RESPECT:

Intellectual Property Aspects of Socio-Economic Research

Three Basic Notions concerning Copyright and Research – a Selection.

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This paper touches on 3 general topics regarding the relation between copyright and research. It does not deal with solutions of positive law, which are different in each legal system of the 15 Member States of the EU.

1. Law and Etiquette
Academic etiquette may forbid what the law of intellectual property allows and vice versa.

2. The "Idea/Expression Dichotomy"
It is a basic rule that copyright only protects "expression", but not scholarly content as ideas, facts, concepts, systems. Can this rule be explained, and does it still hold true?

3. Socio-Economic Research: Who Should Be Copyright-Owner?
Do copyrights belong to researchers, universities or principals of contract research? To what extent? Individual research vs. research projects.

1. Law and Etiquette

Academic etiquette may forbid what the law of intellectual property allows and vice versa.

Copyright may forbid actions which one might, as an academic, consider as innocent – for example, a copying an article of a friend and distributing it to some of the most talented students. But in other situations, copyright is very reticent to interfere where according to the academic etiquette, certain actions should be sanctioned. Copyright will offer no, or too little, protection if a researcher uses certain *ideas* the credits of which belong to another, without mentioning the name of the other researcher. Actions which, within the academic family, are considered to be quite unethical, and which could ruin a reputation as a scholar, are not always forbidden under copyright. Copyright and academic etiquette are sometimes different. This can also be illustrated in the light of the Draft Code for Professional Conduct in Socio-Economic Research submitted by Christoph Hermann and Jörg Flecker. It states inter alia:

> *"Authorship is reserved for those researchers who have made a significant intellectual contribution to a research project"*
> *"Any material, including data, sources, information, ideas and quotes must be clearly attributable to their original authors" (etc.)*

Ideas and information can clearly form (significant) intellectual contributions to a research project, but in principle – and subject to the exceptions which will be dealt with later – they are not protected by copyright and therefore have no "author" in the *legal* sense. This does of course not mean that there is no valid claim under the academic etiquette. It is obvious that

the identification of the source of ideas or information provides vital information for academic users. Indeed, normally, a scholar will, in the first place, be interested in the *idea* put forward by an article of a colleague, however elegant the "form" – the language of the author – may be.

Although intellectual property and academic etiquette may diverge as to certain questions, the etiquette can certainly be legally relevant. A violation of the academic etiquette could have legal consequences outside the strict domain of copyright, for example under tort law. Apart from this, academic etiquette may have an indirect influence on the way in which copyright is applied. The observance of academic etiquette could for example be relevant for questions concerning "fair dealing": in order to decide the question whether (part of) a work has been legally used, e.g. for the purpose of quotation. Copyright may require that general rules of good conduct have been complied with, of which the academic etiquette may form a part.

2. The "Idea/Expression Dichotomy" and its Function with regard to Free Research.

It is a basic rule that copyright only protects "expression", but not scholarly content as ideas, facts, concepts, systems. Can this rule be explained, and does it still hold true?

The idea/expression dichotomy is a vital rule for research in general. Free academic research is possible because ideas, facts, concepts and systems are, in principle, in the public domain. Nobody has an exclusive right in them. Their use cannot be submitted the obligation to get the creator's permission and/or to pay royalties. The "idea/expression" dichotomy is an American term, but in Europe the same concept is expressed in various ways, such as: copyright only protects form, not content, or: copyright protects only the *subjective* elements of a work, not the *objective* elements.

Consequently, it must be underlined that the inherent function of copyright is not alone to define what is protected, but just as much to define what is free, and that in a context of academic research, this last function is as important, and maybe more important than the first one.

I. The rationale behind the idea/expression dichotomy

Several reasons can be imagined to justify the idea/expression dichotomy.

1. Intellectual property rights are meant to foster cultural and technical innovation. The use of ideas, facts, concepts and systems is of vital importance for further scientific and industrial activities in production and innovation, and vesting exclusive rights in them could therefore hinder rather than stimulate innovation. A different view is taken as far as "personal expressions" in the form of books, musical compositions etc. are concerned. These are, from the economic viewpoint mentioned above , more easily substitutable. ("If you cannot read one novel, you can always read another"). Of course, from a *cultural* viewpoint, the product of personal expression may very well *not* be substitutable ("I want to read J.K Rowling's new volume of Harry Potter or no book at all").

2. Intellectual property rights also aim at realising a reward for the author. The idea/expression dichotomy creates a balance between this aim and the needs of society. Although the content of a certain work will stay in the public domain, the expression – the form in which the work is written or otherwise presented – can be protected and thus secure a reward to the author.

3. Intellectual property rights aim at the protection of useful (innovative) investments by securing a fair return on investment with regard to products which, because of their non-physical nature, can particularly easy be imitated once they have been developed. Up to now, this argument was of relatively little relevance for ideas, as the "development of ideas" was either subsidised by public funding, or done in private, or practised as an activity secondary to a main business-activity which could bear the costs. When, however, "competition in ideas (or concepts)" develops towards a largely independent, primary business activity, as can already be observed in certain sectors, it is not at all excluded that the old axiom will be put under strain, as sooner or later a call for the protection in investments will be raised.

4. It follows from the legal system, that where the result of spiritual labour is not transformed into a work which qualifies as a personal expression of the author, there is no reward for the "author" of such labour at all, at least not in the form of an intellectual property right. Repeatedly, this has been felt by scholars as an injustice. In the twenties, initiatives for a *droit des savants* were introduced by the *Confédération des Travailleurs Intellectuels* and discussed on the level of the League of Nations. The same subject was later studied on, in the fifties, by UNESCO, and in the sixties, by WIPO, but it never resulted in concrete proposals.

II. How "real" is the idea/expression dichotomy? Does the law observe it?

1. Firstly, one must be aware that in many situations, and more in particular in the academic field, there is no real difference between form and content. The substance of a theory in a way resides in the exact wording of that theory. However, the fact that the expression of the theory can be protected does not necessarily mean that it is forbidden to use the text, as in all legal systems, provisions allowing for quotation – as well as other exceptions to copyright – exist.

2. A more serious threat might be formed by the continuous expansion of IP-law. I will mention a few striking examples, intruding on what used to be considered as public domain.

    a. The copyright-protection of computer programs is accepted worldwide and prescribed by the European Software Directive 91/250/EEC of 14 May 1991 as well as art. 10, 1 of the TRIPs-Treaty, although software arguably is no more than a concept, or a system, or a combination by these, be it in an executable form

    b. Art. 7 of the European Database directive of 11 March 1996 introduces a sui generis database right in the *content* of databases. It

is true that article 9 of the same directive opens (three) possibilities for exceptions to this right, one of which concerns the extraction of content for the purposes of illustration for teaching or scientific research, but these are only optional for the member states

c. More and more information is distributed online on the internet instead of in the traditional "analogue" form of printed products. Online distribution is considered as a service and, different from the traditional purchase of a book, bound to contractual conditions. According to these conditions, the customer may waive certain or all of the copyright-exceptions the law provides in his favour. This could lead to a rather drastic control of the use of information by the information-providers. The question therefore is, firstly, whether and under what conditions these contracts as such are valid and secondly, whether and in how far the legal exceptions in favour of the user should be considered to be of a mandatory nature, as rights which cannot be given away.

d. Although it mainly concerns the arts, another recent and bizarre extension of the I.P.-domain should be mentioned here. The European Term directive 93/98/EEC of 29 October 1993 creates, in its articles 4 and 5, a 25 years (!) long protection of previously unpublished works as well as of critical and scientific publications of works which have come into the public domain. It seems that the consequences which these rules could have in terms of a reduction of the free (academic) domain can be significant and have hardly been taken into consideration.

3. Who Should Be Copyright-Owner?

Do copyrights belong to researchers, universities or principals of contract research? To what extent? Individual research vs. research projects.

Who should be copyright-owner? There are several options: the researcher himself; the institution which employs him; the body where the initiative, organization and "professional risk" of a project are concentrated; the subsidizing body; the commissioner of contract-research.

a. Legal options

The fundamental rule is that the copyright in a work is, in principle, vested in the real maker – as far as no stipulation to the contrary has been made.
This basic rule may to a varying degree be affected by the fact that the author has entered into a legal relationship with a third party, e.g. an employment contract with the university or a commission contract concerning contract research.

Even in case of an *employment contract*, the majority of legislations takes as a point of departure that the real maker, the individual researcher, owns the copyright in his or her intellectual creations.

However, in the most extreme case, which happens to be that of the Netherlands, the employer is deemed to be "the author" of works which have been created in the course of an employment contract. In that case, the law does not just grant the employer the *rights* in the creation, but regards the employer *as* the maker.

In other legislations, the employer will be granted a number of powers with regard to the creation.

In yet other situations, the legal regime grants the rights to the author - like is the case in France or in Belgium - but the possibility exists that the employer has stipulated contractually that he will be the owner of the copyright or that copyrights must be offered or assigned to him.

As far as *commissioned research* is concerned, the impression is that most legislations will grant the rights to the real maker, not the commissioner. However, in practice it is more likely that the I.P.-ownership will be decided, not according to the legal standard rule, but according to sometimes detailed contractual provisions.

Apart from all this, an important issue can be what the parties may have silently agreed on, or what is general practice.

A *special* legal regime may furthermore apply with regard to certain *works* – as for example software, film or databases. The southern member states have a special regime applying to collective works.

These solutions are different in every member state of the European Union. According to which law they must be solved, is decided by the (national) system of international private law in each of these member states – which system can, again, yield different results. That means that, in particular in cases with international elements and in the absence of clear contractual provisions, the legal situation can be extremely confused.

b. Factual survey

Free individual research
Although I have no empirical material at my disposal, the impression is that so far, few difficulties have arisen with regard to the copyright status of creations of individual researchers. Regardless of the official copyright regime, it seems that universities and research institutions in principle have no problem in leaving the rights with the individual researchers. The solution that individual researchers keep their copyright might, by the way, be the most practical one. There is no guarantee that the universitary bureaucracies, hardly used to administrating intellectual property, would be best in place to safeguard the interests of the individual creators (as well as their own interests as universities). This applies all the more since, as is rightly remarked in Prof Hoeren and Doctor Bohne's draft report, individual scholarly work will frequently be characterized by a very close relation with the so called moral rights of the author concerning the integrity of his work and reputation.

Groups of researchers in research projects
Ever more research is carried out not by individuals but by groups of researchers which are organised in different ways. It seems ineluctable that in such situations, the rights and powers

of the participating individual authors will have to be reduced, either by copyright law or by contractual agreements, or even by the way of tacit obligations. Otherwise, the risk arises that one individual researcher could block the successful continuation or completion of the project by withholding or withdrawing permission to use the part of the project carried out by him. Another question is whether the individual participants should loose *all* the rights; this would seem neither just nor practical.

Larger research projects may be much more subject to active universitary policy than the activities of isolated individual researchers. As a consequence, it may very well be that the university deems it necessary to have the possibility to co-decide in matters of administration of rights.
Within copyright law, film copyright forms the archetype of a situation where multiple makers, under the guidance of a director or a company, contribute to a greater "project", which necessitates to deviate from the standard rule that every individual maker keeps a full copyright in his or her contribution. Research-projects are also multi-maker enterprises, but they differ in many ways and should receive a subtle, tailor-made treatment.

Where subsidising bodies and/or commissioners of contract research take an interest into acquiring the intellectual property rights, it should be carefully considered by both parties whether and to what extent an actual and full assignment is necessary to serve reasonable and practical purposes. Otherwise, a transfer of rights could prove to be of no use to the transferee and a hindrance to the other party in its normal professional activities.

Doctrine of concentration of rights
According to a still predominant traditional doctrine, the fruits of remunerated labour belong to the employer. Consequently, the employer is granted the entire intellectual property right. However, if the question is considered in the light of the general policy underlying intellectual property as formulated on page 11 of the ITM's draft report: to promote the progress of creation and innovation and to reward creators on the other hand, the question of allocation of rights is placed in an entirely different perspective. In many cases, the researchers themselves are the best qualified to see that a work is published and disseminated at the right moment to the right public. In practice, they currently decide about this independently from the university as their employer. In the light of their moral rights, a different rule would in many cases be hard to envisage. It obviously is the most efficient solution to leave the rights in their hands. There is no point in embracing legal constructions denying legal powers to subjects who need them and are expected to act on their basis every day and granting those powers to subjects who do not need them and do not know what to do with them.

Questions concerning allocation of rights might seem of little practical relevance to some researchers, as they are not yet often raised in practise. The experience however is that intellectual property is expanding extremely fast and that problems/claims unheard of 10 years ago may be very practical issues today. Likewise, respect for intellectual property rights of researchers might become an issue sooner than one would expect. The impression is that the outer world grows more greedy in matters of I.P. If that is correct, it certainly is an issue not to be neglected, whatever busy activities tend to distract our attention as researchers from such trivial legal details.