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netherlands national centre of competence in research

**international law of contemporary
media**
session 11:
challenges and opportunities for
contemporary media law

mira burri, dr.iur.,
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challenges? opportunities?

- law as a dynamic set of rules that is meant to react and adapt to the regulatory environment
- media as a particularly dynamic field of regulation; complex developments; effects (often unintended) in multiple directions
- the goal of technological neutral regulation
- overlapping legal domains; emerging models of regulation based not only on law but also on self- and co-regulation.

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focus of today's session

- **copyright:** key role of copyright as fostering creativity and innovation
- copyright's expansion: rhetoric, reality, (positive and negative) effects
- alternative modes of authors' rights protection: **creative commons licence**
- **google books** project
- discussion of the issues at the intersection of media and IP law.
- organisational/exam Q&As

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copyright

- one type of intellectual property (IP) protection (next to industrial property protection)
- **subject matter:** artistic, literary and scientific works; photographic/motion picture works; computer programmes; multimedia
- **protection period:** 50/70 years after the author's death
- **conditions:** creation by human being; individual character; protection regardless of merits
- **no formalities** (registration, etc)
- **the idea/expression dichotomy:** protection does not apply to the ideas/contents of a work.

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copyright: rights conferred

- the author shall have the **exclusive right to decide whether, when and how her/his work is to be used.**
- the author shall have the right, in particular:
 - to **manufacture copies of the work**, such as printed matter, phonograms, videograms or data carriers;
 - to **offer for sale, sell or otherwise distribute copies** of the work;
 - to **deliver or perform the work** either directly or through any kind of medium or to make it perceivable in a place other than where it is presented;
 - to **broadcast the work** by radio, television or similar means; etc.
- **assignment, licensing and collective administration of rights.**

fair use (1)

- US legal doctrine; known as 'fair dealing' in common law and as 'limitations and exceptions to copyright' under civil law jurisdictions
- allows limited use of copyrighted material **without requiring permission from the rights holders**
- **the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (incl. multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.**

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fair use (2)

- **case-by-case test**
- in determining whether the use made of a work is a fair use **4 factors** are considered:
 - **the purpose and character of the use**, incl. whether such use is of a commercial nature or is for nonprofit educational purposes;
 - **the nature of the copyrighted work**;
 - **the amount and substantiality of the portion used** in relation to the copyrighted work as a whole; and
 - **the effect of the use upon the potential market for or value of the copyrighted work.**

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copyright's rationale

- **'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'** (US Constitution, at article I, section 8, para 8).
- without some means to prevent unlicensed copying, authors will have an insufficient incentive to create and disseminate their creative works
- **temporary monopoly granted to authors**
- **but also: balance between private and public interests needed.**

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moral panics and the copyright wars

- the rhetoric of 'property' and 'stealing property'
- copying and borrowing from copyrighted works is **immoral**
- the copyright industries' **pursuit of total control** over the individuals' digital copying, distribution and modification of copyrighted works
- claiming incredible losses; extremely efficient lobbying mechanisms
- suing / new approach: the **graduated response** (three strikes): notice; slowdown of service or temporary suspension; termination
- **changing business and consumer behaviour**
- **ambiguous relationship between creativity and the copyright reward.**

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copyright's expansion

- expansion in scope
- expansion in time
- expansion in enforcement: trade sanctions; TRIPS/TRIPS+, ACTA and technological protection measures
- narrowing of fair use
- previously unknown control over the use of a work (e.g. adobe ebook reader: *Alice's Adventures in Wonderland* permissions: 'no text selections can be copied from this book to the clipboard' / 'no printing is permitted on this book' / 'this book cannot be lent or given to someone else' / 'this book cannot be read aloud').

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copyright's expansion

'Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. ... As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress'.

Mary Bono (Sonny Bono's widow and Congressional successor), speaking on the floor of the US House of Representatives on the occasion of the adoption of the Copyright Term Extension Act 1998

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copyright's expansion

FREE MICKEY

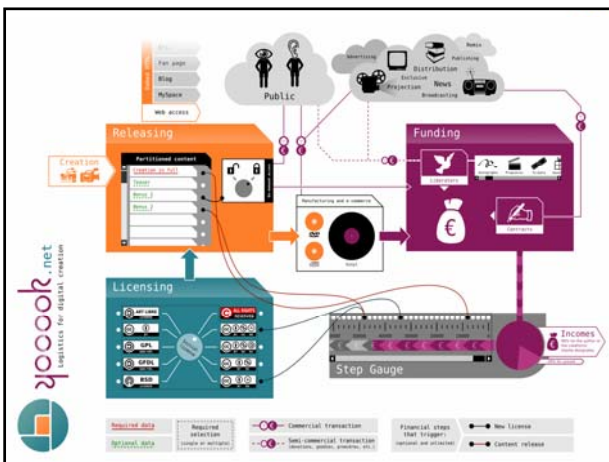


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the changing market

- **production – circulation – exchange**
- **creator – publisher/producer/distributor – user/consumer**
- **under digital media conditions however:**
- **creation – distribution – use/consumption**
- **creator – internet – reader/user**
- authors and musicians are no longer completely reliant on publishers and recording companies to reach mass audiences.

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creative commons (cc)

- **non-profit organisation; founded in 2001**
- **mission:** dedicated to making it easier to share and build upon the work of others, consistent with the rules of copyright
- spectrum of possibilities between copyright ('all rights reserved') and the public domain ('no rights reserved'). cc-licenses help authors keep their copyright while allowing certain uses of their works: **'some rights reserved'**
- **international spread of the cc-licenses:** 70 jurisdictions (<http://creativecommons.org/international/>)
- **2009:** 350 million cc-licensed works

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cc license conditions



attribution: You let others copy, distribute, display, and perform your copyrighted work — and derivative works based upon it — but only if they give credit the way you request



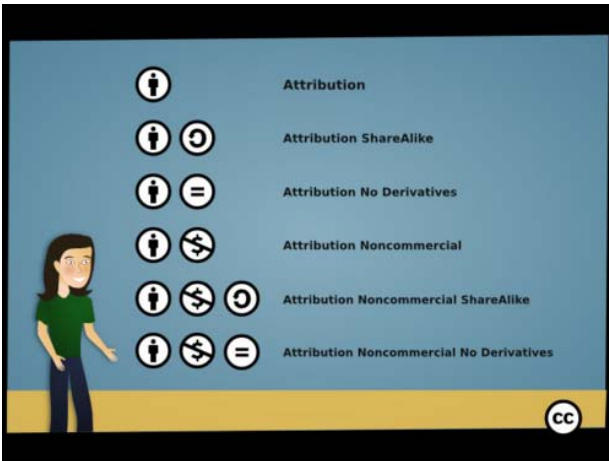
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cc licenses

- **different combinations possible; always 3 types of code: human, legal and technical**
- **retired licenses** (e.g. cc developing nations)
<http://creativecommons.org/retiredlicenses>
- **licenses added later on:**
- **cc0** waives copyright to the fullest extent permitted by law; if the waiver isn't effective for any reason, **cc0** acts as a license granting the public an unconditional, irrevocable, non exclusive, royalty free license to use the work for any purpose
- **cc+** adds commercial (or other) possibilities to a 'standard' cc license
- all cc projects: <http://creativecommons.org/projects/>





cc project nccr trade regulation

- remarkable spread and success (also due to integration in search engines and popular platforms, e.g. flickr: <http://search.creativecommons.org/>)
- does not replace copyright but puts a contractual layer on top of it making the package of author's rights more flexible; fair use and moral rights never affected
- reflects the new types of creativity (sample, remix, share, etc) in a digital environment
- limitations of the cc licenses (mostly non-commercial use)
- no real reform of copyright.

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wipo development agenda

- rejects the usual (and asserted over years) IP-centric view: IP as a 'power tool' for economic development and wealth creation
- posits that strong IP protection does not consistently promote creative activity, facilitate technology transfer or accelerate development
- stresses the benefits of a rich and accessible public domain, national flexibilities, a2k and a balance between the costs and benefits of IP
- adopted in September 2007; of the 45 points, 19 were agreed upon for immediate implementation.

wipo development agenda

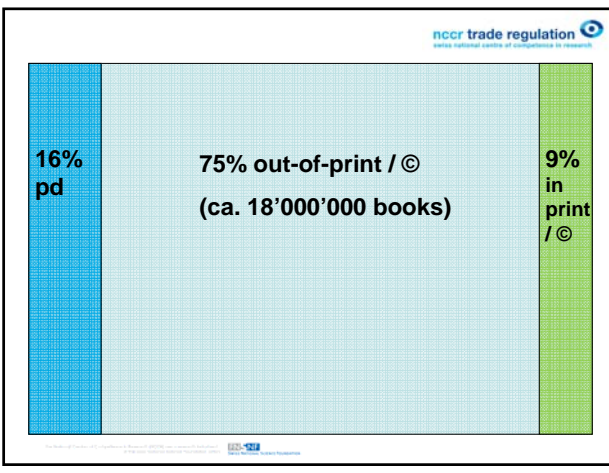
- vital connection between IP protection, trade and development
- recognition at the international level that broad IP rights will not necessarily bring affordable technology, innovation and FDI to developing countries
- more broadly, questions whether economic development and wealth creation are the sole metrics for measuring development
- <http://www.wipo.int/ip-development/en/agenda/>

google books

- a Google service that searches the full text of books that Google scans, converts to text using optical character recognition, and stores in its digital database
- formerly Google Print when introduced at the Frankfurt Book Fair in 2004
- october 2009: 10 million books scanned
- 2010: Google announces intention to scan all 129,864,880 books by the end of the decade
- basically **3 types** of books: (i) in the public domain **16%**; (ii) under copyright and out of print **75%**; (iii) under copyright and in print **9%**.

- **Google library project initial partners**
- Harvard University Library
- University of Michigan Library
- New York Public Library
- University of Oxford, Bodleian Library
- Stanford University, Stanford University Libraries
- **Additional partners**
- Bavarian State Library, Bayerische Staatsbibliothek
- Columbia University, Columbia University Library System
- Committee on Institutional Cooperation
- Complutense University of Madrid, Madrid
- Cornell University, Cornell University Library
- Ghent University, Ghent University Library
- Keio University, Keio Media Centers
- La Bibliothèque Municipale de Lyon
- Princeton University, Princeton University Library
- University of California, California Digital Library
- **University of Lausanne, Cantonal and University Library of Lausanne**
- University of Mysore, Mysore University Library
- University of Texas at Austin, University of Texas Libraries
- University of Virginia, University of Virginia Library
- University of Wisconsin–Madison Library





GERONIMO

sacrifice was deemed necessary. Sometimes the offending one was punished.

If an Apache had allowed his aged parents to suffer for food or shelter, if he had neglected or abused the sick, if he had profaned our religion, or had been unfaithful, he might be banished from the tribe.

The Apaches had no prisons as white men have. Instead of sending their criminals into places they sent them out of their tribe. These faithless, cruel, lazy, or cowardly members of the tribe were excluded in such a manner that they could not join any other tribe. Neither could they have any protection from our unwritten tribal laws. Frequently these outlaw Indians banded together and committed depredations which were charged against the regular tribe. However, the life of an outlaw Indian was a hard life, and their hands never became very large; besides, these bands frequently provoked the wrath of the tribe and secured their own destruction.

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The Outlaw, Winter

books in the public domain; available full text

google book settlement

- Google pays a **total of \$125 million to rights holders of books** it had scanned, to cover the plaintiffs' court costs, and to create a **Book Rights Registry**
- Google created also a Google Book Settlement website; it allows authors and other rights holders of out of print (but copyright) books to submit a claim by June 5, 2010. **In return, they will receive \$60 per full book (\$5 to \$15 for partial works)**
- Google will be able to show ads and make available for sale digital versions of each book. **Copyright holders will receive 63% of all advertising and e-commerce revenues associated with their works.**

google book settlement

- as revised, the settlement includes only books that were either registered with the US Copyright Office or published in the **US, UK, Canada or Australia**
- Google could however work directly with int'l rights holders or organisations that represent them
- **access models:**
- free library access at designated terminals
- **print-on-demand**
- **file download**
- **consumer subscription**
- authors can make books available for free or allow re-use under creative commons or other licenses.

google book search case

- the Authors Guild and the Association of American Publishers sued claiming '**massive copyright infringement**'
- **2 core arguments:** (i) massive copying of copyrighted works without asking for permission and (ii) google is profiting from authors' work
- from a legal viewpoint, unanswered question: **is google's book search project fair use?**
- two cases to consider when contemplating: *mp3.com (UMG Recordings, Inc. v. MP3.com, Inc., 2000)* and *Kelly v Arriba Soft Corp., 2002*.
- <http://images.google.ch/images?hl=de&source=hp&q=andy+warhol&qbv=2&aq=f&oq=>

fair use

- case-by-case test; fact intensive
- in determining whether the use made of a work is a fair use **4 factors** are considered:
 - **the purpose and character of the use**, incl. whether such use is of a commercial nature or is for nonprofit educational purposes;
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google books: pros

- unprecedented access to what may become **the largest online corpus of human knowledge**
- no matter how content is made available, google offers an **index of all books**
- millions of in-copyright out-of-print books will otherwise be not available (possibly also generating new profit for authors)
- access is free
- could change the ways we read, research.³⁵

google books: cons

- copyright violations
- *de facto* monopoly for google on access to the global digital library
- google as a private company: 'The real risk of privatization is simple: companies fail (...) Should we entrust our heritage and collective knowledge to a company that has been around for less than a decade? What if stockholders decide that Google Library is a money loser or too much of a copyright liability?' (Siva Vaidhyanathan, 2007)
- significant privacy issues
- language issues

google book settlement

- march 22, 2011: the amended settlement agreement rejected
- 'While the digitization of books and the creation of a universal digital library would benefit many, the ASA would simply go too far. It would permit this class action (...) **to implement a forward-looking business arrangement that would grant Google significant rights to exploit entire books, without permission of the copyright owners.** Indeed, the ASA would give Google a **significant advantage over competitors**, rewarding it for engaging in wholesale copying of copyrighted works without permission, while releasing claims well beyond those presented in the case'.

goals of the course

- understanding the framework of rules of relevance to media at the int'l level
- fragmented rules (horizontally and vertically); also profoundly different types of rules: from HR to satellite law
- putting different developments into the 'bigger' picture and having a more differentiated, informed view (e.g. new TLDs; Skype deal with Microsoft; ACTA)
- learning to deal with complexity and uncertainty.

a panoply of organisations

- European Union (EU)
- Council of Europe (CoE)
- Internet Governance Forum (IGF)
- Internet Corporation for Assigned Names and Numbers (ICANN)
- International Telecommunication Union (ITU)
- World Intellectual Property Organization (WIPO)
- World Trade Organization (WTO)
- United Nations Educational Scientific and Cultural Organization (UNESCO)

exam info (1)

- oral; limited to 20 minutes; 5 minutes to prepare notes; 2 questions:
- Q1: corresponding to everyone's role during the interactive session (i.e. *pro and con* cyber-regulation or *pro and con* cultural diversity regulation)
- Q2: a concrete 'small-scale' question to be picked blindly from a list of 17 questions
- examples Q: What is NT under the law of the WTO? Difference in NT obligations under GATT and GATS, or Q: What is ICANN and what are its main functions?

exam info (2)

- Q1: not just arguing; choose well your arguments (better fewer than many but unstructured); elaborate; use examples if you can; link between law and facts; between different arguments; don't take paths not travelled yet
- Q2: 1-2 minutes; answer the question precisely and give the essential information
- all information as given in lecture slides

the end

- thank you and good luck (!)
- for the exam and for all your other endeavours
