

Copyright's Bad Name and Changes in the Law

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Copyright's Bad Name

- Broad Criticisms:
 - Tool of control
(>< libertarian view of the Internet)
 - Tool of economic power for “Big Corp.”
(>< anti-globalisation groups)
 - Tool favoring the old
(>< enabling the new)

Bad Name, But Good Shape

- More laws (international, EU, national)
- More high visibility cases
- More legal jobs in the field
- More academic interest and focus
- More students

However, less overall support

Causes for Challenging Copyright

Mix of Market and Technology Factors:

- Internet dream
- Technologies empowering consumers and facilitating access (mobile players, P2P, etc.)
- Open source wave
- Advertising-based business models
- Concentration of markets (competition)
- Development agenda (new claims)
- Claims of researchers re scientific publishing

(EU) Author's Right v. (US) Copyright: Less Noise About the Bad Boy?

- Less focus of the press on legal issues?
- No vocal academics around?
- Less greedy right owners?
- Positive role of collecting societies?
- More mature public?
- More respect for the author/creator?
- More “belief” in the cathedral of author's right?
- No measure to assess droit d'auteur?

Support for Criticisms in the US: The Rationale of Copyright

Art. I, Section 8, clause 8, US Constitution:

“The Congress shall have power [...] 8. 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”

EU: In Search for a Rationale?

- No constitutional provision in EU Member States
- No supremacy of the “promotion of science”
- Less clear balancing with the public interest
- But various author’s right theories:
 - Natural right
 - Human right
 - Remuneration of the creator (socio-economic approach)

Criticisms: Overreaching

- Too long (duration)
- Too many (rights)
- Too broad (subject matter and scope)
- Too strong (TPM protection and enforcement)
- Too complicated (exceptions)
- Too much to pay (levy and royalties)
- Too restrictive (licenses)

Duration of Copyright

- A question:
Will there be a term to the extension?
- A comment:
You can have too much of a good thing!
- A requirement:
Back to the rationale (are there economists in the room?)

If Not, Further Attacks on Copyright

*“An environment designed to enable the new
is being transformed to protect the old”*

Larry Lessig

Impact of the Digital World

« *In this new era, ... the notion of access will replace property* »

Jeremy Rifkin

(The age of access – *The revolution of the new economy*)

Access and Copyright: « something new under the sun? »

- A difficult coexistence, but nothing really new:
« *Right to access* » v. *copyright*
- An evolution, not a revolution:
Copyright as a « right on access »

Access and Copyright

- « *Right to access* » v. *copyright*:
 - Renewed conflicts with other bodies of law:
 - Freedom of expression
 - Competition law
 - Access issue within copyright: private copying and other exceptions
- *Copyright as a «right on access»*
 - Old «right on access» in the analog world
 - New «right on access» in the digital era

“Right to Access” v. Copyright

- Provisions on freedom of expression (art. 10 ECHR) and access
 - No general access “right” (but specific rights to access administrative documents, stored personal data, etc.)
 - No right to access “works” (>< access to pure information)
 - But public interest to access information

Copyright as a « Right on Access » in the Analog World

- Control of access to the *copies*:
 - Reproduction right:
 - control on unlawful copies
 - Distribution right:
 - control on lawful copies

Traditional Exceptions to the Old « Right on Access »

- Right of reproduction:
 - private copying (especially for *time-shifting*)
 - quotation
 - news report
 - exceptions for education and libraries
 - parody
- Right of distribution:
 - first-sale rule (US) / Community exhaustion

The « Right on Access »: Digital Age

- Control of access to the *works*:
 - Temporary reproduction right
 - Making available right (« *in such a way that members of the public may access these works from a place and at a time individually chosen by them* »: Art. 8 WCT)
 - Protection of technological measures

Limitations to the Digital « Right on Access » : Software

- « *Right on access* »:
 - Article 4 of 1991 Software Directive: the reproduction and adaptation rights can prohibit the use of the software and the access to the source code
- « *Right to access* » *within copyright*:
 - Article 5 (1): exception for the use of the program
 - Article 6: exception for reverse-engineering

Integration of the access issue within the realm of *copyright protection of software*

« Right on Access» v. Exceptions: Technological Protection Measures

- « *Right on access* »:
 - Article 6 (1) and (2) of the 2001 Copyright Directive: the protection of technological measures (prohibition of circumvention/commercialisation of circumventing devices)
- « *Right to access* » *within copyright*:
 - Article 6 (4): enabling process to ensure the respect of some traditional copyright exceptions

**Integration of the access issue within the realm of
*digital copyright in general***

A Conclusion: Two Questions

- Is copyright overreaching?
- Is copyright more threatened than ever?

Which Perspective is Accurate?

- Copyright is getting too strong, favoring large powerful companies at the expense of ordinary users and trampling on fair use
- Copyright is more threatened than ever as advances in copying and distribution technology are outstripping the practical ability of copyright owners to enforce their legal rights

Which Perspective is Accurate?

- Copyright is getting too strong
 - Higher penalties
 - New enforcement measures
 - Longer terms
 - International pro-copyright harmonization
 - Copy protection technologies overriding fair use
 - Media industry consolidation
 - Lack of consumer voice

Which Perspective is Accurate?

- Copyright is falling behind
 - Civil enforcement too slow and expensive
 - Criminal enforcement a low priority
 - Ease and low cost of digital vs. physical copying
 - Ease and low cost of online vs. physical distribution
 - Infringement harder to detect and prove
 - Pirate servers move to pirate haven countries
 - Harmonization of laws but disparities in enforcement
 - All DRMs gets hacked

Thanks for your attention

