

Professor Dr. Karl-Nikolaus Peifer,  
University of Cologne

# A legal view on selected aspects and the development of Digital Europe

Cultural flat rate, digital libraries, Creative Commons –  
What role for collecting societies in the 21<sup>st</sup> century?

GRUR meets Brussels  
24 March 2010



# Overview

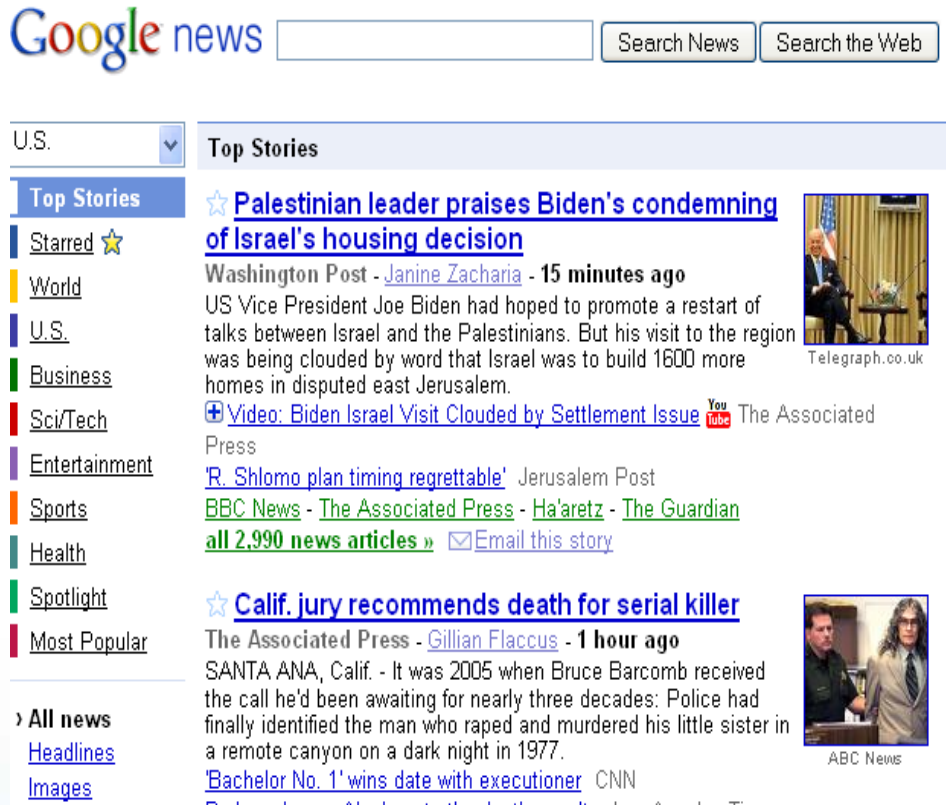
- I. Some of the cases to solve
- II. European Digital Agenda and Copyright
- III. What now?
  1. Full harmonisation by a regulation (Copyright Code)?
  2. Getting rid of territoriality?
  3. Fine tuning of existing regulation?
  4. Contract solutions?
  5. Collective rights management



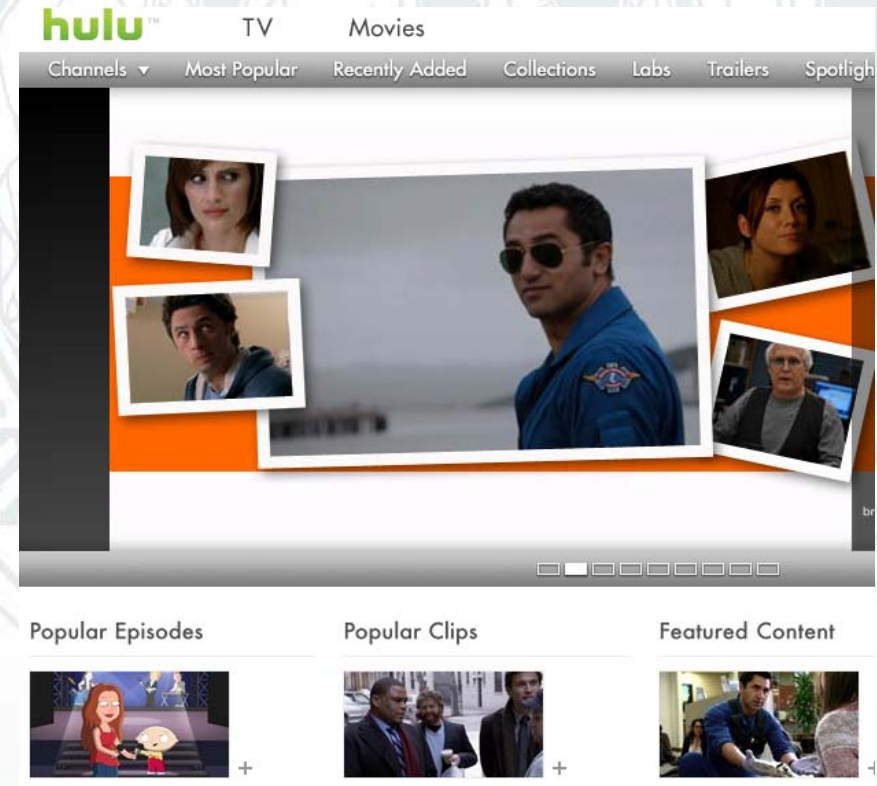
# I. Some of the cases to solve

Hypertexts

... and hyperimages (platforms)



The screenshot shows the Google News homepage. At the top, there is a search bar with "Google news" and two buttons: "Search News" and "Search the Web". Below the search bar, there is a dropdown menu for "U.S." and a "Top Stories" section. The "Top Stories" section features two main articles. The first article is titled "Palestinian leader praises Biden's condemning of Israel's housing decision" and is from the Washington Post, dated 15 minutes ago. The second article is titled "Calif. jury recommends death for serial killer" and is from The Associated Press, dated 1 hour ago. The page also has a sidebar with various news categories like "World", "U.S.", "Business", "Sci/Tech", "Entertainment", "Sports", "Health", "Spotlight", and "Most Popular".



The screenshot shows the Hulu homepage. At the top, there is a navigation bar with "hulu" logo, "TV", and "Movies". Below the navigation bar, there is a "Channels" dropdown and several menu items: "Most Popular", "Recently Added", "Collections", "Labs", "Trailers", and "Spotlight". The main content area features a large video player with a central image of a man in a blue jacket and sunglasses, surrounded by smaller images of other actors. Below the video player, there are three sections: "Popular Episodes", "Popular Clips", and "Featured Content", each with a small thumbnail image and a plus sign.



## II. European Digital Agenda and Copyright

### 1. Copyright Law was faster than the market – a short history

6/8/1991 World Wide Web released for everybody's use, 1993 Netscape

1994 TRIPS Agreement: no digital rights, but: generalisation of the three step test for exceptions and limitations;

1994 ALAI Conference on Digital Copyright, WIPO Conferences on Digital Copyright: international harmonisation proposals on the interpretation of reproduction rights, distribution rights and introduction of the making available right;

1996 WIPO Treaties signed, Digital Copyright regulated on the International level: Tendencies: exclusive rights, no special limitations (3-step-test only), no levies or mere liability regimes, no special provisions for collective rights management.

2001 Information Society Directive mainly adopts the WIPO approach

3/2010 EU joins WIPO Treaties



# Analogue goes digital – but is it the same?

- **The Work:** Hypercontent and multiformate – from the protection of works to the protection of bits? (ECJ – infopaq, sampling-cases) – definition of the a copyrightable work outdated?
- **The author:** Goethe's Faust and Wikipedia – from the individual genius to the „wisdom of crowds“ – new definition of authorship required when multimedia creations are concerned?
- **Copy or display?** What's the tangible media of the future: the book or the file? From libraries to lap tops (or tablets)? From CDs/DVDs to media streams? How to avoid separate rights for the same activity?



# The Digital Strategies of the EU – from property to freedom of access?

1. IP-Approach: strong protection as an incentive to production (classical IP legitimation: summarized in recital 9 Directive 2001/29/EC:

*“Any harmonisation of copyright and related rights must take as a basis a **high level of protection**, since such rights are crucial to intellectual creation. Their protection **helps to ensure** the maintenance and development of **creativity** in the interests of authors, performers, producers, consumers, culture, industry and the public at large.”*

2. IP and Competition: Market dynamics in collective rights management, Recital 9 of Recommendation on Musical Online Rights OJ L 276/54

*“Freedom to provide collective management services across national borders **entails that right-holders are able to freely choose the collective rights manager** for the management of the rights necessary to operate legitimate online music services across the Community.”*



# The Digital Strategies of the EU

**3. Media and Communications Approach:** free flow of audiovisual content: broadband, competition in communication markets, „internet freedom provision“, **recital 3 Media Directive 2007/65/EC**

*„Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by **ensuring freedom of information, diversity of opinion and media pluralism** — education and culture justifies the application of specific rules to these services.“*

**4. Disentangle the knot: Convergence of IP and Media Approaches,** Communication:, COM 2007, 724 final, p. 8 (2.3.):

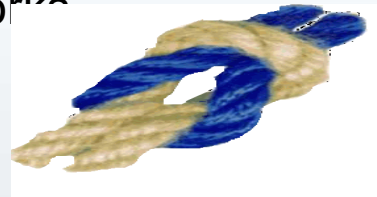
*“The single market originally conceived for an economy reliant on primary products and manufactured goods has to adapt to foster openness and integration in a knowledge-based, service-oriented economy. (...) Further efforts are needed to promote **free movement of knowledge and innovation as a "fifth freedom"** in the single market.“*

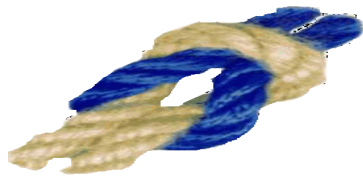


# Tying the knot: Collateral Damages of the harmonisation process

## Harmonisation gaps and overprotection lead to an imbalance of guiding principles, examples

- The notion of a protected work is not harmonised; therefore there is a tendency to protect any bit as far as it has not been copied;
- Economic rights are broadly formulated and tend to be interpreted even more broadly (i.e. making available rights);
- Protection terms are constantly levelled up, which complicates the disentangling of the knot and the rights clearance and licensing.
- Limitations are narrow, but multiple; therefore, neither harmonisation nor facilitation of access is achieved;
- The protection of DRM systems is consequent, however, it has led to barriers for private and priviledged uses of works





## III. What now? Options

### 1. Full harmonisation: from directives to a Copyright Regulation

- might be a good idea but is hard to achieve without getting rid of national copyright laws

### 2. Getting rid of territoriality

- might be a good idea, but see before
- smaller approach: European definition of the place of Copyright infringement (Cable & Satellite Directive, Art. 1 (2))

### 3. Contract solutions (definition of the content of rights usages);

- last resort within the harmonisation-free territory
- problem: no clear, but maybe sufficient EU-competence

### 4. Regulatory solutions

- New limitations? Correction of 2001-Directive required



# III. What now? Options (2)

## 5. Collective rights management

- the challenge to CRM-Societies aggravated existing problems; the challenge was more a challenge to the territoriality problem than to the system of CRMs in general
- Collateral effect: Google filled the gap with huge remaining problems also with regard to competition concerns.
- Still required: one-stop-shopping solutions
- open access solutions need substantial public funding to work and possibly also need access to copyrightable material



# IV. Outlook: Comments to the value of the Google Booksearch

**Common Statement of Commissioners *Reding* und *McCreevy* concerning the Google Book Settlement** (September 7, 2009):

➤ „We believe that such a European solution should breathe fresh life into this issue and could give every citizen with an internet connection access to millions of books that today lie hidden on dusty shelves. Our aim is to blow away stale stereotypes that hindered debate in the past.“

**Comment of the US-Department of Justice in the same matter** (18.9.2009 – Court file No. 720 Google-case):

„The United States strongly supports a vibrant marketplace for the electronic distribution of copyrighted works, including in-print, out-of-print, and so-called “orphan” works. The Proposed Settlement has the potential to breathe life into millions of works that are now effectively off limits to the public. (...). Because a properly structured settlement agreement in this case offers the potential for important societal benefits, the United States does not want the opportunity or momentum to be lost.“

