

# Slip-Sliding Away - Some Reflections on Recent Developments in Copyright and their Consequences

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## INTRODUCTION

Copyright is undoubtedly a very complicated matter. For that very reason it might be useful now and again to look beyond the jungle of treaties, directives, laws, decrees and contracts, and try to establish where we are actually heading. Then we can ask ourselves whether the direction taken is the one we would like to see.

My purpose in writing this article is to demonstrate how the 'balance', which was always considered to be a crucial goal of copyright regulation, has been gradually undermined, to the detriment of the consumers of information and culture. I will also try to illustrate how copyright has become distanced from what was once its very foundations.

If we look more closely at recent developments there are primarily two factors which merit special attention, namely 1) the widespread revision of copyright legislation and 2) The increasing regulation by contract.

## THE REVISION OF COPYRIGHT LEGISLATION

The revision of copyright legislation has usually been labelled as necessary in order to address digital content provision. At the global level, [WIPO](#) (World Intellectual Property Organization) presented their so-called [Internet Treaties](#), formally addenda to the Berne Convention, in 1996.

These treaties established a new creator's right called "Communication to the Public", which pertains to the making available of works at a time and a place chosen by the user, such as accessing the content on internet. Another important element was the clear statement that limitations and exceptions to copyright are as justifiable in the digital environment as in the print one, provided they are in the "public interest". Less attractive to the user community was the support which WIPO gave to the right holders' use of TPMs (Technical Protection Measures, such as encryption), explicitly prohibiting the circumvention of such measures. Long before the approval of the WIPO treaties, the European Union started preparing extensive changes to copyright legislation. The stated goals were:

- Adjustment to the digital environment.
- Harmonization within the Internal Market.
- Strengthening of the right holders' position.

This latter goal was expressed as early as 1994 in the much highlighted *Bangemann Report* ([Bangemann, 1994](#)), named after the commissioner. Commissioner Bangemann considered the tightening up of copyright to be a crucial factor in the establishment of a competitive European information and media industry. Starting in 1991, the European Parliament and Council with regular intervals published half a dozen directives related to copyright, which all served that purpose:

- The so-called *Computer Programs Directive (1991)* made it illegal under any circumstances to copy software protected by copyright.
- The *Lending and Rental Directive (1992)*, based on the assumption that library lending was depriving authors of royalty revenue, required the implementation of an authors' payment scheme under domestic copyright legislation. The leeway given for exceptions initially looked extremely broad; for one thing, it was said that countries with existing payment schemes - e.g. Denmark and Sweden - would not have to

- incorporate library lending into their copyright laws. However, not long after the directive was ratified, the attitude of the Commission hardened considerably. A number of countries have already been summoned to the European Court of Justice for failure to implement the directive, and Sweden will probably be submitted to the same treatment, primarily because our scheme does not apply to authors from other member states.
- *The Term of Protection Directive (1993)* dictated that the term of copyright protection should be 70 years after the death of the author. Prior to the directive only two member states had such a long term. Most of them had life +50 or even life +30.
- *The Database Directive (1996)* gives protection similar to copyright to compilations of data, provided the volumes of compiled data are substantial and/or represent a large investment.
- *The General Copyright Directive*, also called the *Infosoc Directive*, was issued in 2001 and became, so to speak, the crowning glory of the extension of copyright protection within the EU. In many ways it can be seen as an extension of the Internet Treaties. Among other things, it implies a considerable reduction of the types of copying permitted under 'private use'. The goal of harmonizing copyright within the Internal Market was ignored. The list of limitations and exceptions is, but for a single one, voluntary, i.e. something that member countries could either accept or reject. In addition, the proposed exceptions are often coupled with a right for right holders to receive monetary compensation. In September of 2005 the European Commission asked the interested parties for comments on its revision of copyright. According to the answers the right holders are considerably more content than the users. This was briefly summarized by the Commission as: "Right holders stress the fairness of the balance struck in Directive 2001/29 EC (i.e. the *Infosoc Directive*), whereas the cultural institutions and content users point out a number of problems."

Two studies published by the Institute for Information Law/University of Amsterdam in the spring of 2007, which were actually commissioned by the European Commission, are very critical of the lack of consistency between the directives, the lack of actual harmonization, the lack of legal certainty for market players and, last but not least, the obvious imbalance. "The broad scope of the right of reproduction ... gives right holders near-absolute control over acts which in the off-line world were never the right holder's prerogative... While the ... broad wording of the limitations contained in the *Directive* may initially suggest a certain balance between the interests of right holders and those of users, this superficial balance may be seriously undermined not only by the optional character of all but one limitation, leaving Member States at discretion to arrive at "imbalanced" solutions, but also by the fact that they are not imperative and thus may be overridden by contract. This is exacerbated by the *Directive's* failure to directly correlate the legal protection of TPMs with acts of copyright infringement."

## **CONTRACT REGULATION OF COPYRIGHT**

It is clear, that the revision of copyright legislation has favoured right holder interests over those of the users. And the fact that different kinds of contracts increasingly supersede legislation works in the same direction. Contracts override law; that has always been the case in this branch of law (which, of course, definitely does not mean that it has to be that way). But when we, individuals or libraries, acquire print publications we usually do not sign a contract saying how we can use these publications. Applicable law is considered sufficient to protect right holder interests. By contrast, when we purchase access to digital information, we generally have to accept contractual limitations on what may be done with the content.

Contracts can be described in different categories, e.g.:

1. *Licence agreements*, which are usually negotiated between right holders and customers, and which require payment for access. A good example is the consortia licences negotiated for universities and university colleges in many countries.
2. *Click, or shrink-wrap, contracts*, which are imposed, non-negotiable contracts, which you accept by accessing the content.
3. Even *TPMs* could be labelled as contracts, provided that the user knows in advance the implications of these measures.

In all of these cases, right holders more or less unilaterally dictate the conditions and it has been shown that they very efficiently exploit this strengthened position. The British Library recently made a survey

confirming that 28 out of 30 randomly chosen licence agreements were considerably more restrictive than current legislation.

A significant means of influencing domestic copyright legislation to further right holders' interests are a variety of *trade agreements* (usually, with a euphemism, called *free trade agreements*), which have proliferated in recent years. These agreements can, roughly, be divided into global, regional, and bilateral. The global level is governed by the [WTO](#) (World Trade Organization) with its approximately 150 members.

The Agreement on Trade Related Aspects of Intellectual Property Rights, the [TRIPS agreement](#), covers copyright. On the whole, you can say that it is an implementation of the Berne Convention (including the Internet Treaties). The purpose behind [TRIPS](#) is primarily that one should be able to use the WTO's binding dispute mechanism for punishing countries which do not abide by the rules. (WIPO does not have such a mechanism.) But over the last few years, the developed countries, with well established media industries, primarily the US and the EU, have increasingly turned away from the WTO and aggressively negotiated regional and bilateral agreements with extensive intellectual property requirements. They are able to use their strong negotiating position on the market access for agricultural and manufactured goods desired by the less developed countries to impose much more restrictive copyright regulations than those required by TRIPS. (The phenomenon is usually called 'TRIPSplus').

## REFLECTIONS ON THE TRANSFORMATION OF COPYRIGHT

To my mind, the changes in copyright which have taken place over the last 15 years have now taken us so far as to distance ourselves from what was once considered to be the foundations of copyright. A few examples:

1. "*To stimulate the creativity of the author*" has always been said to be the primary purpose behind the creation of copyright. As far as I can see, this is a highly valid motive. Not many professionals are willing to give away the result of their work without compensation. By contrast, I ask myself how this motive coincides with the development towards longer and longer terms of protection which we are currently witnessing. No one can seriously claim that it is possible to stimulate the creativity of an author 70 years after she or he has died. If the primary purpose is a different one, e.g. to make sure the information and media industry gets a good return on their investments, it should be clearly stated. In that case we will have a totally different discussion.
2. Both WIPO, the US, and the EU strongly support the use of TPMs, to the point of prohibiting the circumvention of these measures. In practice, this means that in many cases *the use of lawful exceptions to copyright is illegal*. Could the hegemony of the right holders be expressed more forcefully?
3. As for the principles guiding the exceptions to copyright, we have always turned to the so-called *three-step-test* of the Berne Convention. This principle permits exceptions to the author's rights as long as they do not harm the economic interests of the author.

Let us then compare this with what is now happening in the US, where Google has been taken to court by the Association of American Publishers (AAP) and the American Authors' Guild (AAG). The background is that Google started digitizing a large part of the collections of a number of major libraries, primarily North American but also European. The publications which are not under copyright protection are all made available in full text on the Web. From the protected documents 'snippets' of 10-15 sentences are displayed in response to a search (apart from the metadata). Google is now the object of a lawsuit. According to the AAP (which originally blessed the enterprise) and the AAG, Google should have asked every single right holder for permission before they started, instead of just giving them the opportunity to opt out.

Clearly, in this case, you cannot claim that what Google does, harms the economic interests of the author. To my mind, whether you are arguing that the 15 sentences will mean that people buy fewer of these publications, or that "Google is nicking a business opportunity from the right holders", or "even digitizing for preservation should be a protected act" it is highly unreasonable. And I know for a fact that there are publishers who think this whole affair is counteracting their own interests.

### **... AND THE CONSEQUENCES**

To describe in detail all the effects of the shift in balance which has taken place in the copyright arena would take up far too much space. Let me just relate to one single example which has attracted a lot of attention. Ever since the turn of the millennium, the European Commission has spent considerable sums of money on R&D supporting the digitization of the European cultural heritage as it is represented in the collections of libraries, archives and museums. The grants have primarily been used for networking and the development of 'best practice'. No subsidies have been paid out for the performance of actual digitization.

After half a decade of constant support, the result in terms of digitized documents is rather disappointing. In fact, in 2006, it only added up to approximately 75% of what South Korea alone accomplished during the same period. In the autumn of 2005, the Commission announced an intensified effort in a so-called 'communication' titled *i2010: Digital Libraries* ([Communication, 2005](#)). The chances for success partly depend on the copyright situation. With a term of protection of 70 years after the death of the author it is easy to understand that, most of the time, the digitizers will not get any further than documents published by the end of the 19<sup>th</sup> century, assuming they also want to make available the material they have digitized. In addition, the interest in funding the digitization of our cultural heritage is negatively affected by that deplorable fact.

The Commission is beginning to realize the seriousness of the situation, but seems to hold the view that it is up to 'the market', i.e. the cultural institutions and the right holders, to solve the problems; they obviously mean that the institutions should pay for the right to digitize. Unfortunately, that scenario builds on two assumptions which, as of today, are very uncertain: one, that the money is there and two, that you know whom you are supposed to pay.

### **... AND THE NEED FOR A STRATEGY**

Anyway, we have to face facts: the Commission has set the table, and although we do not at all like what we see, we had better start eating. If the digitization (and making available) of the European cultural heritage is to gain speed, we will have to be prepared to pay for the part of it that is protected by copyright. However - and this is important - the payment must be proportionate to the possible harm inflicted on the economic interests of the right holders AND, even more importantly, *this must not mean that we stop fighting for the re-introduction of some kind of balance into copyright regulation*: the problems with copyright protection for library lending, with contracts and TPMs eliminating lawful exceptions, with ever expanding terms of protection, etc., will need to be tackled.

Of course, it could be said that the Open Access model offers a once-and-for-all solution to most of the problems we have with copyright, but we have to remember that Open Access largely applies only to scholarly publishing and is only just now starting to catch on. I think the most important thing of all is that, for libraries to be successful, *we need a strategy*. We need to be pro-active instead of just reacting to initiatives coming from elsewhere and, for this to happen, we need strong organizations which look after our interests.

### **REFERENCES**

*Bangemann Report, Europe and the Global Information Society* (1994).  
<http://ec.europa.eu/idabc/servlets/Doc?id=18174>

*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - i2010: Digital Libraries*. Brussels : Commission of the European Communities, September 2005. [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0465en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0465en01.pdf)

### **WEB SITES REFERRED TO IN THE TEXT**

TRIPS - Trade Related Aspects of Intellectual Property Rights.  
[http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)

TRIPS Agreement. [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

WIPO - World Intellectual Property Organization. <http://www.wipo.int/portal/index.html.en>

WIPO-Administered Treaties. <http://www.wipo.int/treaties/en/>

WTO - World Trade Organization. <http://www.wto.org/>

#### **NOTE**

This text is a translation, with some modifications, of an article which was originally published in the Swedish journal *Ikoner*, issue 1, 2007. [http://www.bti.se/ikoner/innehall\\_forteck/07\\_1.html](http://www.bti.se/ikoner/innehall_forteck/07_1.html)