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Choice of law in copyright and related rights : alternatives to the lex protectionis

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Chapter 5

The Rationale of Copyright and Related Rights Law

5.1 Introduction

The previous chapters were devoted to an enquiry into the development and principles of the international copyright and related rights system and an analysis of what they imply for choice-of-law rules. The conclusion was that the Berne Convention and other treaties are best viewed as having a law-of-alien character and that they do not contain straightforward conflict rules. The one clear exception is Article 14 bis (2)c BC on the formal validity of agreements regarding the transfer of rights by creative contributors to film producers, but this is of limited significance in practice.

It would thus appear that there are no internationally harmonised conflict rules for most copyright and related rights issues. The *lex protectionis* can be found in some private international law statutes,³⁶⁰ and seems to be the most adhered to choice-of-law rule in national case-law. It is however unlikely to be a rule of customary international law: there is no general agreement on the issues to which the *lex protectionis* applies and it is not applied by national courts in a consistent manner.³⁶¹ That the *lex protectionis* is not laid down in international law –and that,

360 E.g., Art. 110(1) Swiss *IPRG*: 'Immaterialgüterrechte unterstehen dem Recht des Staates, für den der Schutz der Immaterialgüter beansprucht wird.'. Compare the different terminology of Art. 34(1) Austrian *IPRG* which subjects existence, scope and lapse of intellectual property rights to the law of the country where an act of use or infringement takes place; Art. 54 Italian Private International Law Act 1995 which subjects rights in intellectual property to the law of the country of use of the work, invention, trademark, etc.

361 Mäger (1995, pp. 33–36), after concluding that treaties do not contain clear conflict rules, suggests the *lex protectionis* could be deduced from the territoriality principle which he regards as a principle of customary international law. As he remarks, though: 'Die weite Verbreitung des Territorialitäts-Prinzips steht leider in einem umgekehrten Verhältnis zu seiner begrifflichen Schärfe und inhaltlichen Kontur.' This suggests that it cannot be used to deduct a choice-of-law rule. In addition, the fact that the Montevideo Convention –which is based on the notion of copyright as a *droit acquis*– is still in force between a number of primarily Latin-American

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as we have seen in Chapter 4, the legislative sovereignty of states is by itself not an adequate basis for it— does of course not mean that it is not an appropriate conflict rule.

The question is, what would be the justification for using the *lex protectionis* as choice-of-law rule for intellectual property issues? We have seen in Chapter 2 that conflict rules are based on any of (a mixture of) four principles.

The first and most common is the *closest connection* of the legal relationship to a certain country, from a predominantly factual-geographical perspective. A second principle is *party autonomy*. It has traditionally played a substantial role in the area of international contracts, but has also gained ground in other areas, notably those of succession and torts. The third principle is *functional allocation*, which in its narrow meaning safeguards the policies that protect weaker parties in certain areas of (semi) private law (labour relations, consumer law). In a broader sense, functional allocation can be viewed as a means to identify the applicable law considering the function or policies that underlie the substantive law in a certain field. Fourth, the *favour principle* underlies conflict rules that are aimed at either the validation of legal acts, or the advancement of a certain substantive result (for instance, that the victim of a tort enjoys the benefit of the most advantageous law).

Since the nature and rationale of the relevant area of private law plays a role in the determination of suitable conflict rules, the legal characteristics of copyright and related rights and the objectives or justifications for it must be considered. That will be the main objective of this Chapter, the results of which will serve for the discussion of the relevance of the four allocation principles in Chapter 6.

In addition, when ascertaining which allocation principles are most suited, one should also have regard for today's realities of production and dissemination of protected subject-matter. This Chapter will therefore begin with a bird's eye view of some important changes that have been taking place in the information industries: the increased commodification of information, the corresponding changes in the production of intellectual creations and the changes in distribution for which information and communication technologies have allowed (Paragraph 5.2).

Next, the legal characteristics of copyright and related rights will be discussed (Paragraph 5.3), as will be the rationale of copyright and related rights (5.4). Paragraph 5.5 is devoted to the various justifications that are put forward in support of the limitations on intellectual property. It will be argued that the public interests that underlie some of these limitations, notably freedom of expression, is

countries (see note 237, pleads against considering the *Schutzland* principle or *lex protectionis* as a rule of customary international law).

a relevant factor in the determination of an appropriate choice-of-law rule for issues of infringement especially.

In the concluding Paragraph 5.6. I will indicate whether the nature and rationale of copyright and related rights implies the use of certain allocation principles and in which direction changes in the global production and distribution of protected subject-matter point. These observations will serve as a prelude to the more in depth analysis of appropriate conflict rules, which is to be undertaken in Chapter 6.

5.2 Trends in the Information Markets and Technology

When the international copyright system first developed, the economic –if not the social– importance of the ‘copyright industries’ was quite modest. As western countries moved towards the post-industrial, service-oriented society, so the economic significance of intellectual property grew. Today, the contribution of copyright industries³⁶² to gross national product is estimated at 4 to 6 per cent. To give an idea of its relative importance: in the Netherlands the copyright sector is bigger than the chemical industry or agriculture and contributes about the same in added value to the economy as the construction industry or banking.

It is however not just the growth of traditional copyright industries (press, media, design, etc.) that increases the significance of intellectual property. In the often proclaimed ‘Information society’, the production and use of information and information technologies permeates all areas of economic activity. The European Commission estimates that before 2010, half of all jobs in the European Union will be in industries that are either major producers or intensive users of information (technology) products and services.³⁶³

The growing economic importance of information goes hand in hand with developments that are relevant to our subject: the commodification of information and information technologies and global concentration in important parts of the copyright industries. Technological changes have allowed for the production.

362 In various developed countries regular reports are made on the economic contribution of copyright industries, but the definitions used are not the same. In the Netherlands, the copyright industries are made up of the following content producers: publishing (press and literature, 35 per cent of total value added by copyright industries), software (20 per cent), design (19 per cent), research (9 per cent), broadcasting (9 per cent), music and theatre (5 per cent), film and video, multi-media/Internet, visual arts, photography and industry interest groups. See SEO 2000. See also Schricker 1999, *Ei.nl.* at nr. 9 and Fromm/Nordeman 1998, *Ei.nl.* at nr. 1.

363 EC 2000 p. 4.

dissemination and use of information through global communications networks on a unprecedented scale.

5.2.1.1 *Commodification of Information and Information Technologies*

The increased economic importance of information goods and services translates into a corresponding expansion of protection, both as regards the type of subject-matter in which exclusive rights are created and as regards the scope of these rights. As the creative process is industrialised, copyright and related rights increasingly have the function of property law, serving innovation. Copyright and related rights have become more and more a means to protect commercial interests, which has pushed to the background what has been – at least in civil law countries – its traditional (other) function: to protect the non-material interests of creators.³⁶⁴

Not only information goods themselves, but the intellectual property in the content, is considered as a commodity or capital asset, to be traded across borders as other merchandise is. From this perspective it can be argued that choice-of-law rules should serve the smooth operation of international commerce in copyright and related rights. This could be done by adopting conflict rules that validate the transfer of intellectual property rights (*favor negotii*), or allow for a large measure of freedom of disposition for parties to choose the applicable law in the case of licensing or assignment (party autonomy).

5.2.1.2 *Changes in the Production of Information*

The copyright industries (entertainment, media, press, design, software, etc.) have not only grown fast, the structure of these industries has also changed. Castells, in his analysis of the networked society, describes a trend in globalisation where multinational companies grow, not so much by mergers and take-overs, but by building transnational networks of affiliate companies.³⁶⁵ In the media industries, however, changing communications technology and the search for economies of scale, have also caused a massive merger and take-over wave.³⁶⁶ The idea behind

364 On the commodification of copyright see e.g., Barry 1997, Dietz 1988, Dreier 2001b, pp. 64–66, Grosheide 1996, Halbert 1996, Lipinski & Britz 2000, pp. 61–62.

365 Castells 2000, esp. pp. 163–210.

366 For media concentration in the Netherlands, see the report *Mediaconcentraties in Beeld* of the Dutch media regulator, the *Commissariaat voor de Media*, of 21 March 2002. The daily newspaper market is controlled by 2 companies with 5 dailies (90 per cent of the market), in



many of these mergers is that the content one produces can be exploited through many different distribution channels in different versions.

There is a concentration of intellectual property rights in large media groups with a global reach.³⁶⁷ These groups –and other large companies that operate internationally, e.g., in the IT sector– have access to a wealth of legal expertise and will generally anticipate the legal complexities that cross-border commerce can bring along. They have a strong bargaining position against the actual creators of content.

In the entertainment sector especially, there are also many independent creators and performers who work on the basis of commissions, or who sell the rights in their work (synopsis for film or television programmes, compositions) only after they have created them. The level of organisation and thus bargaining power varies: in the US film industry, actors and directors are well-organised in influential guilds. In the Netherlands, the same groups have so far been unable to negotiate adequate collective agreements or standard contracts.³⁶⁸ On the other hand, fiction writers and journalists have been relatively successful.³⁶⁹

The situation of musicians (composers and performers alike) seems rather weak. The global music industry is dominated by the five ‘Majors’, firms that do not control only the vertical production-chain, from music publishers to record shops and radio stations, but who are also important actors at the horizontal level (apart from music, they have interests in other content such as print publishing, computer games, etc.).

Towse concludes that ‘copyrights are a double-edged sword that are instrumental in the growth of large corporations with huge market power and bargaining power over the division of revenues that only really successful artists (or really strong artists’ unions) can assail.’ Data show that in the music industry, the average performing artist earns little. The large sum of royalties that are collected go to a small number of firms and successful artists. Still according to Towse, ‘copyright inevitably distorts markets by strengthening publishers (firms)

television the public broadcasters, together with the owners of commercial stations HMG and SBS have a joint share of the viewers market of more than 80 per cent. In the cable sector, 3 companies control over 80 per cent of the domestic market.

367 The desire to control different producers of content and different distribution channels was behind the composition of modern media companies such as AOL Time Warner, Bertelsmann and Vivendi Universal. These conglomerates have acquired, in the space of barely a decade, large interests in film production (including ownership of large film libraries, i.e., intellectual property in films) and distribution, television and cable (production of programmes and distribution), publishing and Internet (access and service providers). The burst of the Internet/ICT bubble in the new millennium has led to some de-concentration.

368 Kabel 2002, p. 33. In Germany the revision of the law on copyright and related contracts of 2002 stimulate collective agreements on (the definition of) equitable remuneration for authors and performers. See the literature mentioned in note 461.

369 Hugenholtz 2000c, pp. 13–14.

more than it protects authors (artists). This distortion requires correction by some means of countervailing power to assist artists.³⁷⁰

As Hugenholtz concisely put it in his plea for returning copyright to the creators: 'multi-authorship', 'multi-nationalisation' and 'multi-media'³⁷¹ conspire to concentrate exploitation rights in the hands of a happy few, which of course, are seldom the self-employed persons who write, design, compose or paint. Towse³⁷² recommends that the legislature pay attention to the relationship between author and intermediary, especially publisher, since the interests of these two do not necessarily align in economic terms.

A substantial group of 'creatives' are the employees that produce intellectual property in the course of their duties. If the EU-figures for employment in the audiovisual industries are anything to go by,³⁷³ the number of employee-creators will continue to rise steadily. Particularly in the software industry, the activity of employees resembles that of an army of ants, who all write –with the aid of computers of course– part of the millions of lines that make up the code of software programmes.

'Cyberspace' allows for the production of intellectual creations by (large) groups of contributors. In the software sector this is done particularly where open source software is concerned. This type of non-proprietary software, of which the Linux operating system is a well-known successful example, is developed by a loosely-connected group of people and companies.³⁷⁴ Standards, such as those developed under the aegis of the World-wide Web Consortium, are also the result of the input of many contributions from across the globe. However, this type of large-scale co-production in cyberspace seems relatively rare.³⁷⁵

370 Towse 2000; p. 152, 164, 167.

371 Hugenholtz 2000c, p. 16.

372 Towse 2000.

373 According to the EC Proposal for the Media Plus Programme (14 December 1999, COM(1999) 658 def.), in 1995 950,000 people were employed in the EU's audiovisual sector; 1,030,000 by 1997, with an estimated 300,000 additional jobs by 2005. Of course only part of these figures concern creative jobs. In the US, the entertainment industry employed about 5 million workers in the mid-nineties, with an increase of employment of 12 per cent a year; Castells 2000, p. 398.

374 Linux must be the most famous contemporary example. This operating system, the basic code of which was written by Linus Torvald, is expanded and improved by the efforts of –according to *The Economist* August 19th 2000, pp. 61–62– 'millions' of developers world-wide. The 'millions' must be a figure of speech, given the knowledge of computer programming of the average, well-educated person with access to the Internet.

375 In science, scientific papers quite often list large numbers of 'authors' from different research groups around the world, but in practice many of these do not actually contribute to the article itself (they have, for instance, prepared test-instruments, conducted experiments, made samples, etc.).

If the information technology revolution has taught us anything, it is that companies tend to cluster together in relatively small geographic areas, rather than disperse and use telecommunications to co-work. They may relocate the actual production, i.e., the handiwork, to regions or countries where labour is cheaper, but the creative work is concentrated in the 'valleys' because of the presence of highly-skilled employees, knowledge, capital and an inventive culture.³⁷⁶

The copyright industries may increasingly be dominated by large multinationals, on the other hand the spread of information technology and networks have spawned a large number of small companies. Their business is in website design, the development of software that allows for anonymous surfing or the collection of information on Internet users, the construction of portals or search engines that help Internet users to find their way in the ocean of information that is the Internet.

These companies share with such classic sectors of the copyright industries as fine arts and theatre, the type of small-scale production and emphasis on individual creative work. But where the classic sectors often operate locally, the work of Internet companies typically has cross-border implications. These are, however, not so much in production as in the distribution and use of the products or services rendered.

5.2.1.3 Changes in the Distribution of Information

With technological development different exploitation models have developed. Dommering distinguishes four types, namely the print, theatre, broadcasting and telecommunication models.³⁷⁷ The traditional models 'print' and 'theatre' involve the payment of a fee for a physical copy or one-time access respectively, both following the one-size-fits-all principle.³⁷⁸

After radio made it into the home in the first decades of the 20th century, television (terrestrial, cable, then satellite) followed from the second World War onwards. Initially it was technically impossible to restrict access to individual items that were aired, so a new model was introduced. In the *broadcast-model*, a flat fee (TV and radio licence) and/or income from commercials provide the remuneration for copyright owners and others, such as phonogram producers.

376 Castells 2000, p. 417 et seq.

377 Dommering 2001.

378 Books can have paper back and hard back versions of course and in the theatre you could sit in the galley or stalls, but these are differences in packaging or service, not content.

broadcasting organisations and performing artists who secured their own intellectual property rights.

The development of the fourth model, the *telecommunication model* followed not much later, after computer technology had become widespread. Although Colossus, the mother of programmable computers, was already constructed in 1943,³⁷⁹ it took almost another two decades before the production of computers for businesses took off, following the invention of semi-conductor chips in 1959.³⁸⁰ Another two decades passed before the personal or desktop computer began its reign as indispensable home and office equipment. Semi-conductors received their own intellectual property regime in the late 1980's, at about the same time that computer software secured its place as copyrightable subject-matter in developed countries: to be followed by database protection in the 1990's.

Today, of course, copyright's pet-subject is the Internet, or more generally: the exploitation and use of protected subject-matter in a networked environment. Since non-academic and non-government users were given access to the Internet in the late 1980's, the computer networks that form it have spread over the globe like fungoid threads.³⁸¹

Computers, (broadband) telecommunications and cable have given rise to the telecommunication model. Using their television, computer or hybrid, users can mix-and-match content to meet their individual needs, or from the other side, producers can engage in the versioning of information products and services so that they can maximise their profits.³⁸² The Internet makes it easier to distribute information to foreign customers, but companies of course also use the Internet – maybe even primarily so – to serve local users. In such cases, the fact that the websites can be viewed outside the (geographical) target area is a mere spill-over effect.

In sum, technology offers many new possibilities for the distribution of content, without necessarily making old models obsolete. But the trend does seem to be moving away from the supply of physical copies and towards electronic delivery of customised information products.³⁸³ A related development is that the distribution of content is increasingly organised in service-models rather than

379 It was built at the Post Office Research Station for Bletchly Park, the UK's Government Code and Cypher School, see Singh 1999, p. 160.

380 Singh 1999, pp. 243–248.

381 By 2000, in Europe 40 per cent of the people were using Internet and that number is growing fast. EC 2001, p. 5.

382 On versioning, see Shapiro & Varian 1999; Kahin & Varian 2000.

383 The jury is still out on which business model will be the more used for digital information: versioning (offering customers items of information, as in pay-per-view, or being able to 'buy' one scientific article rather than a bundle, i.e., journal issue, as happens in print media) or aggregation (combining items in a package). See the various contributions in Kahin & Varian 2000.

goods-models. As a result, (end-) users will find themselves more and more often party to a licence agreement, whose terms have been set by the producer of information.³⁸⁴ Since telecommunications facilitate the direct cross-border distribution of information goods (rather than using a string of intermediaries in the country of delivery, e.g., the importer-wholesale-retail chain), these licences will also increasingly be international contracts.

The digitally-networked world may provide new possibilities for the production and distribution of content by right owners, it also allows for large-scale copying and distribution of protected subject-matter by users. The many file-sharing systems that have sprung up, particularly where music files are concerned, testify to the problem of controlling the unauthorised use of protected works once they have been released.

In conclusion, there are a number of developments that merit attention when discussing suitable allocation factors:

- Copyright and related rights have become fairly 'normal' commodities, that are routinely traded across-borders.
- Large multinational media/communications conglomerates increasingly own substantial catalogues of intellectual property rights. This concentration will possibly weaken the bargaining position of creators and (end) users alike.
- The digitally-networked world results in more cross-border actions by suppliers and users of information goods and services alike. Only part of these actions are intentionally international. A fair number will probably be aimed at local (domestic) commerce, the international aspects are a technical side-effect of how the Internet and other global networks operate.
- The digitally-networked world facilitates the co-creation of works without there being a clear physical location where creation takes place, or where first communication takes place.
- The digitally-networked world allows for large-scale unauthorised distribution of protected subject-matter in many countries simultaneously.

Other than that, it is of course important to remember that these developments do not replace, but add to, more traditional forms of production, distribution and use of works and performances.

384 See for instance Geller 2000, pp. 241–242 on the more direct relationship between author/right owner and user.

5.3 Legal Characteristics of Copyright and Related Rights

Compared to the early days of copyright (before related rights even existed), today there is relative consensus on the legal nature of intellectual property.³⁸⁵ But the debate on whether copyright is a property right, personality right, or *sui generis* right has not completely subsided.

For our purposes, it is not so much interesting to determine what the differences of opinion are, as it is to see on which characteristics of copyright and related rights there is agreement. The most obvious agreement is on the non-material nature of the subject-matter, which is an intellectual creation (work, performance, broadcast).

It is generally accepted that copyright related rights share with property³⁸⁶ in material objects their exclusiveness, i.e., they are absolute rights, opposable to all. Like property, copyright relates to an object –albeit non-material– and enables the right owner to prohibit others from using a work, it grants the owner sole rights of use.

Also like property, copyright and related rights can be transferred. A transfer may be effectuated by law (e.g., hereditary succession), by will, or by assignment or license of use. Both assignment and license can be partial (e.g., when they pertain only to the reproduction or distribution right) or geographically limited (e.g., when they concern only one country or a specific region). The difference between assignment and licence is that in the case of assignment, the title to intellectual property passes from assignor to assignee, whereby the assignee loses his or her claim on the rights. In the case of a licence, the licensor grants the licensee exclusive or non-exclusive permission to do certain acts that would otherwise constitute infringement. Only if the licence is exclusive, does the licensor himself lose his claim to exercise the intellectual property rights to which the licence pertains.

Under the laws of most countries the assignment of economic rights is allowed,³⁸⁷ but in a few countries (e.g., Germany, Austria) copyright and performers' rights can only be given by way of licence. Because these licences can

385 See Paragraphs 3.2–3.3.

386 The term 'property' used here refers to the term in its narrow, civil law meaning (*Eigentum, propriété, eigendom*).

387 In the Netherlands it is fiercely debated whether interests in intellectual 'creations' (e.g., trade-secrets, sports events) similar to those statutorily defined (such as copyright, patents) should be made assignable under the general provision of Art. 83 book 3 of the Civil Code. The *Commissie Auteursrecht* (2002) in its advisory opinion on the draft proposal *Verhandelbaarheid Vermogensrechten* (assignability of property rights and interests) has advised the government not to make such interests assignable.

pertain to all prerogatives that copyright grants and can also be exclusive, for all practical purposes there is often little difference for the author/transferor between an assignment and a licence.³⁸⁸

Unlike other forms of property, intellectual property is limited in time. In addition, (statutory) copyright and related rights each consist of a collection of predefined prerogatives, rather than of the –in essence– complete freedom of use that characterises property *in rem*. In civil law countries, all these characteristics taken together lead to the notion of copyright if not as true property, then as quasi-property.³⁸⁹

Traditionally, an important distinguishing trait –certainly in civil law countries– is that copyright and related rights have a personality-rights dimension, as is exemplified by moral rights. However, the idea of copyright as predominantly a personality right has never been very popular because of the obvious economic side to copyright. In turn of course, the moral rights dimension has also been used as an argument against the notion of copyright and related rights as property.³⁹⁰

In the German monistic conception of copyright, economic and moral rights cannot be viewed separately from one another and copyright (and performers' rights) should therefore not be regarded as either property or personality rights, but rather be viewed as *sui generis* rights. This is also the dominant theory in Austria.³⁹¹ In the French dualist conception –which is shared by many other civil law countries– the moral rights and economic rights are separate entities. The two are also viewed separately in common law countries³⁹² where moral rights have traditionally been regarded as outside the scope of copyright altogether (to the extent that these were recognised to begin with).³⁹³ Under the influence of the international intellectual property regime, common law countries have brought moral rights more within the fold of copyright and related rights.

388 See Guibault & Hugenholz 2002, Paragraph 3.2 and the literature mentioned there.

389 E.g., Schricker 1999, Einl. at nr. 18–21; Lucas & Lucas 1994, pp. 22–34 (who appear slightly in favour of viewing *droit d'auteur* as a property right). Contra: Leinemann 1998, pp. 29–34.

390 Grosheide 1986 describes the debate over copyright as a personality right, property right or *sui generis* right at pp.148–168.

391 Bühler 1999, p. 19 et seq.; Troller 1983, p. 93 et seq. does not attach great meaning to the differences between the monist and dualist conception of copyright.

392 For instance, Nimmer & Nimmer 2001, at I-§1.10[B] speak of the privacy interest of the author which justifies the right of first publication (a moral right in Europe).

393 It is not just common law countries that do (or did) not regard moral rights as part of copyright. In Spain, for instance, copyright is viewed primarily as a type of property and until recently, moral rights were not viewed as part of intellectual property. A similar situation existed in Greece; see Doutrelepon 1997, p. 51 et seq.

The likeness of property in material objects and in intellectual creations could be a reason to subject questions of existence, scope, ownership and transfer of intellectual property to similar choice-of-law rules as property *in rem* (e.g., *lex rei sitae*). But apart from the fact that the ubiquitous nature of the subject-matter (work, performance, broadcast or other intellectual creation) raises a problem, the moral rights dimension at first glance seems to point not towards using (the situs of) the object of copyright as connecting factor, but using a connecting factor related to the actual creator or performer. The use of different conflict rules for moral rights and for economic rights, does however seem problematic under the monistic conception of copyright.³⁹⁴ Even so, if there were to be clear advantages to using different conflict rules, the theoretical underpinnings of copyright should not automatically lead one to reject their use.

As was indicated above and will be elaborated below, the economic side of intellectual property (intellectual creations as assets) continues to gain importance. This raises the question whether initial ownership and transfer and possibly also issues of scope/infringement of economic rights, should not be subject to conflict rules that primarily promote the efficient operation of international copyright transactions (e.g., by allowing parties to choose the applicable law, or by using the favour principle to improve the chances of a transfer being valid). One must, however, balance the general interest of states and citizens in smooth international legal relationships with that of the objectives of copyright and related rights law. As we shall see in the next paragraph, an important objective is to protect the interests of the actual creator/performer in his or her work or performance, rather than the interests of the right owner or his successors in title.

5.4 Legal Basis of Copyright and Related Rights

The rationales of copyright that are invariably put forward are 'justice' and 'fairness' versus 'utility' and 'efficiency'. Justice arguments³⁹⁵ centre on the person of the author, who is thought to be deserving of a just reward for her intellectual labour, or having a 'natural right' in her creations. Likewise, it is often proclaimed that fairness demands that whoever invests time and effort in the production of information goods and services is entitled to exclusive rights in them.

394 Schack 2000, p. 61 rejects separate allocation for precisely this reason.

395 Another term used for this category is 'deontological' as opposed to 'consequentialist' (instrumental); see Strowel 1993, p. 173.

Utilitarian (instrumental) arguments centre on the public interest. Society benefits from copyright and other intellectual property because it stimulates the production and distribution of knowledge and culture. Another utilitarian argument is that property rights in works are the best instrument to achieve economically efficient allocation of information goods.

One of the most accentuated differences between the common law approach to copyright and the civil law approach has always been their legal basis. Traditionally the civil law countries are said to favour the justice argument as the basis for their 'droit d'auteur', whereas common law countries legislate copyright primarily for utilitarian reasons. Strowel shows in his analysis of 'copyright' versus 'droit d'auteur' systems that although this distinction is indeed rightly made, the difference is diminishing.³⁹⁶ We shall see in Paragraph 5.4.2 that recent EC directives affirm Strowel's observation.

The broad 'justice versus utility' justifications for copyright are often categorised in more detail. Grosheide, for instance, in his work on the nature of copyright, distinguishes seven partly overlapping types of arguments, while other writers divide them into three categories.³⁹⁷ According to Van Engelen, different arguments are often intertwined. He discerns three sub-arguments in the 'justice' category, one in the utilitarian category and unjust enrichment as a separate argument.³⁹⁸ Strowel prefers a distinction between the instrumental argument (copyright as an incentive for production) and the Lockian concept of property (copyright as a fruit of the creators intellectual labour).³⁹⁹ I shall stick with the classification in justice versus utility arguments and distinguish sub-arguments where useful.

For that quintessential civil law copyright country France, Lucas & Lucas acknowledge the growing influence of instrumental arguments but defend the primacy of the justice rationale.⁴⁰⁰ Schricker also focuses on the idea of property in intellectual creations as flowing from natural law, but does profess that copyright should be structured in such a way as to best stimulate cultural and economic progress.⁴⁰¹ In the US, intellectual property has traditionally been viewed as an

396 Strowel 1993. See also Dreier 2001a, pp. 298–303.

397 Grosheide 1986, pp. 128–133; Dommering 2000, pp. 448–450; Guibault 2001, pp. 7–14.

398 Van Engelen 1994 p. 147 et seq.

399 Strowel 1993, p. 174 et seq.

400 Lucas & Lucas 1994, pp. 39, 48–49. Pahud 2000, p. 114 argues that 'Bei der traditionellen individualrechtlichen Legitimierung des Urheberrechts sind starke Erosionserscheinungen erkennbar. Von einem eigentlichen Paradigmenwechsel kann dennoch nicht (oder noch nicht) gesprochen werden'.

401 Schricker 1999, Einl. at nr. 8, 13.

instrument 'to secure the general benefits derived by the public from the labors of the author': rewarding the author for his efforts is only a secondary objective.⁴⁰²

Van Engelen notes that historically, neither Dutch doctrine nor the legislature have paid a lot of attention to the justification of copyright, due to fact that the enactments of copyright acts often resulted from international obligations.⁴⁰³ For the Dutch Law Association (*NJI*), who debated copyright at their annual meeting in 1877, the public interest was the only conceivable ground for copyright.⁴⁰⁴ Later, Dutch scholars routinely invoked fairness and natural rights as appropriate legal bases. The minister of Justice also put such arguments before parliament as they considered the proposed 1881 Copyright act.⁴⁰⁵ Contemporary Dutch doctrine tends to put justice arguments on a par with instrumental arguments.⁴⁰⁶

5.4.1 JUSTICE ARGUMENTS

The rationales for copyright that can be categorised as justice arguments, have played a dominant role in the continental European debate on the basis and legal character of copyright since the 19th century. That discussion has always been particularly lively in France and in Germany. In Germany, the question was traditionally linked to the debate on the nature of personality rights in private law in general. Many scholars, including Savigny,⁴⁰⁷ rejected the notion of natural rights in the sphere of private law, other than the notion that man is essentially free and that within this 'primordial' freedom various rights are enclosed.⁴⁰⁸ The idea of copyright as a property right was not widely supported in Germany, contrary to the situation in France.

402 Nimmer & Nimmer 2001 at § 1.03 et seq.

403 Van Engelen 1994, pp. 154–155.

404 De Beaufort 1907, pp. 73, 78–79; Van Engelen 1994, p. 149; Hugenholtz 1998, pp. 201–202.

405 On these developments see De Beaufort 1907.

406 Dommering et al. 2000, pp. 448–451; Gerbrandy 1992, pp. 17–21; Van Lingen 2002, p. 16–17; Spoor & Verkade 1993, p. 8. Grosheide 1986 at p. 290 et seq. stresses the instrumental function of copyright in modern society.

407 Savigny was not a supporter of the notion that a person has 'by birth' an inalienable right in his intellectual creations, because it would mean that one man can impede another man's thinking. Savigny (1840, *System I*, p. 336 et seq.): 'Das von manchen zu diesem Urrecht gerechnete Eigentumsrecht des Menschen an seinem Geisteskräften sei auf jeden Fall abzulehnen, da es undenkbar sei daß ein Mensch anderen am Denken hindern könne...'

408 Here the influence of Kant and Hegel is clear. See Leuze 1962, pp. 29–51.

In France, most authors viewed copyright as a proprietary right based on natural law. In other words, copyright must be seen as a right that man has by birth; it only remains to be elaborated by the legislature. The bond between creator and work is of paramount importance in the natural rights approach that was so popular in France; but it is also central to the German conception of copyright.⁴⁰⁹ The term 'property' (*Eigentum*) is often used in German legal writing in relation to copyright but as a rule, this is not to be interpreted as a natural law defence of copyright.⁴¹⁰

Today, the natural law debate has subsided and in Dutch, German and French literature alike, various justice and fairness arguments are used interchangeably. In writings of modern copyright scholars,⁴¹¹ the ethical underpinnings of intellectual property are often based on the 'self-developmental' theory of Hegel and the 'just deserts for labour' theory in the Lockian sense.⁴¹²

For Hegel, the freedom of the individual and the recognition of that freedom by others, were central to the justification of property. As May summarises Hegel's position: 'the individual has a will to control and master nature and this is expressed through the ownership of the fruits of such control, reflecting the individual personality.'⁴¹³ If the state and members of society do not respect the property of an individual, they deny the individual his freedom. For Locke, it is the fact that an individual expends effort (labour) on creating something or adding value to it, that justifies his exclusive rights in the result. Allowing individuals the fruit of their labours also encourages them to develop activities. Thus, in Locke's theory there is both a 'justice' and an instrumental argument.

A relatively modern argument—which is reminiscent of the 'natural rights' argument—is that intellectual property rights are human rights and require protection in that capacity.⁴¹⁴

409 For an insightful account of copyright and its relationship to personality rights and natural law in 19th century Germany, see Leuze 1962, esp. pp. 29–81. Dreier 2001a at p. 300, argues that the natural rights argument was popular also because it was 'the most politically expedient way to compel [German] states to adopt intellectual property laws.'

410 Leinemann 1998 provides an analysis of the use of the term 'property' for German copyright in relation to the constitutional guarantee of property rights, as well as its connotation with 'natural law' (pp. 17–33).

411 See among others Schricker 1999, *Einleitung* at nr. 11–14; Lucas & Lucas 1994, p. 39 et seq.; Grosheide 1986, p. 121 et seq.

412 For a recent review of ethical basis for ownership in information, see: Lipinski & Britz 2000. A critical analysis of the (Lockian and Hegelian) justifications of intellectual property is put forward by May 2000, particularly at pp. 16–44.

413 May 2000, p. 26.

414 Cohen Jehoram 1983, Dessemontet 1998a. For a critical evaluation of copyright as human right, see Vivant 1997.

That the justification of copyright and related rights is based on diverse arguments, is partly caused by the dual nature⁴¹⁵ of copyright and the neighbouring rights of performing artists. On the one hand the bond between author and work (or performer and performance) and the author's (performer's) reputation is deserving of protection, which is achieved primarily through moral rights. On the other hand, there are economic interests to be considered. These are shaped primarily as exclusive exploitation rights. This duality is also expressed in the various international human rights instruments that mention the protection of intellectual property.

Article 27(2) of the 1948 Universal Declaration of Human Rights (UDHR) guarantees everyone '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'.⁴¹⁶ A similar clause is found in Article 15 of the International Covenant on Economic, Social and Cultural Rights (CESCR), which is binding on the vast majority of UN member states.⁴¹⁷

There is no consensus of opinion with respect to the relationship between authors' rights and other human rights as enshrined in the CESCR and the Universal Declaration. Both instruments guarantee the freedom to engage in cultural life and to enjoy the results of scientific progress, in articles 15 and 27 respectively. The CESCR also prescribes that States respect the freedom that is indispensable for scientific research and creative activity and work to realise the conservation, development and dissemination of science and culture.⁴¹⁸ Some

415 For a more extensive analysis, see among (many) others: Grosheide 1986, pp. 72-73, 121-154; Guibault 2001, pp. 7-16; Seignette 1994, pp. 20-30; on the rationale of moral rights: Doutreloup 1997, pp. 23-30.

416 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, available at <www.un.org> [last visited 1 November 2002].

417 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force on 3 January 1976; 145 contracting states as of June 2001.

418 Article 15 in full reads:

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.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

→

authors are of the opinion that respect for intellectual property only comes second to cultural, scientific and artistic freedoms, while others see it the other way around.⁴¹⁹

The clause on copyright was added to the UDHR at the insistence of France, Mexico and Cuba, mainly to bring the text into line with the American Declaration of the Rights and Duties of Man (Bogota 1948). The UK and US opposed the idea to include a reference to intellectual property, as did the countries of the then Eastern bloc. The clause was not exactly widely supported, since it was passed with only 18 votes in favour, 13 against and 10 abstentions. Article 15 CESCR has a similar history.⁴²⁰ This illustrates that the notion of intellectual property as a human right was not given a ringing endorsement by the international community. One should therefore be careful not to overstate the significance of the relevant clauses.

Also, the fact that authors' rights are mentioned does not mean that the CESCR and UDHR endorse a 'justice' approach to intellectual property *per se*. It could well reflect an instrumental view of copyright. As Chapman put it: 'The rights of authors and creators are not just good in themselves but were understood as essential preconditions for cultural freedom and participation and scientific progress... Put another way, the rights of authors and creators should facilitate rather than constrain cultural participation on the one side and scientific progress and access on the other.'⁴²¹

Discussions in the UN Committee on Economic, Social and Cultural Rights – which monitors the CESCR – show that if anything, intellectual property is seen as being at odds with (other) human rights. There is concern that the proliferation of intellectual property rights, especially through TRIPs, will adversely affect the access to and sharing of culture.⁴²²

The idea that it is only just that authors be entitled to reap the fruits of their intellectual labours is appealing, but not seldom used rashly to defend the extension of exclusive rights in information or the creation of new ones.⁴²³ The

– 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

419 Strowel 1993 pp. 157–160; Dessemontet 1998a.

420 For a short history, see Chapman 2000.

421 Chapman 2000, p. 9.

422 UN Committee on Economic, Social and Cultural Rights — Report on the twenty-second, twenty-third and twenty-fourth sessions, (pp. 91–102); available at <www.un.org> [last visited 1 November 2002].

423 Brison for instance (2000, p. 14) when discussing the justification of neighbouring rights, compares performing artists (mainly musicians) with composers and concludes that since without them records would not be made or sold (the public buy records because of the singers/groups that



problem with the fairness argument is that it can apply to every type of creator or producer of information goods and services. Furthermore, intellectual property, be it copyright or another sort, is of course not necessarily the best, or most obvious means to provide authors and others with just rewards for their efforts.⁴²⁴

EU legislation in the area of intellectual property is predominantly based on utilitarian arguments. Fairness arguments have played a role in the (successful) quest for exclusive rights for performing artists, record producers, broadcasting organisations and database producers, but generally another 'reward' argument has been more influential: if information products are to be made, the necessary investments must be recouped, which can (only) be done through exclusive exploitation rights. This argument belongs in the 'utility arguments' category, to which we turn next.

5.4.2 UTILITY ARGUMENTS

The various utility, efficiency or instrumental arguments in favour of intellectual property may often be seen as exemplifying the Anglo-Saxon or common law approach, but in reality they are an important rationale of all copyright and related rights legislation. Utilitarian justifications come in many forms. Most depart from the premise that it is in the general interest that works of literature and art are produced and distributed. All assume that proprietary rights are the means to serve that interest.

5.4.2.1 *Incentive for Production*

The traditional justification of intellectual property from a utilitarian standpoint is the incentive argument. It holds that to further the production and distribution of information goods and services, producers must be able to recoup their investment. Given the fact that information can be easily and cheaply copied once released, producers therefore need exclusive exploitation rights in the information. This argument is increasingly used at the European level to justify the extension of intellectual property rights.

The incentive argument has always had a central place in American copyright law, but has not gone unchallenged, not so much for its theoretical underpinning

perform songs, not because of authors that write them), it is only fair that performing artists have proprietary rights (neighbouring rights) just as composers do.

424 Dommering 2000, pp. 448–449.

for its application in practice.⁴²⁵ As Goldstein remarks: 'judged by its results rather than its rhetoric, copyright legislation in the common law tradition historically fails any strict utilitarian measure. While the ideal copyright legislator, before voting to extend protection to new subject-matter or rights, would require a showing that the extension is needed as an incentive to continued investment, common law legislatures have in fact regularly, indeed mostly, extended copyright without any empirical showing that authors would produce and publishers would publish, fewer works if the extension were not given.'⁴²⁶ There is an increasing body of empirical evidence that shows that intellectual property only offers a limited incentive to create,⁴²⁷ but this does not yet seem to affect the almost fungus-like growth of intellectual property.

In the US there is frank criticism of the continuous drive to extend intellectual property to previously 'un-owned' types of information and knowledge and to curb previously allowed uses. Academics and non-governmental organisations show widespread concern that we are witnessing a 'second enclosure of the commons'.⁴²⁸ It is also argued that the legislator is eager to extend intellectual property rights because it pleases businesses but does not involve direct government expenditure (which is not to say there are no social costs).⁴²⁹ Increasingly, business itself shows concern that broad intellectual property rights hamper the development of new products. In the software industry for instance

425 See May 2000, Boyle 2001, Hess & Ostrom 2001 and many earlier writers mentioned in these papers. On the commodification of knowledge and information in general: see Shulman 1999. Hakvoort (2000 at p. 17 et seq.) posits that since for authors other arguments than direct financial gain play a role in the decision to produce works, in these cases copyright does not serve as an incentive but merely redistributes revenues from authors to publishers.

426 Goldstein 2001, p. 8. In an analysis of piracy in developed and developing countries, Burke 1996 concludes that more protection through international agreements does not limit piracy: socio-economic circumstances in countries are much more relevant. On the adverse effects of TRIPs/WTO on developing countries, see Queau 1999.

427 Merges (1995) lists a number of such studies at pp. 107–108. The study of Rappert, Webster & Charles 1999 shows that the role of intellectual property rights in technology transfers by small- and medium sized enterprises is generally not as important as controlling knowledge or information leakage through employees, clients or suppliers (dealt with by non-disclosure clauses in contracts), having the 'first mover' or 'lead time' advantage in the market, using service agreements to recoup investment in products, etc. On the limited importance of intellectual property rights in technology licensing schemes, see Bessy & Brousseau 1998.

428 For an excellent overview of the issues and literature, see the papers presented at the *Duke Law School Conference on the Public Domain* (9–11 November 2001), available at <www.law.duke.edu> [last visited 1 November 2002]. See also Dreyfuss, Zimmerman & First (eds.) 2001, esp. the contributions in Part IV; Hugenholtz 2000a.; Benabou 2002.

429 Merges (1995), pp. 110–111.

complaints can be heard that the sheer number of copyright (or patent) licenses that are needed to develop new software impede innovation.⁴³⁰

In Europe, criticism seems less widespread and is often more subdued (at least until recently), despite the fact that the expansion of intellectual property here is at least as considerable as in the US. In quite a number of areas, such as the lengthening of the term of protection, the introduction of *sui generis* protection for non-original databases and the creation of a rental right, the EC has been at the forefront of expanding intellectual property.

If we consider legislative activity of the EC in the area of copyright and related rights in the past decade or so, we see two trends. One is a move towards the creation exclusive rights for broader categories of subject-matter. The other is to increase the level of protection by bringing more and more types of use of information under the exclusive rights. That often the legislation of the most protective Member state is followed, is rather self-evident. Harmonising 'downward' is politically unpopular and could be regarded as a form of expropriation in the member states with high levels of protection.⁴³¹ In the Directive on the term of protection⁴³² it is clearly stated: 'Whereas due regard for established rights is one of the general principles of law protected by the Community legal order; whereas, therefore, a harmonisation of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by right holders in the Community...' The term of protection –which in most countries was 50 years *post mortem auctoris*– was consequently harmonised at 70 years *post mortem auctoris*.

Vaver⁴³³ remarks about the EC's contention that harmonisation of the term of protection up to the highest level within any member state should be the goal of European policy because it is good for the production and use of works: 'This assertion, which logically leads to broad protection in perpetuity, lacks respectable empirical foundation, despite its instrumentalist claim. Indeed, the proposition that it is in the interests of consumers to continue to pay well above marginal cost for a product for perhaps 100 to 150 years after it was first produced, when the same

430 'Patently absurd?'. *The Economist*, 23 June 2001; 'Who owns the knowledge economy?'. *The Economist*, 6 April 2000.

431 Since intellectual property is limited in time, expropriation could of course be avoided by adequate transitional provisions. Some authors are of the opinion that only a high level of protection is in accordance with EC law, e.g., Röttinger 2001, p. 25: 'Allerdings könnte argumentiert werden, dass ein rechtsharmonisierung auf niedrigem Niveau im Bereich des Urheberrechts dem Art. 151 [EC Treaty]... widerspricht und damit Gemeinschaftsrecht verletzt.'

432 Recital 9, Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, OJ EC 1993 L 290, pp. 9–13.

433 Vaver 2001 at V.

product would have been produced under a regime with a shorter period of protection, is either disingenuous or dishonest.'

As was the case with the Term of Protection Directive, the prime argument for expansion of copyright invariably is the utilitarian incentive-argument. The standard recital in EC directives is that a high level of copyright protection is necessary to ensure the (continued) production of intellectual creations. To give a few examples:

In the Directive on rental and lending rights⁴³⁴ it is said: 'Whereas the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work and the investments required particularly for the production of phonograms and films are especially high and risky; whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the right holders concerned...'

Similarly, the protection of software under the Software Directive⁴³⁵ is thought necessary because '... the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently.'

The Database Directive,⁴³⁶ with its double regime of *sui generis* protection for databases and copyright protection for original databases, considers that '...the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently;...Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases.'

Remarkably enough, reference was made to the US industry in Recital 11 of the Database Directive: '...there is at present a very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries.' The US was at the time already dominant in the global database industry, but US

434 Council Directive 92/100/EEC of 19 November 1992 on the Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, OJ EC 1992 L346, pp. 61-66.

435 Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, OJ EC 1991 L122 pp. 42-46.

436 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, OJ EC 1996 L077, pp. 20-28. On the implementation of the Database Directive in different countries, see Gaster 2000. On early case-law, see Hugenholtz 2001c.

copyright law did not protect 'sweat of the brow' compilations (which many databases are), since the 1991 Supreme Court landmark ruling in *Feist*.⁴³⁷ The utility argument may have been invoked to justify protection. US developments at the very least cast doubt on the necessity of a full blown intellectual property right in databases to spawn a competitive database industry.

From the recitals of the Database directive it does not become clear whether copyright protection for 'original' databases is based exclusively on incentive arguments, or also on justice arguments. For the *sui generis* protection for databases utilitarian motives can be inferred from the fact that the protection against extraction and re-use only applies to databases that testify to a substantial investment,⁴³⁸ and only with regard to the (re)use of substantial parts (or systematic use of insubstantial parts).⁴³⁹

The recent Copyright Directive⁴⁴⁰ also justifies the expansion of intellectual property primarily with incentive arguments (Recitals 2, 3, 6, 9, 10). Another utilitarian argument used in the Directive is that a high level of protection is of great importance from a cultural perspective (Recitals 9 and 11).

In sum, whether or not economic truth bears out its validity, the utility argument is the one routinely used by EC legislators to justify the expansion of copyright and related intellectual property rights. In industrial property it should come as no surprise that the utility argument is predominant.⁴⁴¹ Given the tradition

437 *Feist Publications v. Rural Telephone Service*, 499 US 340 (1991).

438 What the term 'substantial investments' means remains agonisingly unclear. As expected, national courts have already shown differences in interpretation, so the ECJ will have to shed some light on the question. The level of investment required for protection does not seem to be high under German and French case-law. Dutch Courts of Appeal have taken opposing views on the question of which investments should be taken into account if the database is not produced for the purpose of exploiting it, but a by-product (spin-off) of a company's principal activity (e.g., a database with customer-information from a telecommunications company; or with information on real estate for sale from real estate agents), see Hof Den Haag 21 December 2000 (*NVM v. De Telegraaf*) with comment M.M.M. van Eechoud, *Mediatorum* 2001-3, nr. 11; P.B. Hugenholtz, 'The New Database Right: Early Case-law from Europe', available at <www.ivir.nl/publications/hugenholtz/ordham2001.html> [last visited 1 November 2002]. The *Hoge Raad* did not accept the spin-off argument in the *NVM v. Telegraaf* case (*Mediatorum* 2002-5, nr. 17 with comment T.F.W. Overdijk), nor did the Court really clarify what a substantial investment is. See Hugenholtz 2002.

439 See articles 7 and 8 Database Directive.

440 Directive 2001/29/EC of 22 May 2001 on Copyright and Related Rights in the Information Society, OJ EC 2001 L167/10. From hereon: Copyright Directive. On the Dutch implementation see Seignette 2002.

441 See among others: Recital Council Directive 87/54/EEC of 16 December 1986 on the Legal Protection of Topographies of Semiconductor Products, OJ EC L24, 27/01/1987 pp. 36-40; Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs, OJ EC 1998 L289 of 28/10/1998, pp. 28-35; Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs, OJ EC 2002 L 003/1.

in European civil law countries to frame copyright in the natural law corner, one would expect 'justice' arguments to play at least some role. Then again, the more mundane the subject-matter that is protected, the less there may be a valid justice argument. Of course, the role of the European Communities has traditionally been in the economic field, i.e., the establishment of the internal market. The utility argument is a more obvious defence in that respect.

5.4.2.2 *Efficient Allocation*

Some utilitarian justifications are based on notions of economic efficiency. The proponents of the Law and Economics schools in particular are interested in exclusive rights in information as a means to facilitate allocation through the market mechanism. In this view, the objective of intellectual property is to remedy the public goods character of information goods and services.⁴⁴²

A public good is a good which by definition will not be provided by the market because people cannot be excluded from its use (non-excludable) and in principle the use by one person does not affect another person's use of the same good (non-rival).⁴⁴³ Information is in itself such a non-excludable and non-rival good. Once it is released, anyone can benefit from it. Information is 'leaky': despite the fact that some measure of control over copies may be exercised through technological means (anti-copying devices), information itself is not controllable as a tangible item is. Information is also non-rival because the use of information by one person does not reduce its value for someone else. Subjecting information to proprietary rights creates excludability and thus seems to allow for efficient allocation through markets.⁴⁴⁴

That some level of property in information goods stimulates efficient allocation is generally accepted, but which intellectual creations should be protected and at what level is controversial.⁴⁴⁵ Because information is non-rival, completely efficient allocation through the market mechanism does not seem possible. Intellectual property, especially in combination with the technological

442 Von Bar 1889, pp. 233–234 has already recognised that the public goods character of intellectual property made the equation of them with physical 'normal' goods difficult.

443 The quintessential Dutch example of a public good is of course a dike: it protects everyone against the water (regardless of who pays for the construction and maintenance) and the fact that it benefits A does not diminish the benefit for B.

444 Gordon & Bone 1999, p. 191 et seq.; Landes & Posner 1989; Menel 2000, esp. the review of economic studies at pp. 135–146.

445 Benkler 2001a, pp. 269–272; Gordon & Bone 1999, pp. 200–203; Koholdt 1995, pp. 131–135; Merges (1995), pp. 103–107; Towse 2000, pp. 8–9, 23 et seq.

protection of information, introduces excludability, but does not make information non-rival. That is why, once a work has been produced, from the point of view of maximisation of general welfare (which is after all the classic welfare-economist's objective), it should be distributed as widely as possible. The maximum welfare is attained only when anyone who is interested in the information has access to it.⁴⁴⁶

Importing the 'efficient allocation' justification for property in material objects to property in non-material objects is thus problematic because of the ubiquitous nature of intellectual creations (information). As May notes, this problem is often overlooked, dismissed or treated as a minor issue even though it concerns an essential difference. Consequently, the legitimacy of property rights in information is often asserted rather than established.⁴⁴⁷

Another criticism of intellectual property is that it is in fact not a mechanism for efficient allocation, but on the contrary, a monopoly that adversely affects competition and the more so, the stronger it protects information goods.⁴⁴⁸ Koopmans, former Advocate General to the European Court of Justice, criticised the expansion of intellectual property rights because they hamper competition.⁴⁴⁹ In his view, free competition loses out to intellectual property partly because the stimulation of free competition is a relative abstract interest, that is not pursued by well-organised lobbies. The pleas of powerful lobbies of the copyright industries for more and longer protection on the other hand do not fall on deaf ears with politicians.⁴⁵⁰ Koopmans accurately observes that '[intellectual property] specialists still regard exclusive rights as the normal state of affairs and the absence of them as something pitiful that should be remedied as soon as possible.'⁴⁵¹

446 Koboldt 1995, pp. 133–135. The loss of efficient allocation from the static perspective, is necessary to ensure dynamic (long term) efficiency, i.e., to enable producers to recoup their investment and thus produce information goods to begin with; see e.g., Benkler 2001a, p. 271.

447 May 2000, pp. 45–47.

448 Strowel 1993, p. 191 notes that the economic view of copyright gives opposite results depending on your outlook: those who see copyright as an allocation mechanism promote the strongest possible protection, while those who view copyright as a monopoly favour weak protection.

449 Koopmans 1994.

450 On the influence of industry lobbies in the US, see e.g., Samuelson 2001.

451 '... deskundigen beschouwen exclusieve rechten nog steeds als de normale toestand en het ontbreken ervan als iets zieligs dat liefst zo snel mogelijk moet worden verholpen.' (see note 449, p. 108).

5.4.3 SOCIAL ARGUMENTS

The improvement of the position of authors in society is a third argument for vesting them with exclusive rights in their work. This argument could be viewed as a mixture of justice and utility: the reason to emancipate authors is partly that it will stimulate the creation of works, which is in the public interest and partly that it is seen as fair to protect authors against intermediaries and users by giving them control over whether and on what terms their work is exploited.

Historically the position of authors *vis-à-vis* intermediaries and users has been weak. In the course of the 19th century authors became the direct beneficiaries of intellectual property laws rather than publishers. However, publishers largely kept their position of power, as the freedom of contract enabled them to acquire the exclusive exploitation rights from authors. The latter had little bargaining power and it was not until the 20th century that intellectual property law further repaired the imbalance.⁴⁵²

Today, it is seen as an important function of copyright to protect authors, i.e., the actual physical persons that create works, particularly against publishers and other intermediaries.⁴⁵³ In the area of related rights, the performing artists are seen as the weaker party, more so than other owners of related rights such as broadcasting organisations and record producers.

There are many types of provisions in intellectual property laws that exemplify the protective streak towards the actual creator in relation to intermediaries (apart of course, from the basic notion that the actual creator is the initial owner of copyright or related rights).⁴⁵⁴

First, creators are given rights that remain with them independent of the transfer of the exploitation rights. The provisions that involve moral rights give the creator or performer a say in the way in which the work of performance is used, even if all economic rights have been transferred. However, even though moral rights are inalienable (Art. 6bis BC), the fact that they can typically be waived—at least to some extent—robs them of some of their protective effect. For example, among other things Article 25(3) *Auteurswet* prescribes that the right of the author to make changes to the work can be waived. The right to resist a

452 Hugenholtz 2000c, pp. 9–15. On the role of publishers' and authors' interest in the formation of copyright law, see Boytha 1979.

453 Fromm/Nordeman 1998, §1 rd 1; Schricker 1999, Einl. at nr. 8, 14; Grosheide 1986, p. 290 considers that copyright has failed in its goal to protect authors against intermediaries and users, powerful interest groups of authors (e.g., collecting societies) could just as easily protect the (economic) interests of authors.

454 Cf. Katzenberger 1988, pp. 731–733.

distortion, mutilation or other change of the work that could be detrimental to the author's reputation cannot be waived.⁴⁵⁵

Another type of rights that are not transferable are claims in equitable remuneration for certain acts of exploitation, regardless of who owns the exploitation rights. As is the case with moral rights, the mandatory character of these claims may be limited, as under some laws the author or performer can waive the claim. Even if they cannot be waived, the relative value for the creator or performer may be limited if due to an imbalance in bargaining power, the creator or author has little influence when it comes to determining what 'equitable' means (i.e., the level of remuneration).⁴⁵⁶

An example of a mandatory claim is Article 4(2) of the Rental and Lending Directive, which stipulates that authors and performing artists cannot waive their right to an equitable remuneration for rental of copies of their work or performance.⁴⁵⁷ The Spanish Copyright Act (Art. 90) contains mandatory provisions that entitle authors of a film to remuneration for each form of exploitation and a percentage of the box-office proceeds. The box-office provision is not as mandatory as it seems: if rights in a film are assigned with a view to exploitation abroad, a lump-sum may be paid instead of royalties for public showings abroad, in case it is impossible or very difficult to execute the box-office provision.⁴⁵⁸

The recent Resale Directive⁴⁵⁹ provides that the author of an original work of art or original manuscript has an inalienable interest in any sale of the work subsequent to the first transfer by the author.⁴⁶⁰

The second category of protective provisions consists of limitations on the transfer of copyright and related rights, for instance as regards rights in future

455 For the possibility of waiving moral rights in other EC countries, see Doustrepoint 1997, pp. 286–306.

456 Guibault & Hugenholtz 2002 in their study of copyright contract law in the EU conclude that it is often unclear whether remuneration rights can be waived (par. 3.2.3).

457 To be implemented by July 1, 1994.

458 Kabel 2002, pp. 31–33, who advocates the introduction of a mandatory, unalienable right to equitable remuneration for authors of films.

459 European Parliament and Council Directive 2001/84/EC on the Resale Right for the Benefit of the Author of an Original Work of Art of 27 September 2001, OJ EC 2001, L272/32 (to be implemented by Jan 1st 2006).

460 According to Recital 3 '...the artist's resale right is intended to ensure that authors share in the economic success of their works.' Considering that visual artists often have difficulty living off their work because demand is not very large to begin with, one could ask whether for most the resale right will make a real difference, especially because the claim for remuneration only exists above a certain sales price. The audience that visual arts have will probably always remain limited, despite government subsidies for private individuals to buy art and programmes designed to enable artists to support themselves: see De Haan & Knulst 2000, pp. 23–24.

works and with respect to yet unknown, future forms of exploitation. Although in some countries (like the UK and Ireland) the global transfer of rights in future works is allowed, under the laws of most countries it is not. Assignment of rights in future works can generally only take place if the works in question are adequately described and for a pre-determined period (in years, for the duration of a contractual relationship, or accompanied by a right of termination as in Article 40 German *UrhG*, etc.). With respect to forms of exploitation that were unknown at the time an exploitation contract was concluded, national laws prescribe for instance that such exploitation must be included explicitly in the contract (e.g., Art. L131-6 French Copyright Act), or that any assignment involving such exploitation is null and void (Art. 3(1) Belgian Copyright Act).

A third type of rules aimed at protecting creators/performers are the formal requirements for assignment but also for licenses, that many laws contain. Often Acts prescribe that an assignment must be in writing, or that a contract must describe the type of rights, scope, duration and agreed remuneration. What the consequences of non-compliance are differs and is not always clear for individual provisions. For example, under Dutch copyright law, the transfer of the title to copyright is only effectuated by a written and signed document (Art. 2 *Auteurswet*). Without such a document, the assignee has not acquired the copyright (even though it may be concluded that a licence has been granted). In other countries, the requirement that an assignment be in writing is (merely) viewed as a rule of evidence for the benefit of the author, i.e., non-compliance does not necessarily have as an effect that no rights have been acquired by the assignee. Licences are form-free under Dutch law and there are no specific rules as to their content. But the French, German, Spanish and Portuguese intellectual property acts contain extensive rules on licences. Non-compliance with these rules may lead to relative or absolute nullity of the contract.⁴⁶¹

A fourth type of protective rules relates to the interpretation of assignment contracts or licences. Often copyright and related rights acts prescribe (or courts have developed the rule) that contracts be interpreted in favour of the author or performer. For example, Article 37(1) of the German *UrhG* states that if an author grants to another an exploitation right in his work, he shall be deemed in the case of doubt to have retained his right to authorise the publication or exploitation of any adaptation of the work.

Finally, some laws also give authors the right to terminate an exploitation contract if the other party does not use the exploitation rights granted.

In general, one could say that just how protective the copyright contracts rules are depends largely on their contractual overridability. Traditionally, German

461 For the different requirements in the EC countries, see Guibault & Hugenholtz 2002, Chapter 4.

copyright contracts law has contained few mandatory provisions (e.g., in the 1901 *Verlagsgesetz* on publishing contracts), but the legislator has recently heeded the call for the improved protection of creators and performing artists.⁴⁶² In France and Belgium for instance, copyright and related rights contract law is largely mandatory.⁴⁶³

5.4.4 CULTURAL POLICY, FREEDOM OF EXPRESSION

Of the lesser rationales of copyright –in the sense that they are less often put forward and certainly less convincing– we can mention cultural policy and freedom of expression and information. Basically, arguments of this type hold that without proprietary rights in information there will be inadequate information present to express or receive, or that culture will be the poorer for it.

Often the *cultural policy* argument coincides with the incentive argument, but is then given a twist. A good example is Brison's statement that exclusive rights for authors and performers are necessary because without a financial incentive they would produce less and a country that discourages its own authors' creativity invites massive importation of foreign works, which in turn would ultimately undermine the nation's cultural identity.⁴⁶⁴

Suffice it to say that where national cultural 'purity' is the objective, copyright does not exactly spring to mind as the suitable instrument to achieve or maintain it. For example, even though European countries have always had copyright regimes that are (at least) as protective as that of the US, the majority of music and films consumed in European countries are of American origin, not European, let alone national.⁴⁶⁵ Incidentally, the US ranks first as the world's largest net-importer of cultural goods such as newspapers and periodicals, musical instruments, paintings, sculptures and antiques.⁴⁶⁶

Copyright is sometimes also seen as an instrument to stimulate culture, not just because it serves as an incentive, but because part of the rents can be used to

462 *Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstler* of 22 March 2002 (BGBl. I 1155). For a description see Schippan 2002, Schricker 2002 and Lenselink 2002. The initial *Professoren-Entwurf* of 1990 was much more pro-creator than the eventual Act: debate on the significance of the revised copyright contracts law continues, see Schack 2002 and Erdmann 2002. On the (private) international (law) ramifications, especially of Art. 32b, see Hilty & Peukert 2002.

463 Hugenholtz 2000c, p. 12.

464 Brison 2000, p. 13. Leinemann (1998, pp. 90–91) argues that cultural policy should have no role in copyright law.

465 See the statistics in OECD 1998.

466 UNESCO *Facts and Figures 2000*, pp. 30–31.

finance cultural goals. Cultural policy is thus paid for in part by copyright owners. In several countries part of the remuneration collected through collective rights management organisations goes to funds that subsidise the arts. This use of the intellectual property system as a kind of tax instrument cannot in itself justify copyright, as *Dommering* and others note.⁴⁶⁷

A controversial, instrumental justification is that copyright is necessary to maintain *freedom of expression and information*. This turns the table on the generally accepted argument that it is necessary to limit intellectual property in the interest of freedom of expression (see Paragraph 5.5). The argument typically runs along the lines that without proprietary rights in works, information would not be produced and there would be no free flow of information. With others, I doubt that property rights in information are the only means to stimulate production. Nor am I convinced that economic interests decide the effective use that is made of the right to free speech.⁴⁶⁸

Another version of the free speech argument holds that intellectual property enables authors to be self-sufficient and that this financial independence from the state guarantees the author's freedom of expression. In reality, of course, public financing of authors takes place on a large scale (academics, subsidies to visual artists, novelists and poets, film makers and other groups who cannot live off their work, etc.) despite copyright's blessings as a means of sustenance.

To conclude, of the instrumental defences the incentive argument is the most professed and most convincing reason for the protection of works of literature and art, or for that matter, other types of intellectual property.

5.5 Policies Underlying Limitations

Copyright seems to be in a perpetual state of flux and new technological and economic developments have always rekindled, often intensified, the debate on its proper limitations. An important concern today is the possibilities for right owners to control access and use of works on a scale that was unforeseen not so long ago.⁴⁶⁹ Digital technology and the (not so distant) omnipresence of high speed, high capacity communication networks are predicted to cause a huge increase in

467 *Dommering* 2000, pp. 449–450; *Leinemann* 1998, pp. 90–91.

468 See among others *Hugenholtz* 1989, pp. 150–151 who also observes that it is improper to restrict the fundamental right to freedom of expression and information by invoking copyright as a free-flow of information enhancer. *Dommering* 2000, p. 450; *Grosheide* 1986, p. 144.

469 See among others *Alberdingk Thijm* 1998, *Hugenholtz* 2001b.

the on-line distribution of information goods (or services), both within and across national borders.

This development may reduce the 'natural' limitations to the copyright owner's control over the use of works (e.g., a traditional printed work cannot easily be copy-protected, but the copying of digital information can be controlled through technological means). Digitalisation could also enable right owners to circumvent certain legal limitations to their exclusive rights, either through the use of technological means or clauses in (on line) user-licences.⁴⁷⁰ That is, of course, in so far as limitations apply in the digital environment to begin with. According to the WIPO Copyright Treaty, existing limitations under the Berne Convention may be extended to the on-line environment and new exceptions and limitations that are appropriate in the digital network environment may be introduced.⁴⁷¹

As regards limitations to copyright, the central question from the perspective of choice of law is of course which law's limitations govern the use of works. Do the policies that underlie limitations reflect purely local interests (e.g., of cultural organisations, schools, competitors) and are they of such importance that choice-of-law rules should reflect their (local) predominance? Should a user always be able to invoke the (mandatory) limitations of his or her local copyright law against a right owner, even though the terms of the user-licence restrict the user's freedom and the contract contains a clause that subjects the licence to the law of another country? The nature of the principles that underlie limitations may provide clues to the answer of questions like these.

As we have seen in Chapter 3, the copyright acts and bilateral treaties of the 19th century, as well as the Berne Convention already provided for limitations. Then as now it was clear that the interests of authors and other right owners (whether as individuals or as a group exemplifying the general interest in the production of information goods) need balancing against other public and individual interests. Copyright and related rights have not escaped the effects of the general trend of 'socialisation' of private law in the course of the 20th century, i.e., limitations on (the exercise) of proprietary rights in the general interest became more acceptable.⁴⁷²

The balance of interests is largely achieved within the confines of copyright acts, through the delineation of subject-matter, term of protection, scope of the

470 See Hugenholtz 1999.

471 Agreed statement to Art. 10 WCT 1996.

472 Grosheide 1986, p. 295. Interestingly, Leinemann 1998, p. 164 observes that while other property rights have become weaker, copyright has become stronger despite the restrictions stemming from increased 'Sozialbindung'.

rights, the introduction of exemptions, etc.⁴⁷³ As a rule, the outer circumference of copyright (what is protected, for how long, what the prerogatives are in general) reflect both the incentive rationale and the public interest in freedom of expression. The term of protection for instance, is limited because an eternal copyright is not necessary to recoup investments made, and/or at some point the general interest (a public domain) outweighs the interests of the author.⁴⁷⁴ Facts, concepts, theories and ideas are not considered as protected subject-matter because their monopolisation would hamper progress and unduly restrict the free flow of information.⁴⁷⁵

The inner boundaries drawn concern limitations to copyright which consist mainly of certain acts that are not regarded as copyright infringement (also called exemptions, permissions, statutory licences). They may take the form of free use with or without remuneration. In common law countries, the copyright prerogatives are typically laid down in great detail and narrowly interpreted and these are combined with a relatively flexible system of exemptions.⁴⁷⁶ e.g., the fair-use privileges or fair-dealing defence in American and British copyright law.⁴⁷⁷ In civil law countries, the rights of the copyright owner are mostly described in broad terms, coupled with a system of narrowly defined exemptions.

With the implementation of the Copyright Directive, exemptions with regard to copyright and related rights are supposedly harmonised throughout the EU. However, the more than twenty categories of limitations mentioned in the Directive are borrowed from the laws of all the Member states and since all but one limitation is facultative, it is likely that the current diversity will remain. We have seen in Paragraph 3.3.2 that the exemptions in the Berne Union are also mostly facultative. Some are also loosely defined, e.g., the important Article 9(2) BC gives union countries the possibility to permit reproduction of works without the author's authorisation as long as the exemption from the reproduction right is limited to certain special cases, does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.⁴⁷⁸

473 On the question of whether these interests are best balanced within or outside copyright, see Dreier 2001a, p. 295 et seq. On balancing these interests in the digital environment: Litman 1996; Lipinski & Britz 2000.

474 Nimmer & Nimmer 2001, at §1.10[B]2.

475 The idea/expression dichotomy, i.e., the notion that copyright does not protect ideas but only their expression has been shown by Hugenholtz 1989, pp. 38–40, 72–75 to be an inadequate instrument to determine what is and is not protected subject-matter. For an elaborate analysis see Haeck 1998.

476 Benkler 2001b; Geller 1998, p. 570.

477 See Pinto 2002 for free speech (Art. 10 ECHR) and British fair dealing.

478 Art. 13 TRIPs has extended the criteria of Art. 9(2) BC to all limitations on copyright and related rights for WTO members. On Art. 13's three-step-test see Hugenholtz 2000b, Ficsor 2001, Ginsburg 2001 and Lucas 2001. On the basis of Art. 15 of the Rome Convention 1961, contracting

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The right to quote is the only limitation that countries must provide for (Art. 10(1) BC).

National legislators thus have a fair amount of leeway to legislate any limitations to copyright and related rights they deem necessary. Existing exemptions range from widely recognised ones, such as the right to quote from works and certain uses for educational purposes (with or without remuneration), to highly local ones, such as Article 53(4) Austrian Copyright Act which –roughly speaking– permits the public performance of folk music if the performance is meant to contribute to the preservation of folklore.⁴⁷⁹

The status of the privileges or exemptions is not always clear. Some exemptions in some countries are seen as mandatory, while others can be set aside by contract. Guibault, in her study on the contractual overridability of limitations on copyright, concludes that the rules on copyright combined with the general limits on freedom of contract prove insufficient to ensure that the legitimate interests of users of copyrighted material are taken into account in copyright licensing agreements.⁴⁸⁰ Guibault⁴⁸¹ distinguishes four main reasons for limitations on copyright, which categorisation will be loosely followed below.

5.5.1 FUNDAMENTAL FREEDOMS

In most European countries copyright acts (in EU-countries at least) have a closed system of limitations: the balancing of interests has taken place beforehand and has resulted in narrowly-defined permitted acts.⁴⁸² Quite a number of these limitations are inspired by the fundamental right to freedom of expression and information,⁴⁸³ relatively few have to do with the right to privacy.⁴⁸⁴

states are allowed to make exemptions to the rights of performers, record producers and broadcasters similar to the exemptions in the BC.

479 Limitations not mentioned here are the ones based on various social considerations like the free use of music in church services, or by amateur marching bands, the reproduction of works in braille for the blind, etc. These limitations tend to concern small-scale use of works which is economically not very significant.

480 Guibault 2001, p. 302.

481 Guibault 2001, p. 27 et seq.

482 See for an overview of closed versus open systems the country reports in Baulch et al. 1999. In the Netherlands the Amsterdam Hof in the *Anne Frank Fonds v. Parool* case (8 July 1999, [1999] AMI 7, p. 116 et seq. with note Hugenholtz) seems to have left an opening for a general freedom of expression (Art. 10 ECHR) defence. The Copyright Directive, however, reflects a closed system of limitations.

483 On the relationship between intellectual property and free speech generally, see: Austin 2000, Cohen Jehoram 1983; Hugenholtz 2001a, Maceracchini 2000.

484 Enshrined in Art. 10 ECHR, Art. 11 Charter of Fundamental Rights of the European Union (OJ EC 2000, C364/11), Art. 19 UDHR and other international instruments.

5.5.1.1 *Free Speech and Freedom of Information*

Exemptions such as the right to reproduce and communicate political speeches and other public debates without permission and the free use of (excerpts) of works for news reporting of current affairs are inspired by free speech considerations.⁴⁸⁵

Other acts that are allowed without permission from, or payment to, the copyright owner include the right to quote works in criticisms and the use of works for parody purposes.⁴⁸⁶ Exemptions regarding press reviews are partly inspired by freedom of expression considerations, but are also a reflection of industry practice at the turn of the 20th century.⁴⁸⁷

Related to free speech, but of another dimension, are freedom of information considerations, i.e., the exclusion of government information from copyright or – less far-reaching – limitations that allow for the reproduction and communication of public sector information for some purposes. An example of the former are provisions that exclude laws, judgments and other (administrative) texts from copyright protection (e.g., Art. 11 Dutch *Auteurswet*, Art. 7(1) Austrian URG, Art. 5 German UhrG). An example of the latter are provisions that allow users to make a copy of an act of parliament or other official document (e.g., section 182(a) Australian Copyright Act).

5.5.1.2 *Privacy*

The right to privacy is an interest that only plays a modest role in copyright.

Traditionally, the most important limitation connected to the right to privacy concerns home-copying. When copying equipment started to make its way into the home from the 1950's onward, the question was how right owners could be compensated for this substantial use of works. Before, there was no real need to extend the right owners' grasp to private uses of works, but now unremunerated, large scale home-copying threatened to cannibalise the sale of copies. The enforcement of copyright in this case would involve a breach of citizens' privacy since right owners would have to monitor the reproduction of works in people's homes. In addition, individual enforcement would also have been impractical. That is why most copyright laws provide for a levy on blank media (audio- and video tapes, CD-R's, etc.) or on copying devices, to be redistributed among

485 On the use of copyrighted works in the press, see Macciachini 2000.

486 Guibault 2001, p. 32.

487 Guibault 2001, p. 56 et seq.

copyright owners. In this way, both privacy concerns and the practical difficulties of enforcement were dealt with.

Since modern technology gives authors (and other information producers for that matter) increasing means of control over the distribution and use of their works, the right to privacy and freedom of expression and information have moved to the centre-stage of today's copyright debate. It is likely that within copyright legislations, they will become the dominant policies behind limitations, as technological developments increasingly outdate current practical justifications for limitations.

5.5.2 PROMOTION OF CULTURE AND KNOWLEDGE

It is generally difficult to distinguish the limitations on copyright that serve the promotion of culture and knowledge from those that serve freedom of expression and information. On the whole, one could say that the interest of free speech is primarily expressed in the (outer) circumference of copyright: ideas and facts are not protected but only the expression is, the duration (term) of protection is limited.⁴⁸⁸ In *addition* exemptions (internal boundaries) are provided for certain classes of institutions or certain uses of information that traditionally are of particular importance for the promotion of culture and knowledge and often indirectly also for free speech.

The most obvious of such institutions are (public) libraries, public archives and research and educational institutions. The position of libraries in intellectual property law differs substantially from country to country.⁴⁸⁹ For instance, the UK has relatively elaborate legislation on the organisation and tasks of (public) libraries and a detailed library privilege in the Copyright, Designs and Patents Act 1988. However, the privileges do not provide libraries with adequate means to perform their task, so licences with right owners are routinely concluded.⁴⁹⁰ The US also has detailed library privileges in copyright law. In the Netherlands there is no comprehensive library privilege, except that as a rule publicly funded libraries are exempt from paying a remuneration for lending.⁴⁹¹ In Germany, as in the Netherlands, public libraries rely on the general exemptions for certain uses.

488 Nimmer & Nimmer 2001, at §1.10[b]2.

489 Information on library privileges is taken from Krikke 2000, especially pp. 47–121.

490 On the work on licensing solutions in the UK, see: Clark 1999.

491 According to Krikke (2000, p. 70), there is one other specific library provision (based on the Auteurswet's 'copying for private use' provision and laid down in an Order in council): if lending an original document bears the risk that the document will be damaged or lost, a public, non-profit library is allowed to make a copy of a document and supply that to the library user.

notably the freedom to make a reproduction for private purposes (either free or against payment).

Schools often enjoy special privileges, e.g., reproduction of works for students against an equitable remuneration, or the recording and/or showing of broadcasts under a statutory licence.⁴⁹² In addition, schools and research institutions can often benefit from a number of general exemptions, like the ones that allow private copying for study purposes, or for purposes of review and criticism.

5.5.3 PRACTICAL CONSIDERATIONS

As indicated above, the system whereby levies are charged on blank media or on copy equipment itself as a remuneration for private copying, not only relieved privacy concerns but also solved the problem that enforcement at the level of individual users is highly inefficient. The latter is also a reason for the various exemptions that allow for reprographic copies being made in businesses and government for internal use, against payment of a fee to a collecting society.

In the (near) future, the on-line dissemination of works may allow for the efficient monitoring of use of information goods and services at the individual level. Together with the large-scale introduction of new micro-payment schemes⁴⁹³ this would remedy the problem of efficient enforcement. It is thus conceivable that exemptions for businesses and governments will disappear.

For private-use exemptions this is less likely. As has been said, privacy concerns will remain; indeed, they will be aggravated by the right owner's growing means to electronically monitor and control the use of information. Data protection laws will have a more dominant role to play here. Maybe private-use exemptions will remain because the enforcement problem will shift from not being able to control the copying of information in private homes to not being able to control the use of anti-copying devices⁴⁹⁴ at home.

492 For an overview of national exemptions for research and education, see the country reports in Baulch et al. 1999.

493 Micro payment schemes are already in use of course, such as paying for information by way of calling toll-phone numbers, whether voice-direct or over the Internet.

494 The Copyright Directive prohibits the circumvention of anti-copying and other technological measures. It does allow for digital copying for private use, if accompanied by a system of equitable remuneration and if the possibilities of technical anti-copying measures are taken into account. For a discussion of the Copyright Directive's section on technological measures, see Koelman 2001.

5.5.4 FREEDOM OF COMPETITION AND FREE TRADE

Next to the exclusion of ideas and facts from copyright protection, probably the clearest competition-oriented exemption is the right of users of computer software to reverse-engineer or decompile the software for purposes of interoperability.⁴⁹⁵

There are hardly any other limitations in copyright that are motivated by competition concerns. Rather, it is the exercise of intellectual property rights that can run afoul of competition law as laid down in national and European laws.⁴⁹⁶ However, from our perspective that is not relevant because the fact that intellectual property rights are balanced against other (external) interests will not provide us with anything useful for the purpose of identifying conflict rules for copyright and related rights.

A limitation of copyright that is more inspired by free trade (especially the free trade of goods in the internal market) is the exhaustion principle or first sale doctrine. This doctrine was initially developed by the courts, both in the Netherlands and at the European level.⁴⁹⁷ Exhaustion at first meant that once copies of a work have been brought on the market with the (indirect) consent of the author, subsequent distribution (resale, rental, lending) of the copies could not be resisted by the copyright owner.

In the Netherlands the exhaustion principle was based directly on an interpretation of copyright law itself: the Supreme Court ruled that the Copyright Act's exclusive rights, although broadly drafted, do not include a right for the owner of copyright to control more than the initial distribution of copies of a work. The Dutch court did not so much view the control over subsequent distribution of copies as detrimental to competition, but primarily regarded it as being at odds with the property right of the owner of the copy of the work.

The European Court of Justice, in a series of judgments handed down since the 1960's, based the exhaustion principle on other grounds. On balance, the principle of the free flow of goods (as enshrined in Art. 30, ex 36 EC Treaty) outweighs the copyright owner's interest in preventing parallel imports. Here, copyright is limited externally, through the application of *public law*.⁴⁹⁸

495 Guibault 2001, pp. 65–68.

496 On the relationship between European free trade (internal market) and intellectual property and the legal basis of EC legislation in intellectual property, see Röttinger 2001.

497 In the Netherlands the Supreme Court first (implicitly) applied the exhaustion doctrine to copyright in the *Leesportefeuille* case (HR 25 June 1952, [1952] NJ 95) and more clearly in *Stemra/Free Record Shop* (HR 20 November 1987 [1988] NJ 288); the ECJ (after having applied the 'first sale' doctrine to trademarks and patents earlier) first applied it to copyright in *Membran v. K-tel* (joint cases 55/80 and 57/80, ECJ 20 January 1981, [1981] ECR 147).

498 The same goes for restrictions on the use of intellectual property rights through competition law, especially Arts. 81–82 (ex 85–86) EC Treaty (abuse of dominant position, etc.).

The trade-oriented elements of intellectual property are increasingly harmonised. For example, in the past decade the exhaustion principle has been harmonised through several EC Directives. It now no longer applies to the rental or lending of works. Member states can no longer maintain universal exhaustion.⁴⁹⁹ In addition, the Copyright Directive⁵⁰⁰ makes clear that the exhaustion principle only applies to copies of works distributed on material carriers, not to on-line or other non-material distribution of works. As more and more works and performances will be distributed not via tangible media but via telecommunication networks, the significance of the exhaustion principle may gradually diminish.

As this short overview illustrates, limitations of copyright are founded in a diverse set of principles; and a given limitation may be an expression of several policies at once. Some are based primarily on practical considerations. More important are considerations of democracy and fundamental freedoms, which justify limitations of copyright. This latter category of exemptions is intimately connected to the goal of maintaining a meaningful public domain, that people can make use of and contribute to, not just in the interest of democracy but also to enable citizens to develop personally. The close connection between self-expression and personal autonomy means that restrictions on free speech by intellectual property law should be taken seriously.⁵⁰¹ The need to maintain a public domain, especially by ensuring that in the digital world there are mandatory exemptions for private use, the press and for educational and research use, is among the most hotly contested subjects in intellectual property.⁵⁰²

Of relatively small significance seem limitations that are inspired by concerns of economic organisation, i.e., freedom of competition and free trade, despite the contention of some authors that intellectual property strongly reflects local economic policies.⁵⁰³ The increased attention from consumer law advocates (and the departments of national and European governments that deal with consumer protection) for intellectual property issues is not mirrored in copyright law. Limitations are more aimed at 'citizens' than at consumers. Where they do also

499 I.e., the exhaustion principle only applies to copies first introduced into the EC/EFTA market, not for copies first distributed outside Europe.

500 Art. 4 Directive 2001/29/EC of 22 May 2001, OJ EC L 167/10.

501 See e.g., Austin 2001, p. 295 et seq.

502 The Dutch *Commissie Auteursrecht* 1998 advised the government that as direct relationships between right owners and (end)-users are likely to increase in the digital environment, there is a need to strengthen the position of users in order to safeguard their traditional rights. Publishers are of course not sympathetic to mandatory users' rights, see for instance Ekker 1999, pp. 33–34, who argues that direct delivery of information to the user requires an increase in protection and no limitations on the freedom of parties to set their own licence terms.

503 Locher 1993, pp. 17–18.

address consumers (e.g., copying for private use), they seem to be primarily inspired by practical considerations, not concern for the rights or position of the consumers as such. Consumer groups do however –and rightly so– take a keen interest in the effects of internationalisation of supply and consumption of information goods and services.⁵⁰⁴ They quite ardently promote the idea that the use of information by consumers should be governed by their local (copyright) law and that they should not be sued abroad for infringement of intellectual property.⁵⁰⁵

5.6 Conclusions

The primary objective of this Chapter was to identify the legal character and objectives of copyright and related rights, with a view to determining which allocation principles are most suitable. That exercise will be undertaken in Chapter 6. To conclude the current Chapter, some observations will be made on the different objectives of copyright and related rights, on their relative position and on the allocation principles they seem to point to.

In a traditional Savignian choice-of-law analysis, the technical-legal nature of copyright and related rights would be a relevant factor in the determination of a conflict rule, as it shapes the nature of the legal relationship between the owner of intellectual property and third parties (users, intermediaries). The fact that copyright and related rights are, like corporeal property, absolute rights in objects that are opposable to all, begs the question whether intellectual property should not be treated similarly to corporeal property. If it were to be, the issues of existence, scope, duration of the intellectual property, as well as (initial) ownership and non-contractual aspects of transfer, would be subject to the law of the place where the intellectual property is located.

For corporeal property, the principle of the closest connection is reflected in the use of the *situs* of the property (its physical location in space) as connecting factor. However, for incorporeal property like copyright and related rights, this would of necessity be a fictitious place. In addition, the moral rights dimension of copyright and performers' rights suggests that one may as well consider attributes of the author or performer (notably habitual residence) as connecting factor.

504 On the probable negative effect of TRIPs on national consumer protection, see Mayer 1998.

505 See for instance the Consumer Project on Technology <www.cptech.org> and the Transatlantic Consumer Dialogue on the proposed Hague Convention on Jurisdiction clauses regarding intellectual property <www.tacd.org> [last visited 1 November 2002].

For the identification of modern choice-of-law rules, what is more relevant than the technical-legal character of copyright and related rights, are the principal policies that underlie copyright and related rights. These policies or rationales, namely justice, utility and the protection of authors and performers as weaker parties *vis-à-vis* intermediaries (publishers, etc.), point towards different allocation principles.

The growing role of the utilitarian rationale for intellectual property goes hand in hand with the commodification of information goods and intellectual property rights themselves. The economic rights, which in practice have always been more important than moral rights, have gained even more in importance. As the trade in information goods and the intellectual property has become almost as common as (cross-border) trade in other commodities, one could argue that party autonomy and the favour principle (in its function of facilitating the validity of legal transactions) deserve a bigger role.

In Paragraph 5.4, it was concluded that the justice argument appears to be losing ground to utilitarian arguments, since the expansion of copyright and the introduction of new related rights are based almost exclusively on utility arguments. That does not alter the fact that in most legislations 'justice' is and will in all likelihood remain an important, if not the most important rationale for copyright and performers' rights. The justice argument focuses on the reward of the creator for intellectual labour done and on the bond between the spiritual 'father' and the work or performance to be respected (moral rights). At first glance it seems to have a natural ally in the method of functional allocation in its narrow meaning, i.e., protecting the creative individual.

However, copyright and related right do not only have a *protective function* towards authors and performers and their successors in title. These laws also have a *defensive function*. The public domain is staked out by defining which intellectual creations deserve protection and for how long and by prescribing which acts with regard to the work or performance are restricted. This demarcation is the result of the particular balance of interest that underlies each national intellectual property law. The economic and moral interests of the right owner (justice argument), are weighed against the general interest in an optimal production and dissemination of information goods (utilitarian or instrumental argument).

There seems to be no reason to regard *à priori* the protective function of copyright and related rights as more relevant than the defensive function where it concerns the existence, scope and duration of intellectual property, nor where it concerns the closely related issue of infringement. In other words, there seems to be no immediate reason to use allocation principles (favour principle, functional allocation) that reflect the creator's rather than the user's interests.

As regards the limitations on copyright and related rights, we have seen that these may result from long-standing local industry-practices, or be legislated for

practical purposes. The latter two do not warrant special consideration from the choice-of-law perspective.

However, limitations often also reflect a refinement of the balance of the author's versus the public's interest. The more fundamental policies behind limitations on copyright and related rights are freedom of expression and freedom of information. Together with the promotion of culture and knowledge, these reflect the general interest as it is perceived locally. It is because of the public interest dimension of their task that public libraries, research institutions, schools and the press enjoy certain privileges. It is by no means the prime objective of copyright to protect these groups. Consequently, there seems to be no reason to take into account the policies behind limitations as a separate factor in the determination of appropriate conflict rules. In other words: there is no need to formulate separate choice-of-law rules for infringement by certain groups of users.

Considering that fundamental freedoms are involved, there is of course always the possibility of using the public policy exception, or priority rules, in cases where the application of a more restrictive foreign copyright law is viewed as too grave an assault on the forum's conception of freedom of speech.