent.

It is obvious that such a fundamental change in function is not without effect on the field of law itself and on its perception by those affected. Today, copyright law applies to a large extent to technical and communicative matters that were still unknown at the time of the legislation and for which it was therefore not conceived. It is not surprising that these applications often lead to inappropriate, impractical or simply absurd results. More difficult than identifying such inadequacies is finding ways to remedy them. It is true that legislators at both national and international level are eager to update the existing regulations and develop them further in line with new circumstances and in order to adapt copyright to the digital world. Likewise, the creative industries take every opportunity to emphasise the great importance of this copyright protection for their further development, indeed for their existence, especially in the digital world. However, neither has been able to silence the calls from other sides to abolish the entire set of regulations as quickly as possible and without replacement, as they are hopelessly outdated by digitalisation.

Against this background, this article will attempt to systematically classify the effects of digitisation on copyright and to situate the resulting questions in the context of legal history.

This should make it possible to gain new points of reference for copyright law in the digital world that are compatible with the overall copyright legislation as it has historically evolved.

II. A brief review: on the origin of copyright

1. The origins of copyright in England

The English Statute of Anne from 1709 is considered by legal scholars to be the first copyright law.[4] Officially, this decree is called the "Act for the Encouragement of Learning, by vesting the Copies of printed Books, in the Authors or Purchasers of such Copies, during the Times therein mentioned".[5] This title makes it clear that the central concern of the newly created protection is not seen in the welfare of the authors and also not of the printers and publishers, but in the "Encouragement of Learning", i.e. in an educational policy objective of enlightenment. Copyright is understood here as an instrument to promote the state-desired dissemination of knowledge contained in printed matter that already exists and that is yet to be created.

The special and epochal novelty of this law is that it also applies to future works.[6] Regulations against the reprinting of existing books already existed in abundance, and the provisions contained in the Statute of Anne concerning the obligation to register books and to deliver deposit copies were by no means new. What was ground-breaking, however, was that "the Author of any Book (...) that shall hereafter be composed" was now also guaranteed a 14-year protection against reprints in the future. This protection refers to the mere intention to write a book and thus necessarily to the authors of these future books. However, even here the protection remains dependent on the later existence of a physical object: it is only granted on condition that a book is published, and the duration of protection is calculated from the time of this publication. Furthermore, the right immediately passes to the publisher or printer to whom the authors sell their manuscripts. Thus, even under the aegis of the Statute of Anne, there is still no question of real ownership of intellectual work.

The same applies to the various Copyright Acts enacted following the United States Declaration of Independence in 1776.[7] The importance of copyright for social and economic progress and the goal "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Investors the exclusive Right to their respective Writings and Discoveries"[8] even received constitutional status here. As before in the English mother country, however, this was not a right to intellectual property of any kind, but rather a protection of book production under competition law, which was primarily motivated by education and development policy.

2. The development of the *droit d'auteur* in France

While in England it was book production that gave rise to copyright regulations, in France it was theatre production that needed protection from unfair practices. Although the theatre authors' claim to royalties was undisputed, it was systematically undermined by the

directors through embellished accounts.[9] Also, the claim was only directed against the theatre that first performed the plays, while no compensation was paid for later performances on other stages, especially in the French provinces.[10] Even under the Ancien Régime, an arrêt of the Conseil du Roi of December 1780 had dealt with this situation and established a royalty regulation that was more favourable to the authors. Less than two years after the Revolution, on 13 January 1791, the newly composed National Assembly enacted a law aimed directly at protecting authors that, in its Art. 3, states: "The works of living authors may not be performed by any public theatre in France without the formal and written consent of the author; in the event of infringement, the entire proceeds of the performances shall be confiscated for the benefit of the author".[11]

The starting point of the French regulation is therefore not the unauthorised reproduction and distribution of a product, as in England and the USA, but the performance of a dramatic or musical-dramatic work. Since these works were often not printed at all or only after a successful stage career, the prohibitions on reprinting known until then had no effect in this area. Authors could only be protected by granting them a right to their works regardless of any physical manifestation of their production. It was only with the implementation of this principle that intellectual creation was recognised as a specific legal right, whose protection is independent of copies of reproduction.[12] It is therefore only the Act of 1791 that contains truly intellectual property law, and the honour of the first copyright law in history should actually go to this Act. Two years later, with an Act of 19 July 1793, this legal protection for intellectual property was extended to the authors of many other types of works.[13]

Unlike ownership of property, ownership of intellectual creations cannot be transferred by transferring the legal object into new ownership. It must therefore take a special legal form, namely the exclusive right of use.[14] The French law of 1791 also provides the model for this by making the right to perform dependent on the "formal and written consent" of authors. This enables them to make the use of their work dependent on the fulfilment of the conditions they have set.

However, it soon became apparent that the authors were in fact not in a position to exercise the rights granted to them. It was not possible for them to control the schedules of all French theatres and to ensure that their works were only performed with their consent and for appropriate payment. This task had to be entrusted to organisations that exercised this control on behalf of the authors and negotiated the royalties. Such organisations, the predecessors of today's collecting societies, emerged in France in the theatre sector immediately after the legal recognition of performing rights. The SACD, which still exists today, goes back to these beginnings. In the sector of non-theatrical music, the French SACEM was, in 1851, the first such organisation to be founded. The recognition of performing rights had remained a dead letter for half a century in this sector.[15] Practical experience had shown that for an author-based copyright, collective management of rights via collecting societies was indispensable.

3. The emergence of neighbouring rights

The profound impact that the different approaches of English copyright and the French *droit d'auteur* had on the further development of copyright law is exemplified in the disputes over

so-called neighbouring rights. The invention of sound recording devices and the associated development of records had fundamentally changed the possibilities of using music. In private circles, music could be heard without much effort, and at public events, music from records replaced the previously customary live music in many places. The development of radio broadcast in the early 1920s increased this form of music use, because the rapidly spreading radio companies also filled their programmes with music, much of which was broadcast from records. Music was thus omnipresent, but the work opportunities for musicians were reduced, and the turnover of the record industry also fell far short of expectations, because only a limited number of sound recordings were required to operate a radio.

The economic difficulties of the music industry associated with these developments led to ever louder calls for copyright protection of these sound recordings as well. In essence, the efforts amounted to linking the use of a phonogram to the same compensation consequences as the organisation of live music. In particular, radio stations were to be obliged to pay compensation for the use of records in their programmes.

The music industry in the USA succeeded very quickly in implementing this demand. Already in the Copyright Act of 1909, sound recordings were put on an equal footing with printed works and thus subjected to copyright protection.[16] However, the legal protection was still not linked to an immaterial good, but to a physical product: only "works published with a valid copyright notice affixed on copies"[17] were protected. Works that were not fixed in physical form automatically fell into the public domain even then, and they still do today.[18]

At the same time, the collecting societies active in the field of music lobbied for the use of music in radio programmes to be recognised as an additional exclusive right for composers. With the revision of the Berne Convention of 1928, they had achieved this goal.[19] In this respect, the basis for compensation for the use of sound recordings would actually also have been laid in the area of application of the *droit d'auteur*.

However, this new legal protection in Europe could initially only work in favour of the composers, not in favour of the music industry and certainly not in favour of the suffering musicians. Since copyright protection there was not linked to the material product, the record, but to the intellectual creation, a protection of musicians could only be reached through the recognition of their co-authorship in the performed work. Some scholars tried to justify this co-authorship by the fact that musical works only became perceptible to the public through interpretation. Since each interpretation was characterised by the personality of the performers, the work came into being anew with each performance, and the performers had the function of co-authors.[20]

In contrast, the Italian copyright lawyer Amedeo Giannini wanted to assign such co-authorship to the producers of the records. He argued that it was the producers who, by choosing the works to be recorded and the performers, and by organising the recording, were actually creating the artistic performance.[21] His proposal was based on an authoritarian-corporatist understanding of the music industry as a branch of industry, which should be organised in national compulsory bodies committed to the common wellbeing under state supervision, so-called professional chambers.[22] It found great support, especially in the professional circles of the Axis powers of the time.[23]

It was clear that such views were bound to meet with fierce resistance from composers and their interest groups. They feared, probably not without reason, that their royalties would have to be shared with more and more entitled parties and that composers would be left with an ever smaller slice of the cake.[24] They therefore successfully fought the Italian attempt to anchor recognition of the co-authorship of performers in the Convention at the revision conference of the Berne Convention of 1928 in Rome.[25] As a result of this defeat, the Italian government, which was particularly committed to this authoritarian corporatism in the music industry, argued for the creation of a supplementary state treaty which would guarantee producers an exclusive right of reproduction in the phonograms they produced and a right to compensation for their use in film and radio.[26] The project failed because Italy had been subjected to economic sanctions by the League of Nations as a result of the military invasion of Ethiopia in 1935. It was therefore no longer possible to hold the diplomatic conference, which was already fixed for December 1935, in Rome.[27]

Nevertheless, plans to create copyright protection for the interpretation of music and for the production of sound recordings were not abandoned. After the Second World War and after years of negotiations, they led to the so-called Rome Convention in 1961,[28] in which no copyrights were enshrined, but "rights related to them", referred to in French and English terminology as "neighbouring rights".[29] According to this agreement, performers of copyrightable works are assigned certain prohibition rights, producers of sound recordings are assigned actual exclusive rights and both are assigned some claims for compensation.[30] In addition, the broadcasting organisations, which as employers of radio orchestras had also claimed protection of artistic performances for themselves just in time, were also granted their own exclusive rights.[31]

However, the adoption of the treaty did not lead to the hoped-for breakthrough of neighbouring rights. The number of contracting states remained modest, and even the states that had ratified the agreement often linked the declaration of consent with reservations regarding the scope of application.[32] The USA, which was and is very important for the music industry, also stayed away from the agreement, as it had long since covered its regulatory needs in other ways.

4 Less and less copyright, more and more producer protection right

While copyright law in the Anglo-Saxon world has always been primarily a protective right for printers and publishers in economic competition, the continental European *droit d'auteur* sought to protect the existence of individual freelance authors. With the help of copyright law, they were to be enabled to sell their intellectual creations to producers, in this specific case above all theatre directors, and thereby secure their economic survival.[33] From this objective, it was clear that authors could only be those who had created the works. On this basis, a copyright for producers or other intermediaries between the creation of a work and its enjoyment could not make sense from the outset.

This fundamental difference is still reflected in the copyright laws in force today. While the USA, with the "work-made-for-hire" provision inserted into the Copyright Act in 1976,[34] legally anchored the assignment of copyrights to employers without compensation,

European legislation held firm to the so-called creator principle: only natural persons who had personally created a work could be recognised as authors. In Germany and Austria, this creator principle was further reinforced by the fact that the rights thus created were qualified as non-transferable. Only defined rights of use could be licenced, but the copyright in the work remained inseparably linked to the author until it expired. However, this doctrine, known as the "monistic theory", was not able to establish itself in the rest of Europe.[35]

Despite this adherence to the creator principle, legal scholars agree that the *droit d'auteur* today is also to a considerable extent a property right of producers and other exploitation organisations. In many cases, the holders of the rights are intermediaries who have acquired these rights by contract, often as part of the services that employed authors have to provide. In some cases, however, this assignment of copyright to employers without compensation is also anchored in continental European laws, especially with regard to authorship of computer programmes, films or databases.[36] It was also common practice in many European collecting societies for decades to give publishers a share of the revenue from remuneration claims, even though there was no legal basis for this according to the ECJ.[37] Axel Metzger notes an increasing discrepancy between the law and legal reality and speaks of the "life lies of copyright".[38] Reto M. Hilty doubts the sense of stubbornly adhering to the creator principle and criticises "this ideologically coloured approach to copyright (...) that it cannot be reconciled with social reality in any way".[39]

The culmination of the path from copyright to producer protection law is the Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994, the so-called TRIPs Agreement.[40] This agreement, which formally constitutes an annex to the WTO Agreement, obliges all member states of the World Trade Organisation (WTO) to implement the substantive provisions of the Brussels Agreement into national law.[41] Excluded from this are the provisions on moral rights. At the same time, the agreement stipulates that computer programs must be protected as literary works and that an exclusive rental right must be created for computer programs and film works. Likewise, copyright protection must be established for databases insofar as they "constitute intellectual creations by reason of the selection or arrangement of their contents".[42]

The economic background to these additions is the fight of the USA and other industrialised countries against the rampant product piracy worldwide, which also affected the US software, music and film industries in particular.[43] The then EEC also followed this line with its 1988 Green Paper.[44] "It is not the rights of the author that are to be protected in the first place, but the investments of the producers and the free movement of these goods within the Common Market", the German ministry official responsible aptly summarised the concept of this Green Paper.[45]

In a comprehensive analysis of the TRIPs agreement, US economist Donald G. Richards comes to the sobering conclusion that "the TRIPs agreement is best understood as one of several regulatory mechanisms designed to facilitate the international accumulation of capital. It operates to define and protect international property rights and thereby mediate the international competition among and between individual capitals whose interests in regards to knowledge based production often conflict".[46] What falls by the wayside are not only the interests of authors, but also the interests of the general public, especially the

consumers of protected works. Under the aegis of TRIPs, there is no longer any talk of an "Act for the Encouragement of Learning" or an endeavour "to promote the Progress of Science and useful Arts", and the orientation towards the common good wellbeing of authoritarian corporatism has also disappeared, with good reason. According to the preamble, the goal of the TRIPs Agreement is exclusively to strengthen free trade.[47]

The protection of authors against exploitative practices of intermediaries, which stands at the beginning of the continental European *droit d'auteur*, has also evaporated in the TRIPs Agreement. This can be seen most clearly in the transformation of the three-step test adopted from the Berne Convention: what in Art. 9 of the Berne Convention is a general clause for future restrictions on the right of reproduction,[48] in the TRIPs Agreement becomes the limit for the permissibility of all existing or future provisions on limitations.[49] The interests of authors are no longer the decisive criterion, as was still the case in Article 9 of the Berne Convention, but those of the rights holders.[50] Copyright law has been transformed into pure producer protection right.

III. Digitisation and its consequences for copyright law

1. Reproduction in the private sphere

As with the emergence of neighbouring rights, it was technical developments in the field of recording sounds that brought about the major changes in copyright law in the 20th century.[51] The possibility of recording words, sounds and noises on magnetic tapes shifted the production of sound carriers into the private sphere. Every private person was now able to record music, transfer it from records or radio broadcasts, edit existing recordings or even delete them again. With the further development of recording technology, the quality of the recordings became better and better, and as a result of digitalisation, the recordings, once made, could be copied in any number without any further loss of quality.

What had begun in the field of sound recording soon continued in the audio-visual field. Films and news broadcasts could be recorded and duplicated with equipment that was affordable for every household. While these sound-image recordings were initially of poor quality and therefore only suitable for limited use, this also changed with digitisation. High-quality film copies came onto the market in the form of DVDs, and these could also be duplicated in the same quality with the simplest of means.

Not only did private households benefit from these new technical possibilities, but a worldwide industry of piracy production quickly developed.[52] In countries such as the People's Republic of China, South Korea, Taiwan, Egypt, Brazil or Mexico, production facilities emerged that produced unauthorised millions of duplicate copies and distributed them at junk prices. They concentrated mainly on copying computer software, music and films, all sectors of the creative industries in which the USA was a leader. Accordingly, the demand to prevent this product piracy was raised primarily there. Copyright was to serve as the central tool in this fight.

The Federal Republic of Germany had reacted to the mass distribution of private tape recorders by introducing a copyright levy on such devices in 1965, the proceeds of which

were then distributed to the rights holders.[53] The USA, supported by Japan and several European industrialised countries, took a different approach: they demanded the worldwide enforcement of the exclusive rights due to producers, especially in the areas of software, music and film. As already mentioned,[54] they succeeded with this policy after long and tough negotiations with the adoption of the TRIPs Agreement in 1994 making only very few concessions.

In addition to legal adjustments, the software and cultural goods industries also relied on technical measures to protect their products from unauthorised copying. In particular, data carriers were manipulated in such a way that their capacity to be copied without restriction, which was actually given by the technical requirements, could no longer be realised.[55] Thus, data carriers were equipped with country codes, access and copy locks and other measures that were intended to restrict the possibility of their use to authorised persons. "The answer to the machine is in the machine" was the motto often heard to justify such measures.[56] In addition, these technical measures also received the blessing of the highest copyright authority, when the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty of 1996 obliged all member states to provide special civil and criminal protection provisions for these technical measures in their national laws.[57]

However, the success was very limited. On the one hand, the measures proved to be extremely hostile to users, as they not only made unauthorised copying more difficult or impossible, but also many other, perfectly permissible uses. On the other hand, computer programmes that could be used to overcome these barriers quickly became widespread. The equipment industry also prevented the worldwide implementation of this strategy because it refused to equip its products with components that could have recognised the country codes and prevented reproduction.[58]

2. The internet: files become ubiquitous

The regulations contained in the TRIPs Agreement all relate to the handling of physical data carriers. Although the commercialisation of the internet in the form of the World Wide Web had already begun at that time,[59] it did not play a role in the negotiations on the agreement. Accordingly, it does not contain any provisions on the distribution of intellectual property via the internet.

It soon became apparent, however, that this World Wide Web was once again fundamentally changing the use of copyright-protected works. Texts, music and audiovisuals no longer had to be materialised in the form of data carriers for transmission, but the files could be distributed as such worldwide practically free of charge. Anyone who was able to upload a file to the internet could make it accessible worldwide. While this distribution initially suffered from technical limitations in that large files, such as those produced by music and film recordings, needed a great deal of time to be transferred, these bottlenecks soon fell away as well. Suddenly, the production of and trade in physical goods could be circumvented by the simplest means.[60]

Straight away, these new technical possibilities were also used to circumvent music and film distribution. So-called peer-to-peer services emerged, through which especially music and

audio-visual files could be exchanged between private users without any payment. Commercial companies put huge music and film catalogues online for free download without being authorised to do so in any way, and used the demand for these works to generate advertising revenue.[61]

International legislation had reacted astonishingly quickly to this new development. The WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty agreed in December 1996 already obliged the member states to recognise a right of making available, which assigned the competence to upload a copyrighted work or a performance protected by neighbouring rights to the authors or the performers or producers as a new exclusive right.[62] At the same time, it was stated that the distribution of files on the internet could not have any exhaustion effect.[63] Finally, the member states were obliged to guarantee protection under civil and criminal law for the technical measures already mentioned, with which the unauthorised copying of files with protected content was to be made impossible.[64]

Here too, the adaptation of the legal framework had only limited effect. It is true that through legal action, the music and audio-visual industry repeatedly succeeded in eliminating individual players such as Napster or Pirate Bay, who had built up business models based on the unauthorised distribution of protected works. However, the enforcement of the newly created rights proved to be extremely obstacle-laden. The illegal acts often took place in countries where copyright protection did not exist or could not be efficiently enforced. Moreover, they often took place anonymously, so that no addressees could be found for a possible lawsuit. And even in the case of success, it could not be prevented that by the time a court decision was available, music and audio-visual files had been irrevocably disseminated in enormous quantities and that new actors immediately took the place of those who had been eliminated.[65] Despite new legal instruments, the protection provided by law could therefore only be realised very selectively.

3. Loss of the requirement of individuality and freedom of work consumption

In addition to the emergence of a huge piracy market, the digitisation of copyrighted works and performances and their distribution via the internet also had repercussions on copyright law itself. For example, blocking the consumption of works by means of access or download barriers had the effect of undermining the copyright protection feature of the "individual character" of an intellectual creation as a delimitation criterion. The access blocks and paywalls made it impossible to consult not only protected works, but also any other content hidden behind such security measures. In fact, in practice, almost any kind of content is marked as copyright-protected and equipped with technical protection measures. Banal data collections, lists of facts, product information, etc. are treated as copyright works, even though the legal requirements for copyright protection are not met. Although in these cases legal protection would in all likelihood not be granted in a court dispute, this does not change the fact that access to these files is de facto not possible for persons not expressly authorised.

But even where the content is actually protected by copyright or neighbouring rights, access is unjustly blocked by these measures. It is one of the basic principles of copyright law that

the rights holders are reserved the right to distribute and exploit their intangible property, but that mere consumption of the work is always permissible.[66] Copyright law aims precisely to make the content of protected works known to the public "for the encouragement of learning" and "to promote the progress of science and useful arts". In this sense, any interested person may go to freely accessible libraries or audio libraries to consult the books or listen to the music available there free of charge. Similarly, works may be viewed free of charge in publicly accessible exhibitions, be they works of the performing arts or other genres of work. It may be that access to the venues in question costs something, but there can be no compensation based on copyright for the consumption of the works present.

However, digitisation with the simultaneous application of technical protection measures now means that even this actually consumption of works is no longer possible. Because every consultation of a file requires a prior conversion into an analogue format and thus a reproduction, anyone who is interested in a work must acquire an authorisation to access the work, even before he or she knows the exact content. This has enormous implications, especially when dealing with scientific literature.[67] Scientific periodicals often only exist in digital form, and they can no longer be freely consulted in public libraries. In particular, consultation from the outside, i.e. by people who do not belong to the institutionalised user circle of a library, is usually no longer possible. Since each individual library can only document a small part of the actually existing scientific literature, this means that for the entire remaining part, the consumption of works is de facto made impossible or is dependent on high user fees.[68] The original objective of copyright "to promote the progress of science and useful arts" is thus reversed.

4. What is copyright in aid of?

The development described above also calls into question one of the central economic starting points of the entire copyright system: the separation of the creation of works on the one hand from the availability of means for the production and reproduction of copies of works on the other. Whereas authors used to depend on their texts being printed and published and distributed by publishers, on their dramatic works being performed, on their music being played by orchestras, this is less and less the case today. Writers create their digitised manuscripts themselves, and they can make them known worldwide on the internet even without a publisher. Composers can digitally record and distribute their works on their own recording systems. Film makers can upload their productions to their own platforms and thus make them accessible worldwide. Visual artists can exhibit their works worldwide without involving a gallery by placing them on the internet.

Of course, this does not mean that intermediaries become superfluous. The publishing and distribution of books and other written works remain highly specialised activities that can secure a work the desired attention and distribution. The worldwide music industry with its highly developed production and sales structures cannot be replaced by the individual distribution of individual recordings. Films do not market themselves, which is why real visibility can only be achieved through meticulously planned distribution and screening. And the art trade is not replaced by the marketing of individual works on the internet, but plays at least as great a role in this digitalised world as it did before.

It does mean, however, that the previous justification for independent legal protection of intermediaries no longer applies. Intermediaries do not provide an immaterial service that goes beyond the processing of a work created by others or a performance provided by others into a marketable product. Consequently, there is no reason in a market economy to treat them differently from all other providers of marketable products. Reto M. Hilty rightly speaks of an "overprotection" contrary to the system, which is problematic above all "because the competition control function inherent in a property right encourages one-sided maximisation of benefits".[69]

In addition, the traditional intermediaries have been joined by new players offering very comparable services.[70] Internet platforms also provide access to works protected by copyright or neighbouring rights. Search engines do not mediate commoditised products, but they enable their acquisition in an extremely user-friendly way. These new intermediaries do not provide their services in an illegal way at all, but they operate on the basis of permitted business models, often also with the explicit or tacit consent of the rights holders themselves or even on their own initiative. It can only be explained historically why the current law provides some intermediaries with special legal protection, but simply ignores the others.

The assertion, repeated like a prayer in German copyright law, that producers' rights are not about the protection of intellectual achievements, but about investment protection, is also misleading. For one thing, it does not correspond to the legal facts, because an investment is not required to obtain protection.[71] Producers of sound recordings and audio-visual recordings are also protected if it is a sound recording made without relevant investment or a film shot with the mobile phone and produced without any financial effort. Secondly, it is clearly not the investors who are protected, but the producers of the data carriers, regardless of who may have made the necessary investment. And finally, it is completely unclear why precisely this production service should be privileged over all other intermediary services in the creative industries and be given special protection.

Continental European copyright law arose from the need to provide authors who do not have the means of production necessary for the marketing of their works with the possibility of offering their creative services on the free market as goods and thus being able to exploit them. The digitisation of creative work and the possibility of distributing works and performances on the internet have changed the framework conditions in this respect. Today, authors of various genres can make their works known themselves via the internet, musicians can produce music files themselves and place them on the internet, film makers can upload their films themselves if they wish to do so. All authors therefore actually have the necessary means of production, and they basically have the possibility to produce and distribute their works in a marketable form.

However, nothing has changed about the fact, which already existed in the early days of copyright, that taking advantage of these opportunities and especially commercial marketing can overburden the creators themselves. These activities require completely different knowledge and skills than the creation of works or the artistic interpretation of works. For this reason, authors and performers will continue to depend on intermediaries to take on these tasks in their place. They can be collecting societies, but also traditional intermediaries

of works such as publishers, film production companies or production houses of the music industry, or they are new intermediaries such as internet platforms.

In order for creative practitioners to enter into a contractual relationship with them and sell their creative services, they must have tradeable rights, i.e. copyrights or performers' rights. This is exactly what copyright law must still do today.[72] Copyright is therefore anything but obsolete. It continues to be the basis for cultural workers to be able to operate in a market economy without having to sell all their labour force.

IV. The objective of copyright: FAIR[73] works

1. Excursus: FAIR data principles

The problem of inaccessibility of important information is not only discussed in the field of copyright. Access barriers and paywalls prevent access not only to protected works, but to any content that cannot be freely accessed and is not simultaneously stored in physical form, i.e. as a data collection, a book or journal, an image, etc., in a publicly accessible institution. This is proving to be an undesirable side effect of digitisation, especially in the area of scientific data.

The interim report of an EU expert group on FAIR data published in 2018[74] highlights three reasons why data and other results of scientific research must be accessible and reusable:

- Access to data is at the heart of scientific integrity. Existing forms of scholarly publishing has failed sufficiently to integrate analysis and results with access to the data and methods that underpin those results. This is an important factor in widespread concerns about the lack of reproducibility, the cherry-picking of results and scientific fraud.

- Access to open and reusable data has transformed scientific research. Many research domains now rely on the open availability of data from multiple sources in order to operate effectively.

- There are broader economic and societal benefits to open research. Data allows us to address the pressing human, societal and environmental challenges in agriculture and nutrition, sustainable development, disaster risk and response, climate change, etc. Open accessibility of data also allows the use of these data for innovations beyond academia.[75]

These considerations led to the increasingly loud call for data and results from publicly funded research to be freely accessible as a matter of principle. This was demanded, for example, by the OECD in 2007 in its "Principles and Guidelines for Access to Research Data from Public Funding",[76] as well as by a declaration of the G8 science ministers in 2013[77] or the "Guidelines on Data Management" of the EU's Horizon 2020 research programme.[78] Many research funding institutions now also tie the funding of research activities to the condition that the data and results found are made publicly accessible.

Against this background, a group of researchers at Leiden University in the Netherlands developed the so-called "FAIR Guiding principles for scientific data management and

stewardship".[79] The abbreviation "FAIR" stands for "Findable, Accessible, Interoperable, Reusable", whereby the play on words with the terms "fair" and "fairness" is of course intentional, but can lead to misunderstandings in the context of copyright law.[80] The requirements for the four goals are described in more detail in the guiding principles and broken down into sub-goals.[81] Today, these objectives can be regarded as an internationally recognised standard for the exchange of information in science, and a great deal of work is being done to implement them in scientific practice.[82]

2. FAIR data requires FAIR works

What has just been said about the justification of FAIR data must also apply unchanged to data in protected works: ensuring scientific integrity in research requires the accessibility of all basic data and methods used, even if they are part of protected works.[83] Citations only have scientific value if they are verifiable and traceable, i.e. if the works cited are accessible. Scientific research with large amounts of data from different sources is only possible if these data can be found, accessed, linked and reused even if they are part of protected works. The economic and societal benefits of research must not fail because necessary data are contained in copyrighted works hidden behind access barriers and paywalls.

What is expressed with the formula "Findable, Accessible, Interoperable and Reusable" is ultimately only an updated form of the original objective of copyright. "Encouragement of Learning", "to promote the Progress of Science and useful Arts" was the slogan of the 18th century, FAIR works corresponds to this in the age of digitalisation. And as in the early days of copyright, this concept only makes sense if it takes into account its dual objective: the protection of the providers of intangible performances by enabling them to exploit these services on the free market. And the protection of the general public, which is dependent on access to these intangible performances and their further use for cultural, scientific, social and economic development.

Utilitarian considerations alone cannot be used to justify such regulations. It is rather the case that the various interests have become entrenched in fundamental rights over the course of time.[84] For example, the position of authors, but also of performers, is protected by the property guarantee and the economic freedom of Articles 26 and 27 of the Swiss Federal Constitution. At the same time, the interests of the general public are anchored by opposing fundamental rights, such as the freedom of opinion or information, the freedom of the media, the freedom of art and the freedom of science, as well as the right to schooling of Art. 16-21 BV.

The Universal Declaration of Human Rights brought the two aspects together as early as 1948 in its Art. 27, when it states:

> "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

This dual fundamental right aspect is also reflected in Article 15 of the International Covenant on Economic, Social and Cultural Rights,[85] which reads as follows:

> "(1) The States Parties to the present Covenant recognize the right of everyone,
> (a) to take part in cultural life
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

It is true that, according to their wording, both legal texts refer only to authors, while interpreters are not mentioned. This makes sense in the historical context: the Universal Declaration of Human Rights was proclaimed in 1948, the International Covenant on Economic, Social and Cultural Rights in 1966. At that time, there was no globally recognised instrument on the rights of performers, and a right to protection of their moral and material interests would therefore have been a reference into the blue. Today, due to the broad recognition of personal rights for performing artists, as it results from the worldwide validity of Art. 5 WPPT[86] and Art. 5 BTAP[87], it seems obvious to also include these cultural workers in the scope of application of the aforementioned human rights provisions.

While the Universal Declaration of Human Rights is not legally binding, the UN Covenant is. Both the recognition of copyright as a subjective right of creatively active people and the guarantee for the general public to participate in cultural life and to share in the benefits of scientific progress therefore have constitutional status.[88] Of course, the signatory states have a great deal of freedom in shaping this system of protection. However, it is equally clear that a copyright law that is one-sidedly oriented towards maximising the benefits of the manufacturers of marketable products, as has emerged under the aegis of the TRIPs Agreement, does not do justice to these claims guaranteed under international public law. From a fundamental rights perspective, a repositioning of copyright law is therefore imperative.

3. Principles of a copyright regime for FAIR works

A copyright law that is comprehensively oriented towards these fundamental rights aspects would probably have to correspond to the same principles as those developed for FAIR data. The protected works and the performances protected by neighbouring rights would have to be "findable, accessible, interoperable and reusable". In addition, however, it must also protect the moral and material interests of authors and performers resulting from the creation of "works of science, literature and art". The balancing of interests at the constitutional level must therefore be oriented towards the interests of the creators on the one hand and the general public, i.e. the consumers of the protected works and performances, on the other.[89]

In order for works and performances to be "discoverable", they must be made accessible through sufficient metadata.[90] This means that information must be available that provides detailed information about the content of these works and performances, and that this information can also be found using appropriate search routines. This is not just a matter of bibliographical information such as authorship, title and place of publication, but of the most

precise information possible about the content presented in the works and performances. Since individual authors cannot be expected to create this metadata themselves, it must be possible and permissible for third parties to extract this data from the works and performances and make it available to all interested parties in the form of holdings lists, subject indexes and the like.

This alone presupposes that the works and performances are actually "accessible". It must be possible and permissible to obtain knowledge of the content of these works and performances without individual permission. This in turn requires that access must be possible by means of generally usable, standardised procedures, including by machine.[91] From a copyright point of view, this means that the consumption of the work must not be technically hampered or unreasonably impeded.

In order for the found or compiled metadata, through which the works and performances are made accessible, to be "interoperable" with each other, they must be written in a widely understandable, standardised and also machine-readable language.[92] Where this is not the case, it must be possible and permissible for third parties to convert the existing metadata into such standardised formats so that the linking becomes technically possible.

Finally, the works and performances must be "reusable". This requires that the metadata provide sufficient information not only about the content, but also about the origin of the work or performance, about the rights holders, about any conditions for reuse, etc. This information must also be accessible in a form that can be understood by all interested parties, including machines.[93]

4. FAIR works and the interests of creative workers

The question of how the moral and material interests of creators can be safeguarded in such an open system remains. As far as moral interests are concerned, the tried and tested instruments of copyright law are available for the time being, i.e. the rights to attribution and to the integrity of the work. It can be demanded without further ado that the authors or performers be named when works and performances are made accessible, when they are made available for consumption, when they are linked and when they are reused, and that the use of the work does not take place in a form that violates the personality of the rights holders. Such a restriction on use, the modalities of which can also be adapted to the particularities of individual genres of work, does not unreasonably restrict the public's interest in use. It is even easier to implement in a digital world than it was and is in the traditional cultural sector.

However, authors and performers must also be able to determine the time and form in which the results of their creative activity leave their private sphere and are made public. In other words, they must be able to decide when they consider their work or performance to be complete and want to make it known outside their circle of acquaintances. In the traditional understanding of copyright law, this is also a moral interest of the creators and thus part of their moral rights.[94] This interest can only be taken into account if, in addition to FAIR works, there is always a second category of works, namely those not or not yet

accessible to the general public. Likewise, there will have to be a category of performances which are not yet FAIR, i.e. which are, in particular, neither findable nor accessible.

However, if it is clear that there is a constitutionally protected interest of the general public that as many works and performances as possible are FAIR, i.e. findable, accessible, interoperable and reusable, copyright law must create incentives for creative persons to assign their works and performances to this category as early as possible. They should have an interest in promoting the findability, accessibility and interoperability of their works and performances.

This incentive is most likely to be created by ensuring that a material interest of creators only comes into play at the level of reuse. Even if creators have the possibility of withholding works and performances from the public or exploiting them only within a circle of persons determined by them, this legal position is not necessarily privileged in a material respect at the same time. Rather, as far as possible, only the moral interests of the authors or performers should oppose the general interest in the findability, accessibility and interoperability of the works and performances. It is only at the level of re-use of works and performances that the economic interests of the creators should be taken into account.

This also seems appropriate from the point of view that it is only at the moment when the works and performances considered for re-use have been identified, consulted and, if necessary, related to each other, that there is an objectively assessable interest in use. Not until then is it clear which works and performances are to be reused and for what purpose. Only at this point is a balancing of interests practicable, because it is only then that the interest of the general public, i.e. the potential consumers, but also the interest of possible intermediaries, can be defined and weighed against the interest of the rights holders to derive a material advantage from the use of their work or performance.

For the time being, it follows from these considerations that a copyright regulation of FAIR works must assume that there is always a category of protectable works and performances that are not FAIR. It will therefore be necessary to delimit the two categories from each other and to determine the legal consequences associated with the respective categories. In this context, the general interest requires that as many works and performances as possible fulfil the requirements of FAIR works. This in turn suggests that a legal obligation to compensate for the use of works or performances should only start at the level of re-use. A closer look at these few statements reveals some important cornerstones for a copyright in the digital world.

V. Conclusions for a copyright law in a digital world

1. Substantive requirements for protection: Individuality and originality

Special legal protection for creative achievements is only compatible with the principle of equality if the achievements to which special treatment is accorded differ from other socially relevant achievements. There must be an objective reason why creative achievements are treated differently from other achievements. In the history of copyright law, originality of work has emerged as this special feature: a created work is legally protected because it is

individual and new compared to what already exists.[95] It adds something to social knowledge, to social culture, which did not exist before, at least not in the form created. A protectable work must therefore not be a copy of something that already exists, but must be statistically unique and at the same time an original intellectual creation.

This novelty criterion is sometimes found in national laws, but surprisingly not in international copyright treaties. It is sometimes indirectly addressed there through exclusion criteria, according to which certain intellectual creations such as ideas, concepts, data collections and others are not works in the sense of copyright. However, a positive definition is not found in the international conventions, and it is often missing in national laws as well.[96] Nevertheless, the novelty, the originality of works as a copyright delimitation criterion plays a central role in worldwide jurisprudence. In the USA, it was a Supreme Court decision in 1991[97] that made it clear that there can be no copyright without creative decisions by an author. In several decisions, the ECJ developed an autonomous notion of work, which, as a prerequisite for the recognition of copyright protection, is based on the existence of an intellectual creation, which must be the expression of personal decisions by the author.[98] In the jurisprudence of the Commonwealth countries, there has long been a tendency to grant copyright protection for almost any somewhat elaborate intellectual activity, referred to in the judgments as "skill and labour" or as "sweat of the brow".[99] But even there, it is increasingly recognised that it cannot be sufficient for a person to have performed a service with "skill and labour" in order to obtain special copyright protection.[100] Rather, an element of creativity must be added; the work must be an expression of creative decisions made by the author.[101]

Daniel J. Gervais defines this criterion of "creative choice" as a decision "made by the author that is not dictated by the function of the work, the method or technique used, or by applicable standards or relevant good practice".[102] The expression "intellectual creation with individual character"[103] used by the Swiss legislator may also be understood in this sense: an individual character must be established by the elements of an intellectual creation that are not determined by external specifications such as the function of the work, working methods or techniques, standards and customs of an industry. Only if these individually designed elements characterise the intellectual creation is there a protectable work. And only if such a work is interpreted with an individual character (or an expression of folklore) is there a performance worthy of protection.

2. Delimitation criterion for FAIR works: perceptibility.

If there is an original intellectual creation in this sense, it should, if possible, be perceptible to the general public. Only revealed works enrich social knowledge and culture.[104] Only in the case of revealed works can it be determined whether they contain something new or are simply a copy of what already exists. The works do not necessarily have to be "fixed in a tangible medium of expression", as Section 102 (a) of the US Copyright Act[105] still requires today, but they can also be accessible as virtual files. They must however be perceptible to the general public.[106]

This consideration only seemingly clashes with the principle of Art. 3(1) of the Berne Convention, according to which the protection shall apply to "authors who are nationals of

one of the countries of the Union, for their works, whether published or not". In fact, authors must be able to defend themselves against their as yet unpublished works being taken away from them and exploited by third parties without authorisation. It is up to authors to decide when and in what form they want to disclose their works, and copyright law must protect them in this interest.

This upstream protection, so to speak, is a moral interest in the sense of the aforementioned understanding of international law, not a material one. "Disclosure" or "divulgation" is not the same as "publication". According to Art. 3(3) of the Berne Convention, published works are "works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work".[107] Accordingly, only works that are available to the public and satisfy its normal needs, i.e. are findable and accessible, are considered to be published. Therefore, a scientific article contained in an e-journal and hidden behind a paywall is not made available to the public in this sense. It is disclosed, but not published, because it remains reserved exclusively for the community that has access to this e-journal.

It is neither self-evident nor required by convention law that the same legal provisions must apply to such a merely disclosed contribution as to published works. Rather, it would be in line with the objective of copyright "to promote the progress of science and useful arts" to grant more and different prerogatives to the rights holders of published works and performances than to the rights holders of unpublished or not yet published works. This would create the aforementioned incentive for authors[108] to make their creations available to the general public as early as possible. In this sense, it would be correct, for example, to limit the right to share in the proceeds from compulsory collective exploitation of works or from statutory licences to rights holders of published works.

However, current copyright law does the exact opposite: it provides special protection to rights holders in works that have been disclosed but not yet published, in that the WIPO Conventions oblige member states to enshrine in their national laws protection under civil and criminal law for technical measures to prevent access to such works and performances. Thus, those who do not make works and performances available to the public but restrict access to them to an arbitrarily defined group of persons, not infrequently on the basis of financial criteria, are rewarded by the legislator with a strengthened legal position. A sharper contrast to the intended contribution to the "Encouragement of Learning" and the goal "to promote the progress of science and useful arts" is hardly conceivable.

One cornerstone of copyright in a digital world would therefore be the simple abolition of these dysfunctional provisions on the protection of technical measures. It is true that the rights holders must be free not to make their works and performances available to the general public. However, they do not need protection that goes beyond rights of personality. Removing this legal protection of technical measures should be all the easier because these provisions hardly play a role in copyright practice. They are impracticable, outdated by technical developments, and are therefore hardly ever applied. Daniel J. Gervais rightly calls the regulation "misguided and anachronistic".[109]

3. No original legal protection for intermediaries

The premise that there can only be copyright protection for intellectual creations with an individual character must also apply to any derivative copyright protection. A book is only a copy of a work in the sense of copyright law if it represents the reproduction of a protectable work. If this is not the case, the book is simply a movable good such as a chair or a piece of clothing, and business dealings with this commercial good must be governed by the general provisions of the Code of Obligations. Similarly, the object of a copyright licence should only be permission to use a copyrighted work. Anyone who grants a licence to use any other product, e.g. a collection of addresses, is acting outside the scope of copyright law, even if copyright terminology is used.[110]

The same applies to neighbouring rights: an artistic performance is only protected under neighbouring rights if it involves a copyrightable work or an expression of folklore.[111] A person who plays football, who performs magic tricks, who practices artistic gymnastics is not a performing artist, no matter how outstanding and impressive the physical performance may be. Their work cannot therefore give rise to a transferable neighbouring right.

Therefore, anyone claiming a right to an intangible property must either have performed the creative work himself or herself or have acquired a corresponding right of use directly or indirectly from an author or performer. Only such an acquisition of rights may lead to intermediaries also having exclusive rights to intangible property, which they may assert against third parties.

However, there are a few exceptions to this clear principle. The most important in practice is the original claim of producers of phonograms, as enshrined in the Rome Convention[112] and the WPPT.[113] In the EU Directive 2001/29, this special protection is also extended to producers of audio-visual recordings.[114] The Directive thus contains a discrepancy with the relevant treaty for this area, the BTAP,[115] which only recognises performers' rights, but no original producers' rights.

As explained above,[116] these special regulations go back to concepts of authoritarian corporatism, which wanted to shape the then newly emerging production of records as an economic sector that – like other economic sectors – was to be regulated by compulsory corporations under state supervision. In a free market economy, such an instrument of control has lost all justification. On the one hand, the factual point of reference for the regulation, the industrially produced physical sound carrier, has lost a large part of its economic significance and has been replaced by other technologies as a means of recording and distributing music. On the other hand, today there is hardly any reason why this small part of a creative industry should be granted such special protection, when there is no such protection for equally important related industries such as publishing, theatre, art galleries, cinema, etc. Even within the privileged industry, it seems hard to understand why the production of physical sound carriers or audio-visual carriers leads to an original legal claim, while this is not the case for comparable services in the area of the distribution of acoustic or audio-visual content, e.g. by way of podcasts, streaming or any other distribution of digital files. Such unequal treatment can at best be explained historically, but is no longer justifiable in terms of legal policy.

In view of all these aspects, it seems appropriate for the development of copyright law in the digital age to eliminate these systemic inconsistencies under neighbouring law. Unfortunately, EU legislation has instead preferred to pay its respects to the particular interests of an additional set of intermediaries in EU Directive 2019/790. Under the title "Protection of press publications with regard to online use", press publishers are granted an original neighbouring right to their publications. It is neither required that these publications are copyrightable works nor that they are used in a copyright-relevant manner. Rather, the mere fact that such publications are linked to, i.e. that they are made findable and accessible by third parties, is intended to justify a claim to financial compensation. Why such services of making content findable and accessible, i.e. the provision of elementary services for the realisation of the public interest underlying copyright, should be financially burdened, remains the secret of the EU legislator. The same applies to the question of why only press publishers should be entitled to such a claim and not all other intermediaries whose content is redistributed by internet platforms and search engines and thus made findable and accessible. It cannot be surprising that this legislative aberration is overwhelmingly rejected in European copyright doctrine.[117]

From its social objective, copyright can only protect works, i.e. intellectual creations with an individual character. Whether an intellectual creation is based on the necessary creative decisions by authors which make it appear new and original, i.e. give it individual character, can only be decided on the basis of the individual work. Accordingly, protection under copyright law as well as under neighbouring rights may only ever be granted if it can be directly or indirectly traced back to such a copyright-relevant creation. The legal form of this traceability is the direct or indirect contractual acquisition of rights from authors or performers. In contrast, there is no objective justification for an original claim by intermediaries.

4. Necessity of collective management

As already mentioned,[118] authors have always been dependent on entrusting the management of their rights to third parties. In the field of literature, it was printers and publishers who were responsible for the production and distribution of copies of works and thus also for the collection of compensation for authors. In the visual arts, it is the art trade that in most cases takes on this task. In the area of performing rights and broadcasting rights, the rights holders themselves formed specialised agencies, which we now call collecting societies, to which they entrusted the control of the market as well as the negotiation and collection of royalties.

The need for such specialised intermediaries for the administration of copyrights and performers' rights has changed little as a result of digitisation and globalisation. It is true that the internet makes it easier for individual authors to distribute their works independently and also to collect royalties from individual users. Similarly, with manageable effort it is now possible to record artistic performances and distribute them on the internet. But a profitable worldwide exploitation of works and performances requires much more than this. Those who want to make a living from their works or artistic performances still need a professional exploitation organisation.

However, the situation of users and consumers has changed gradually. While in the first half of the last century intermediaries were quite capable of acquiring the exploitation rights they needed directly or via other intermediaries from the rights holders, this business model ran into major difficulties for the first time with the advent of television. The large number of rights required for programming led to enormous transaction costs for broadcasters, without it being possible to say with certainty that the acquisition of rights was complete. At almost the same time, the shift in the use of works to the private sphere, especially as a result of the rapid spread of photocopying and private image and sound recording devices, led to the fact that consumers who had previously been able to invoke the freedom to enjoy works and performances now became users from a legal point of view: they no longer only consumed works and performances, but they also made reproductions. These private reproductions were not actually allowed under the provisions of copyright law in force at the time, but they were mostly tolerated because there was neither an incentive nor a realistic and practicable way for the millions of private users to acquire the rights required for these uses.

In response, some Scandinavian countries introduced so-called extended collective licences for education and broadcasting.[119] These allowed certain users to acquire a collective licence from a representative collecting society for certain uses specified in the law, covering the entire repertoire of works they required. This licence, named in the original laws as "agreement licence" and known in the rest of Europe as "extended collective licence",[120] was also valid for works of rights holders who were not represented by the collecting society in question. Although these rights holders could request that their works be excluded from the licence, this possibility to opt-out was not, in practice, used.

A little later, Germany became the first country to introduce a statutory licence for private copying. The law allowed the recording of protected works by means of tape recorders for private purposes, but linked this use to a levy which was collected on the purchase of these devices and distributed to the rights holders of the reproduced works via a collecting society. This system of device levies was subsequently extended to other sound and image recording devices and other reproduction devices, and it was also adopted by a large number of other European countries.[121]

Both forms of collective exploitation of rights were differentiated in the following years and extended to further uses. Within the EU, their application is now harmonised in Directives 2001/29 and 2019/790. This is done, on the one hand, by adopting the instrument of the extended collective licence into EU law and, on the other hand, by defining a catalogue of mandatory or optional exceptions to the general protection provisions.

In view of the digitisation of works and performances and their worldwide dissemination via the internet, such collectivised forms of licensing often appear to be the only possibility of acquiring rights that can be realised with reasonable effort, especially from the perspective of users. However, in practice they can only be implemented in very limited areas. In the field of non-theatrical music, for example, there is an almost global network of cooperating collecting societies which administer a considerable part of the world's repertoire on the basis of voluntary collective management, and can offer correspondingly comprehensive rights of use in many countries. With regard to all other types of works and also for performers' rights, however, these international networks exist only sporadically or not at

all. As a result, it takes a disproportionate effort for users outside the field of non-theatrical music to acquire rights of use for a numerically somewhat larger repertoire of works that extends beyond their own country's borders.

However, it is characteristic of the digital world that a large number of uses relate to a great number of works and that these works and performances originate from a wide variety of countries. If their re-use is to be linked to the payment of compensation even in such cases, this can only work through a system of mandatory collective exploitation. The use of FAIR works in particular therefore requires comprehensive regulations of compulsory collective exploitation.

Over the decades, rights administration by collecting societies has emerged as the adequate form of organisation for this collective exploitation. However, the role of these societies must also adapt to the changed technical conditions of the use of works. Whereas in the beginning they exclusively represented the interests of the rights holders in copyrights and performers' rights, today they must see themselves as mediators between the rights holders on the one hand and the users on the other. At the same time, they must also protect the interests of the general public, i.e. the consumers of the works and performances, so that they are not unreasonably hindered in their opportunities to enjoy the works.[122]

VI. The function of copyright in the digital world

1. Copyright as a right of the creator

In a market economy, the non-rivalrous nature of immaterial goods, i.e. the fact that they can be used an infinite number of times by an infinite number of people without being consumed, leads to the political-economic necessity of finding a commodity form for such services in which they can be exploited in market form despite their objective lack of exclusivity.[123] In capitalist societies, two variants have developed for this. One form is the sale of labour power itself: providers of immaterial services are turned into workers who are paid for their work through salaries. The market product resulting from their work is then legally assigned to the companies concerned, i.e. to the employers. This form underlies the various variants of work-made-for-hire arrangements, and it is also the basis of authoritarian corporatism as still evident today in the Rome Agreement.[124] The other commodity form is the structuring of the intangible good as a legal object: the result of the intangible performance, the work or performance, is treated legally as a kind of thing even before it is commodified and thus made into a tradable good.[125] This work result then legally belongs to those who have produced the intangible performance. Continental European copyright law is an expression of this second variant.

The fact that the current copyright laws combine these two possibilities leads to the "overprotection" criticised by Reto M. Hilty.[126] Such an accumulation does not really make economic sense, because there is no need for a special status for the trade in books, audio carriers, audio-visual carriers or other commodified copies of works: as movable objects, they already take the form of a commodity. The same applies to files such as application programmes for computers, which are traded as products on the market. It is sufficient here that the immaterial work is compensated through wages and the work result is legally

assigned to the enterprise. The fact that this market-shaped work product is then additionally provided with a status that goes far beyond the protection under competition law that applies to all other work products is an expression of the development of copyright into producer protection law described above, and it leads to the current dysfunctionalities of copyright.[127]

As a consequence, there is an economic necessity for copyright where the result of creative work in a not yet commodified form is to be legally assigned to the creators themselves. Only in relation to such results of creative work is there not yet a commodity form, and only in these cases is there a need for the work result to take the form of a legally recognised good. It is also immediately obvious that such a commodity form must be directly linked to the creative person, because it constitutes the result of his or her work as a legal good. The so-called "creator principle" is therefore not simply an ideologically based thought-pattern, but is rather the economic basis of continental European copyright law. For this reason, it cannot be abandoned without calling into question the entire legal figure of the notions "work" and "performance".

The rights of use applied to these intangible goods are logically assigned to the performers of the intangible performances. They can be expressed in the form of personal rights, exclusive rights of use or claims to remuneration. Their scope and form are a matter for the national legislator, which is why they differ from country to country. This also applies in particular to the question of the transferability of these rights of use. What all these regulations have in common, however, is that rights of use can only exist insofar as they have been acquired directly or indirectly from the providers of the immaterial performance.

2. Copyright as a right of re-use of FAIR works

In addition to the structuring of intangible property and the recognition of rights of use linked to it, copyright has the further central task of regulating the transfer of rights of use and thus the reuse of works and performances by persons other than the original rights holders. This corresponds to the functions fulfilled in relation to material goods by property law and in particular the Code of Obligations. However, anyone looking for such rules in the current legislation will at best find the clutter of copyright contract law described by Reto M. Hilty: "There is no question of a reasonably clearly defined regulatory framework; rather, this area of law is largely a hodgepodge of more or less consistent building blocks, often developed by legal practice".[128]

This may not be surprising insofar as the entire copyright law is private law, and the extensive lack of both dispositive and mandatory contractual norms could therefore be understood as an expression of unlimited contractual freedom. However, it also means that no interests other than the direct interests of the two contracting parties can play a role in the drafting of the contract. The legislator thus renounces both the protection of a possibly weaker contracting party and the protection of general interests in legal transactions with works and performances.

This is indeed the case with respect to works that have not or not yet been published. The rights holders in works and performances are not compelled by any legal norm to publish or

even to disclose their creations. It is only up to them to sell their rights of use to third parties or to allow them certain uses of the works and performances, whereby this permitted use can also be limited in terms of subject matter, space or time. It is also up to them to negotiate financial compensation or, if necessary, to agree on further modalities of use, insofar as their negotiating power permits this.

However, once the works and performances have been published, re-use is very much subject to legal regulations. These consist of the fact that certain uses are permitted by law or that licensing for certain uses is only possible via a collecting society. This legal authorisation can be granted free of charge, as in the case of the right of quotation or the claim to freedom of panorama, for example, or it is tied to the payment of a remuneration, which is referred to as "fair compensation" in the EU directives. Copyright law, seen in this light, is already today to a considerable extent the right of re-use of FAIR works.

Developments in recent years have shown that this task of copyright law is becoming increasingly important. Thus, many copyright laws have been supplemented by additional exceptions and limitations provisions that allow socially desirable uses of works and performances or grant statutory licences for them. For example, restrictions on the use of orphan works and performances, on the production of copies of works for people with disabilities, on the use of works and performances for the purposes of scientific research and on the compilation of inventories by memory institutions were added in the course of the revision of the Swiss Copyright Act. The EU provides for regulations serving the same purposes in Art. 6, para. 4 of Directive 2001/29/EC and in Art. 3 ff. of Directive 2019/790/EU. At the international level, the Marrakesh Treaty of 2013 also regulates the use of works by persons with visual disabilities.[129]

At the same time, further forms of use have been made subject to mandatory collective management and the possibility of granting extended collective licences has been created, which significantly expands the possibilities of collective rights management.[130] This is no longer limited to the areas expressly provided for by the legislator, but can be applied in almost any constellation through corresponding agreements between users on the one hand and collecting societies on the other. Obtaining licences for larger collections of works and performances has thus become much easier.

Many of these new regulations have been prompted by the use of works in the digital environment. They are intended to enable as many works and performances as possible to be found, accessed, linked and thus reused without incurring disproportionate transaction costs.

3. Copyright as a right of access to the results of creative work

However, the new limitations just mentioned, as well as the extension of collective management, also have an additional objective: they are intended to facilitate public access to works and performances and thus their perceptibility. As the title of the Statute of Anne illustrates, copyright has had this task since its beginnings in British copyright, when it was designed to serve the "Encouragement of Learning". Today, it fulfils this task by exempting the consumption of works and performances, and by permitting certain preparatory acts, in

particular copying and recording on data carriers in the private, educational and business spheres.

As a result of digitisation, this function of copyright today requires partly different regulations than under traditional copyright law. In particular, the possibility of free consumption of works must be ensured. This is done in the Swiss Copyright Act, for example, by limiting the legal enforceability of the protection of technical measures: it only applies to measures intended to prevent the unauthorised use of protected works and performances, and it cannot be enforced against authorised uses.[131] This provision of the law, which Reto M. Hilty refers to as the "right to hack",[132] may also be interpreted in the light of the foregoing as justifying the circumvention of technical protection measures for permitted consumption of works.[133]

In addition to their primary purposes, the new provisions on exceptions and limitations for the production of copies of works for persons with disabilities, for the purpose of scientific research or for the design of inventories in publicly accessible memory institutions mentioned in the previous section also indirectly serve the access of the general public to works and performances.[134] They contribute to making more works findable, accessible, interoperable and reusable, i.e. FAIR.

4. Collecting societies as intermediary institutions

Collecting societies have established themselves as mediators between the interests of creative professionals and the users of works and performances. Originally conceived to represent the interests of freelance authors, their function has gradually changed over time, at least in Switzerland. They are still the trustees of all rights holders in their field of activity. However, they must be equally concerned with safeguarding public information interests and enabling the lawful use of works and performances.[135]

At the same time, their activities can and should by no means make the predominantly economically oriented activities of other intermediaries between creative work and the use of works and performances superfluous. The mediation and economic exploitation of the results of creative activity remains the business field of the various sectors of the creative industries. Collecting societies merely have a complementary function: they have to ensure that works and performances can be found, accessed, linked and reused despite the constraints of the globalised market. They must ensure that copyright does not serve the sole purpose of maximising profits, but also takes into account public interests and the interests of consumers of works and performances. They must ensure that users can easily acquire the rights they need and pay the compensation set for them.

It is the task of the legislature to prescribe these political objectives of copyright policy and the instruments necessary to achieve them. This includes the anchoring of exceptions and limitations to copyright as well as the definition of the areas in which collective rights management is mandatory. However, the implementation of these objectives should be left to the collecting societies. This is the only way to achieve the most differentiated balance possible between the interests of rights holders on the one hand and users on the other,

taking into account the particularities of individual genres of works and different areas of exploitation.

The central task of collecting societies must be to return copyright to its original functions, to contribute to the "Encouragement of Learning" and to promote the "Progress of Science and useful Arts". While they should remain trustees of the rights holders, they should also be trustees of the general public who, to use the terminology of Article 15 of the International Covenant on Economic, Social and Cultural Rights once again, need FAIR works in order to participate in cultural life and to enjoy the benefits of scientific progress and its application: works and performances that are findable, accessible, interoperable and reusable.

Acknowledgements

I would like to thank Dr. Dieter Meier, former director of the collecting society Suissimage, and Dr. Emanuel Meyer, head of the copyright legal service at the Institute of Intellectual Property, for their valuable advice. I particularly thank Sadie Plant who has carefully reviewed the English translation of the article.

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48 Art. 9 para. 2 TRIPs Agreement (SR 0.231.15).
49 Art. 13 TRIPs Agreement (SR 0.632.20, Annex 1C).
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51 Dommann, op. cit. (n. 16), pp. 208 ff; Egloff, op. cit. (n. 6), pp. 75 ff.
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62 Art. 8 WCT (SR 0.231.151) and Art. 10 WPPT (SR 0.231.171.1). The same provision is now also found in Art. 10 BTAP (SR 0.231.174).
63 Art. 6 para. 2 WCT (SR 0.231.151) and Art. 8 para. 2 WPPT (SR 0.231.171.1) as well as the "Agreed Statement on Art. 2 let. e, 8, 9, 12 and 13" WPPT.
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68 Andreas Lutz, Zugang zu wissenschaftichen Informationen in der digitalen Welt, Tübingen 2012, p. 179. Also Reto M. Hilty, Das Urheberrecht und der Wissenschafter, in: GRUR Int. 2006, pp. 179 ff; Willi Egloff, Wissenschaftliche Forschung und Urheberrecht, in: medialex 2009, pp. 11 ff.
69 Hilty, op. cit. (n. 35), n. 101.
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71 According to Art. 2(d) WPPT, "'phonogram producer' means the natural or legal person who, on his own responsibility, arranges for the initial fixation of the sounds of a performance or other sounds or the representation of sounds". According to Art. 3(c) Rome Convention, "'phonogram producer' means the natural or legal person who first fixes the sounds of a performance or other sounds". Financial participation is no essential element of the notion in either case.
72 Nuss, op. cit. (n. 14), p. 161; Rahmatian, op. cit. (n. 14), pp. 201 ff.
73 "FAIR" here stands for Findable, Accessible, Interoperable and reusable (cf. IV.1. below). The term qualifies a category of works. It has nothing to do with the terms "fair use" in US copyright law or "fair dealing" in British copyright law, which describe certain types of use of works.
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90 Hodson/Jones et al., op. cit. (n. 74), p. 12.
91 Hodson/Jones et al., op. cit. (n. 74), p. 13.
92 Hodson/Jones et al., op. cit. (n. 74), p. 14.
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94 Denis Barrelet / Willi Egloff, op. cit. (n. 29), n. 20 on Art. 9 URG; Cyrill P. Rigamonti, Urheberpersönlichkeitsrechte, Bern 2013, p. 269.
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105 U.S.C. 17, section 102 (a).
106 Gervais, op. cit. (n. 5), p. 33, points out that even in early times the granting of copyright was understood as a quid pro quo for the disclosure of texts: "The protection of author at the time was a quid pro quo for disclosure". This connection was also explained in the dissertation by Johann Rudolf Thurneisen, De Recusione Librorum Furtiva, published in Basel in 1738; see Egloff, op. cit. (n. 6), pp. 9 f.
107 SR 0.231.15. The original French text speaks of "oeuvres publiées". This means works that are published and distributed in the form of copies of works. In contrast, the Swiss URG understands "publication" (Art. 9 para. 3 URG) to mean the disclosure of a work to a non-private audience, which is correctly referred to as "divulgation" in the French version of the law.
108 Above 4.4.
109 Gervais, op. cit. (n. 5), p. 203. See also Hilty, op. cit. (n. 35), n. 869.
110 Therefore, for example, a CC0 waiver can never be a licence, as Creative Common itself repeatedly states. With the CC0 sign, someone expresses that in his or her view there is no copyright in an object, i.e. it is not a protected work, and that authors of this object waive

the assertion of copyright in the event that under any national legal system this object should nevertheless qualify as a "work" in the sense of copyright.
111 Art. 2 let. a WPPT (SR 0.231.171.1); Art. 33 para. 1 URG (SR 231.1).
112 Art. 10 Rome Convention (SR 0.231.171).
113 Art. 11 ff. WPPT (SR 0.231.171.1).
114 Art. 2 let. d Directive 2001/29/EC.
115 Art. 2 let. d Directive 2001/29/EC.
116 Above 2.3.
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125 Nuss, op. cit. (n. 14), pp. 178 ff.
126 Hilty, op. cit. (n. 35), n. 101.
127 Above 2.4.
128 Hilty, op. cit. (n. 35), n. 548.
129 Marrakesh Treaty of 27 June 2013 on Facilitating Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (SR 0.231.175).
130 Art. 43a URG (SR 231.1). An analogous but much more restrictive provision is contained in Art. 12 Directive 2019/790/EU.
131 Art. 39a, para. 4 URG (SR 231.1). Cf. Egloff, in: Denis Barrelet / Willi Egloff, op. cit. (n. 29), n. 2 and 12 on Art. 39a URG; Hilty, op. cit. (n. 35), n. 101.
132 Hilty, op. cit. (n. 35), n. 877.
133 Egloff, in: Denis Barrelet / Willi Egloff, op. cit. (n. 29), n. 12 on Art. 39 a URG.
134 Art. 24c, 24d and 24e URG (SR 231.1).
135 Egloff, op. cit. (n. 122), p. 132.