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Integrating Consumer Rights into Copyright Law: From a European Perspective

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Abstract Until recently consumers and consumer-interests have been virtually absent not only from the rules of copyright but also from copyright's discourse. This has been so even though the combination of an expansion of copyright and a devaluation of the internal balancing mechanisms raise concern from a consumer perspective. There would, therefore, seem to be a need to incorporate a consumer perspective into copyright analysis. To integrate consumer interests in copyright law, this study recommends action aimed at two levels. On the general level it is suggested to rebalance copyright in order to recognize the interests of users on the same level as right holders. On the concrete level it is suggested to change the limitations found in copyright to ease access to reuse elements of previous works. It is also proposed to reinforce the rule on private copying and to consider measures to secure access to basic information.

Keywords Copyright · Consumer law · i-consumers · Limitations · Private copying

Copyright

Copyright grants exclusive rights to "right holders" such as authors of works or producers of databases, films, or music CDs. Copyright serves the public interest by promoting creativity and innovation. It does so by making it possible for right holders to include the costs of creation in the price of their protected products/services and thereby to "tax" end-users. It is copyright's basic proposition that society benefits from copyright in a dynamic perspective because the value of the innovation market made possible by the exclusivity-prize generally outweighs the short-term losses suffered on the product market due to the

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higher price paid by consumers. The exclusive right of the right holder is, therefore, not a goal in itself but merely a means towards greater societal ends.[1] The copyright system is not tailored to make it possible for right holders to act out of the market economy framework but to act within the market. For this reason right holder are basically subject to the normal market rules and regulations such as competition laws, laws on unfair market practices, general contract law, and consumer protection laws.

Setting the Scene: Consumers and Copyright

Consumer protection has gained in importance during the past 30 years at least in the EU and consumer protection law now plays a central role in the EU which aims at providing for a common and "high level" of protection (see Unfair Commercial Practices Directive[2], Recital 24 and Rosch 2007). Consumers of copyright protected goods or services are protected by the general rules of consumer law which, e.g., prohibits "Unfair Commercial Practices" including misleading actions as to the existence or nature of the product or the main characteristics of the product (Unfair Commercial Practices Directive, Articles 5 and 6),

Until now consumers have not surfaced in copyright legislation. Until quite recently they were also almost absent from the copyright debate. This does not mean that copyright has been unaware of the existence of consumers. Consumers have traditionally been taken to benefit from copyright as the recipients of the information products or services brought forward by right holders because of the exclusive right (Liu 2003, pp. 402–404). This point has probably been regarded as being too basic to even articulate in copyright legislation. The Infosoc.-Directive expressly mentions consumers in this passive role[3] but does not discuss the matter in any detail. No reference to "consumers" would seem to be found in any other EU Copyright Directives. Various groups of users benefit from the limitations found in copyright law, see below in "Limitations" section, but these rules have been drafted from the perspective of right holders (as "limitations" to the exclusive right) and tend to focus on "uses" rather than "users" (Cohen 2005, p. 363). Modifications to this lack

[1] See the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994), Article 7: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Similarly, the Infosoc.-Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society), Recital 4. See also the Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases), Recital 12 and the Rental Directive (Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)), Recital 5.

[2] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 4/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

[3] Recital 9: "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. Intellectual property has therefore been recognised as an integral part of property." (emphasis added)

of articulated interest in the end users is found in the database and computer programmes Directives which give rights to the "lawful (end)user" to perform acts necessary for the purpose of access to the database, to extract/or re-utilizing insubstantial parts of its contents (EU Database Directive, Article 6(1) and 8(1)) and back-up copying (EU Computer Programmes Directive[4], Article 5(1)). These rules are highly interesting from a consumer perspective as they demonstrate that the grant of "users' rights" is not unknown in copyright law. The rules, however, were not developed in the latest Directive—the Infosoc.-Directive—and they do not represent a more comprehensive interest in the needs and interests of consumers or other users as such in the EU copyright acquis which is in the focus in this article. This may change. In the recent Green Paper on Copyright in the Knowledge Economy (Commission 2008) the European Commission thus intends to broaden—and possibly also soften—both the discussion and the EU copyright rules to take into account the perspective of various users such as publishers, libraries, researchers, people with disability, and "the public at large" (p. 3). This also includes "consumers" (p. 19 on "user-generated content").

Recently, the lack of interest in the consumer in copyright law and discourse has been pointed out in the academic copyright debate.[5] These scholars all point out that information is a special commodity as seen from the interests both of consumers and society, and that i-consumers, in order to take full advantage of the typical information product to engage in "creative self-expression" (Liu 2003), "play" (Cohen 2005), or "participate in the production of culture" (Elkin-Koren 2007), need to perform acts which fall within the exclusive domain of copyright. In the same vein, Lessig (2006, p. 193) notes how digital technology has boosted an "amateur culture", i.e., "culture created by people who produce not for the money, but for the love of what they do." According to these commentators, the picture of the "consumer" as a passive recipient is far too simplistic and copyright should recognize the interests of consumers in their own right and not just regard their benefits as pure incidental by-products of copyright. They also point out that the conditions on which consumers can use protected goods and services are often determined unilaterally by the right holders who rely on a unique and unbeatable combination of copyright, contract law, and DRM to get it their way. In this set-up copyright law would seem to be badly equipped to find the correct balance between right holder incentives and consumer interests. There are also signs that this line of reasoning is finding its way to the legislative process. At the EU-level, the Commission (2008) has taken a first step, and in the UK, the Gowers Review (2006) commissioned by the government makes the point that the digital technology has changed the role of consumers in the value chain and enabled "previously passive consumers to become adaptors and innovators themselves" (p. 31).[6]

The effect of copyright protection to consumers' access to protected material is also being debated increasingly in consumer law where it has manifested itself in case law where consumer organizations have used legal action to clarify the extend to which right

[4] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

[5] E.g., Cohen (2005), Elkin-Koren (2007), Engelbrekt (2008), Guibault and Helberger (2005), Helberger (2005), Helberger and Hugenholtz (2007), Litman (2007) at pp. 1875, Liu (2003), and Mak (2008). An early exception to copyright's lack of interest in users is Patterson, and Lindberg (1991) who describes "the law of users' rights" as "an essential component of copyright law" and defines it as consisting of two branches: "the law of personal use and the law of fair use" (p. 193).

[6] The Review among other things recommends to improve the balance and flexibility of IP rights to enable consumers to use material in ways that do not damage the interests of right holders and will help ensure that citizens have trust in the system, Growers Review, p. 4 and further below in section "Concrete Initiative: "Consumers' Rights?"".

holders can rely on copyright law to control consumers' actions, e.g., to make private copies, discussed below under "Limitations".

Also the venue for legislative or other intervention has been debated. Should any tensions be dealt with in copyright or in consumer law? A main argument for a consumer law approach is that it does not get caught up in the intricacies of copyright law but can be aimed directly at the interest of consumers (Helberger (2005) and also Helberger and Hugenholtz (2007, pp. 1080–1084)). On the other hand consumer law may tend to simplify matters too much. Elkin-Koren (2007, p. 1121) has rightly pointed out that traditional consumer protection primarily aims at the "economic aspects of consumerism." In this way a focus only on the interests of the consumer may miss not only that i-consumers may have needs that require special attention but also the legitimate interests of the right holder to receive adequate compensation. In the following I will concentrate on the merits and arguments in favour of a copyright approach.

Overview of Discussion

I will first explain how copyright law has until now expanded. Then I will briefly set out the inner balancing mechanisms found in copyright law which aim to secure that the overall societal balance of copyright is met. Next, I will discuss whether and how to integrate consumer rights into copyright law. It is my conclusion that the difficulties facing i-consumers are symptoms of a general imbalance in copyright which has lead to a one-sided strengthening of the position of right holders. A full incorporation of the consumer interests in copyright, therefore, basically requires a new perspective on copyright law which takes better account of the interests of "users" including consumers. I will, however, try finally to sketch out some basic lines for concrete and limited legal initiatives aimed at i-consumers.

Background: The Copyright Expansion

The expansion of copyright is the result of developments both in law and in technology and involves what could be called a primary (direct) expansion and a secondary (indirect) expansion. As is often the case with copyright, the legal and technological developments are so closely inter-related that one needs to look at the combined result in order to ascertain the consequences.

The Primary Expansion

The primary expansion has taken place in copyright law proper and has resulted in two trends.

The first trend is related to the exclusive right awarded to right holders. Here copyright has expanded in time. The standard protection time is now 70 years[7] after the death of the author and not just the 50 years previously applied in many EU-countries. Next, copyright covers new forms of uses of protected material such as technical and incidental copies which are part of any use on a computer (see further below in section "Private Use") and the making available of protected material to the public, e.g., on the internet. Copyright

[7] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

protection has also expanded "horizontally" to cover new subject matter, such as computer programmes and non-original databases (further below in section headed "Subject Matter") and "vertically" to include creations which were not previously considered worthy of copyright protection because of their trivial character (often referred to as "the small change" of copyright). The result is that almost any use by consumers of information products or services requires some sort of copyright consideration.

The second trend of the "primary" expansion of copyright includes the introduction of new aspects of regulation to the copyright system such as harmonized rules of enforcement and compensation for infringement. Theses issues have not previously been harmonized on an international level, but are now part of the TRIPs Agreement (Part III). In the EU they have been intensely regulated by the Enforcement Directive.[8] As seen from a consumer point of view, the most important part of this second aspect of the primary copyright expansion, however, is the expansion of copyright law to include the protection against the circumvention of technological protection measures (TPMs) and digital rights management systems (DRM). TPMs include, e.g., encryption protection on DVDs and passwords, and are part of DRM systems which "create an environment in which various types of use, including copying, are only practically possible in compliance with the terms set by the right holders" (Guibault and Helberger 2005, p. 9).[9] The introduction of copyright to these mechanisms has created an additional level of what has been called "'Übercopyright' norms" (Helberger and Hugenholtz 2007, p. 1096) or "para-copyright" (Geist 2005, p. 213 with further references). Copyright protected material which is located on devices protected by TPMs, therefore, enjoy a multiple layer of protection: the traditional copyright protection directed to the (protected) content and protection directed at the physical access to and concrete use of the content.

The Secondary Expansion

The primary expansion of copyright law described above has meant that the result of almost any personal effort which has resulted in something of economic value is protected by a very long and far reaching copyright which also includes business models based on TPM. This development has made the secondary expansion possible or rather has made the impact of this expansion very dramatic. The secondary expansion is based on contracts. In order to access protected material a consumer normally has to accept standard conditions set by the right holder. For material found on the internet the consumer does so by clicking on the "I accept-buttons" on websites. The result of this "click-wrapping of copyright law"[10] has been described as a privatization of copyright whereby the "private fences" of contract are replacing the public law of copyright and "code becomes law" (Lessig 2006, e.g. p. 175), Guibault and Helberger (2005, p. 9) and Geiger (2008a, b)).

The individual contracting offers obvious advantages for consumers to suit their individual needs and, e.g., not buy the songs on a CD they do not want. The i-contracts,

[8] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.

[9] The Infosoc.-Directive Article 6(3) defines "technological measures" as "...any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorized by the right holder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC." The protection only covers "effective" measures, Article 6(3) *in fine*.

[10] Paraphrasing McManis (1999) on the "shrink-wrapping" which takes place with the sale of copies of (typically) computer programmes.

however, also have a dark side and it is towards this side that any legal initiatives targeting i-consumers' interests should obviously be directed. Contracts involving TPM differ from other one-sided contracts of adhesion in at least two important ways. Firstly, i-consumer contracts may have a general effect. If TPM is employed for basic information (further below in section "Private Use") the result may be a "monopolization" of information. Secondly, the combination of contract and TPMs give the right holder a structural strength which is unknown in the sale of physical goods. In the physical world, the effects of contractual limitations is limited because of transaction costs. If a contract involving the sale of a book stipulates that the consumer could not copy the book the consumer can choose to disregard the contract. Normally, there would be no realistic way for the bookseller to execute the limitation. The situation is totally different in a TPM-environment. Here the system would simply refuse to execute any right which is not part of the contract. Lessig (2006, p. 183) talks of "perfect control" and even though such an expression is not entirely precise—any TPM system is capable of being hacked—the label certainly points to a central concern as seen from a consumers perspective.[11]

TPM and the "perfect control" scenario obviously have implications for copyright law. Copyright law has been conceived to fit a market where post-sale control to the extent now made possible was simply not feasible. One would, therefore, expect copyright to have addressed the risks of overprotection arising from TPMs and the "Übercopyright" scenario. To a certain extent this has also happened; at least on paper. The latest global copyright convention, i.e., the WIPO Copyright Treaty from 1996 (WCT) which obliges members to provide for legal protection of "effective" TPMs (Article 11), thus, at the same time emphasizes "the outstanding significance of copyright protection as an incentive for literary and artistic creation" and recognizes "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information ..." (Preamble).[12] This description of the relationship between incentives and access is arguably both broader and more inviting than the traditional description. The WCT also seeks to include TPMs and the limitations in the copyright balance (see Articles 10 and 11 on TPMs and limitations). As has been pointed out by Reichman, Dinwoodie, and Samuelson (2007) the invitation in the WCT to seek to rebalance copyright, however, has not been accepted in neither EU nor US copyright legislation. Despite of the expansion, copyright is left with its traditional, internal balancing mechanisms. As it will be pointed out in the next section the effect of these has decreased in parallel with the increase in the strength of right holders.

Copyright's Internal Balancing Mechanisms

Copyright contains a number of internal balancing mechanisms.[13] The purpose of these is to ensure that copyright law fulfils its societal goal to further creativity and innovation. On the general level they aim to make sure that exclusivity is reserved for such subject matter which society should generally be interested in paying to have. On the more detailed level,

[11] It is finally a point worth noticing that the right holders are actively using the policing abilities given to them, see e.g. Litman (2007), p. 1873–1874: "Today ... the recording industry has sued more than 20,000 individuals for making personal uses that can be characterized as 'commercial' only be redefining commercial to mean 'unlicensed'".

[12] Similarly the WIPO Performances and Phonograms Treaty (WPPT), Article 18.

[13] I will not deal with external balancing mechanisms such as competition law.

copyright contains inbuilt limitations (sometimes called "exceptions") which target a number of uses which are of particular interest to consumers (such as private use) and carve out certain uses from the exclusivity.

Subject Matter

A central balancing mechanism relates to the identification of the protected subject matter and the conditions of protection. The limitation—which is normally referred to with the rather unclear label as the "idea/expression dichotomy"—seeks to fence in the copyright system to make sure that access to the "public domain" is free. Exclusivity, therefore, is not afforded to any effort but only to such which have resulted in a product of general interest. Basically, a work of art is protected only if it is "original in the sense that it is the author's own intellectual creation".[14] Based on this it is a fundamental premise in copyright law that copyright protects only (original) expressions and not "ideas," "news," "basic knowledge," "theories," "facts," and "information" etc.[15]

It has often been pointed out that the requirements have generally become very low and that this entails a threat to the overall balance of the copyright system (e.g. Geiger 2008a, p. 182). In the words of Drahos (1996, p. 208): if facts and information can be protected "copyright comes to function as a private tax on basic information exchanges". This risk would seem to be particularly acute regarding the sui generis-protection by the EU Database-Directive of non-original databases. The Directive explicitly states that the protection does not extend to the "mere facts or data" contained in the database (Database-Directive, Recital 45).[16] It has, however, been noted that the reality may be different and that the "sui generis" right may come "precariously close to protecting basic information", Commission (2005, p. 24).[17] This conclusion is even more worrying as the Commission's analysis would also seem to indicate that the controversial aspects of the Directive (i.e., the sui generis right) have not had any visible effect on EU innovative activity in the field of databases vis-à-vis the US where no similar protection exists (ibid., pp. 24–25 and Kur et al. 2006). Not only has the Database-Directive seriously confronted a basic inner balancing mechanism of copyright but it has done so without any positive effect to consumers who would seem to end up paying "a private tax" to owners of databases but with no more choice than a non-proprietarian system would have yielded.

The negative effects of the Database-Directive have to some extent been mitigated by the European Court of Justice (ECJ) which in a number of resent decisions has dramatically reduced the effect of the Directive by denying protection to "sole source databases"[18] such

[14] Computer Programmes Directive, Article 1(3), Database Directive, Article 3(1) and Terms Directive, Article 6 (on photographs).

[15] TRIPs, Article 9(2): "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." See expressly on computer programmes where the line between (non-protected) ideas and principles and protected (i.e. original) expressions of ideas etc. has been particularly difficult to draw the Computer Programmes Directive, Article 1(2).

[16] Likewise TRIPs, Article 10(2) *in fine*.

[17] This is also the conclusion of Herr (2008), p. 122: "Clearly ... the creation of a database right represents a rejection of the idea/expression dichotomy as one of the major mechanisms through which unoriginal content is freely available and remains in the public domain".

[18] I.e. databases which consist of material which has been *created* rather than *obtained* in the process of making the database.

as fixtures lists, telephone directories, or TV-guides.[19] This limitation would seem to be good news for consumers. Sole source databases will normally be produced anyway and the consumers "taxed" in regard to the right holder's primary activity. Now consumers will end up paying only once. In this way access has increased and a reasonable level of incentives maintained. At the same time, however, the existence of the sui generis protection and the process leading to the Directive is evidence of the tendency to expand protection which seems to be built into the copyright system like a force of gravity. It was arguably the ECJ rather than the EU legislators who succeeded in counterbalancing the protection of right holders with the interests of the public at large.

Apart from the movement towards protecting basic information etc., the sheer amount of protected subject matter which has been the result of the lowering of the requirements and the extremely long protection time creates problems for consumers and tends to blur the line between that which is protected and that which is not—perhaps even cannot be. Often consumers face a web of rights which makes almost any use of material dependent on what are frequently very complicated copyright considerations. As a consequence some consumers are probably dettered from performing perfectly legitimate acts.

"Private Use"

Traditionally, copyright would stop "at the doorstep of the private home" and acts performed in the private sphere were free. At home songs could be sung, texts copied, read aloud, and altered etc. without any thoughts of copyright. These traditional freedoms still exist. Many of the new uses made possible by technology and considered as being "private" and taking place in a private setting amongst friends or family, however, now require careful copyright considerations. Indeed this is the case every time the use involves the making of a "copy." Due to the very broad definition of the exclusivity relating to making copies (the reproduction right) as "the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" (Infosoc.-Directive, Article 2), this happens all the time: "Copies are to digital life as breathing is to our physical life" (Lessig 2006, p. 192). This does not mean that normal activities involving computers are illegal. Article 5 of the Infosoc.-Directive contains a mandatory limitation on "temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process ...." Consumers can therefore, e.g., browse on the internet and access sites without downloading. Such "breathing" is allowed for, but only as an exception to the rule of "non-breathing". Also in this regard an area traditionally reserved for the user has been fenced in by copyright law and i-consumers have been "drawn" (Helberger and Hugenholtz 2007, p. 1077)—or perhaps rather "reined"—into the sphere of copyright law. To make matters worse, seen from a consumer's perspective, the limitation on private copying has not expanded in the same pace.

[19] Case C-46/02, *Fixtures Marketing Ltd v Oy Veikkaus Ab*, [2004] ECR I-10365, Case C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB*. [2004] ECR I-10497, Case C-444/02 *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)* [2004] ECR Page I-10549 and Case C-203/02, *The British Horseracing Board Ltd and Others v William Hill Organization Ltd*. [2004] ECR I-10415. See generally Herr (2008), pp. 104–115.

Limitations

In the light of the expansion of copyright law the "limitations" in copyright law have become of central interest. The base line for the limitations is found in the so called three-step-test which originates in the Berne Convention for the Protection of Literary and Artistic Works, Article 9(2)[20]:

> "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in *certain special cases*, provided that such reproduction does not *conflict with a normal exploitation of the work* and does not *unreasonably prejudice the legitimate interests of the author*" (emphasis added).

Based on the Berne Convention and the Infosoc.-Directive, a number of concrete limitations are found in the copyright laws of the EU countries ensuring the rule of law, public security and order, freedom of speech and expression, education and science, affirmative action regarding special groups of users (e.g. the handicapped, social, and non-profit institutions), private use, maintaining the national heritage, freedom of religion, and certain limitations substantiated by technical/practical considerations. Some of these limitations are of great importance to i-consumers.

The three-step-test seeks to provide balancing tools but evidently sees these from the perspective of the right holder. The effects of limitations to the exclusivity should be measured from the point of view of the "legitimate interests" of right holders and not society. The copyright system and the three-step-test are not, surprisingly, biased towards the interests of the right holder and this obviously limits the application of limitations as an instrument for internalizing a consumer (user) perspective in copyright law.

It is, furthermore, worrying as seen from an EU-users perspective that any pro-user effects of the principle in Article 9(2) of the Berne Convention would seem to have been reduced by the Infosoc.-Directive. The Directive contains an exhaustive list of limitations but according to Article 5(5) (and Recital 44) these are only allowed in "certain special cases." In this way the relatively open rule of the Berne Convention would seem to have been replaced by a one-way-only flexibility in favour of the author (Riis and Schovsbo (2007, pp. 1–2) but perhaps differently Geiger (2008a, p. 195)).[21] From the users' point-of-view, the result would seem to be a devaluation of the limitations as a means of safeguarding their interests. This has also been the result of the application by some national courts of the three-step-test made possible by the Infosoc.-Directive. A clear example of this is the recent decision from the French Court de Cassation from 2006.[22] The French supreme court in this decision relied on the three-step-test and the Directive to clearly state that no positive "right" to private copying exists in French copyright law and that TPMs can be used to exclude private copying (see Geiger 2006, 2008b). Such decisions are obviously problematic as seen from a consumer perspective. Firstly, they limit the flexibilities found in the legislation. Secondly, a more proactive role of national courts may lead to legal uncertainty (Engelbrekt 2008, p. 85). As seen from a global perspective

[20] The same principle is included in Article 13 of the TRIPs Agreement which applies to all the exclusive rights of the right holder and is not limited to the right of reproduction.

[21] See also Tawfik (2005), p. 85 according to whom neither the Berne Convention nor the WCT would prevent the development of "users rights". No such strings were apparently felt by the Canadian Supreme Court in CCH Canadian Ltd. V. Law Society of Upper Canada, 2004 SCC 13.

[22] *First Civil Chamber* 28 February 2006, Perquin and UFC Que Choisir v. SA Films Alain Sarde, Sté Universal Pictures vidéo France et al, *IIC 2006.760.*

the picture becomes even less clear. In a recent decision the Canadian Supreme Court thus categorized the fair dealing exception as a "user's right" which should be understood "as an integral part of the Copyright Act rather than simply a defence."[23] The case involved libraries but according to Craig (2005, p. 449), the decision has broad implications as it represents a ".... larger theoretical shift in the rationalization of copyright as a whole: as shift from the author's rights and towards the public interest." Such a development is obviously to be welcomed from a consumer's (user's) perspective but the ramifications of the decision on the international copyright scene have yet to surface. The decision would seem, however, to resonate reasoning found both in the Gowers Review and in the Green Paper issued by the Commission (2008).

If one focuses on the most important limitation as seen from a consumer's perspective, the tendency to limit the effect of the limitations in an EU perspective becomes even more apparent.

Private Copying

The Infosoc.-Directive, Article 5(2)(b) allows for national rules on private copying on condition that the use is non-commercial and that the right holders receive fair compensation. The right to make private copies is a classical copyright limitation and can be seen as a reflection of the principle that copyright ends at the doorstep and does not extend to acts of consumption or reception of information by individuals (Guilbault and Helberger (2005, pp. 3–5) and "Private Use", above). Copyright has now very much been brought in to the private sphere. As seen from a consumer's perspective it is, therefore, of particular concern that the Infosoc.-Directive is very unclear regarding the nature of the limitations including the private copying limitation. This is particularly problematic in the light of the "click-wrapping" of copyright ("The Secondary Expansion", above) and leaves it very much in the dark whether or not the limitations should be regarded as "rights" which cannot be limited by contract or whether they can be contracted out of. The Infosoc.-Directive, Article 6(4) leaves it to the member states to "take appropriate measures" to secure certain limitations but the list does not include private copying. As has been explained by Helberger and Hugenholtz (2007, p. 1096), the national implementation has not clarified matters much and private copying in Europe—according to these scholars—"remains as diverse as its cultural tradition".

Integrating Consumer Rights into Copyright Law

According to one commentator: "all attempts to adapt the traditional approaches to subsequent technological and socio-political developments [have] merely resulted in a strengthening of the legal position of right holders" (Hilty 2007, p. 135). This description is valid also for the present discussion: consumers and consumer-interests are absent not only from the rules of copyright but also from copyright's discourse. This has been so even though the combination of an expansion of copyright and a devaluation of the internal balancing mechanisms would seem to be worrying from a consumer perspective. Hilty's remarks also underline that the limitations and legal uncertainties facing consumers are symptoms of a broader set of problem which affects all users of copyright protected goods or services including creative users such as artists.

[23] CCH Canadian Ltd. V. Law Society of Upper Canada, 2004 SCC 13 at point 48.

Should Copyright Care about the I-Consumer?

If one sees copyright's primary goal as protecting right holders then the interests of consumers are of little importance to copyright. If, however, one sees copyright's primary purpose as furthering societal goals and if one regards the public at large as the primary beneficiary of copyright then copyright should take an interest in the user/consumer for the same reasons why copyright takes an interest in right holders: to serve the interests of society at large in creativity and innovation. This does not automatically imply that copyright should seek to internalize specific consumer protection rules in law. Nor does it imply that copyright should grant consumers broad rights to make copies etc. The acknowledgement of the importance of the societal purpose of copyright, however, broadens the basis for the discussion. It also suggests that the solutions sought should benefit the public at large and not just special interest groups such as right holders or consumers.

A consumer law perspective would focus on the individual relationship between consumer and right holder; the "private bargain". The consumer law approach would also take into account the specific market structure created by the TPMs—the "perfect control" scenario described above—but the pivotal point of the discussion would relate to the consumers' "legitimate interest." A copyright perspective on access, on the other hand is that access is part of the bargain between right holder and society. Right holders should receive an adequate reward but they should not be overcompensated. The present balancing mechanisms are weak and to a large extent leave it to right holders to decide on whether or not to allow consumers to benefit from the limitations found in copyright law. This clearly implies a risk that right holders seek to extract benefits which go beyond what is adequate in order to secure the production of the information product in question. In order to change this it is necessary basically to return copyright law to the copyright legislation and make copyright a "public" law area again where access and incentives are balanced to serve the interests of society and not just to have a fair bargain on the individual level of the parties to a contract.

A reclaim by copyright of areas lost in the privatization does not mean that copyright should be generally hostile to contracts. It means that copyright law should take proactive steps to regulate contracts involving information goods and services by setting up clear boundaries for the freedom of contract to take place and copyright to work. The idea of regulating contractual issues in copyright law to make sure that copyright works, i.e., that it produces the intended benefits, is by no means alien to copyright. Until now it has, however, been focused on the protection of the right holder (the individual author). A recent and most interesting development in this area has taken place in Germany, where special legislation in the context of copyright law to strengthen the legal position of (individual) authors (and performing artists) was introduced in 2002.[24] Interestingly, from the i-consumer's point of view, the background for this legislation was also the changing market condition and increased risks of misuse of market power in the contractual relationship as a consequence of the new technologies and changing market conditions (fewer and stronger publishers and other producers). The German law aims in part to make sure that producers would not use their bargaining power to secure for themselves all the fruits of the copyright expansion (Dietz 2002, p. 832). In many ways the individual author of books, music etc. would seem to be in a position similar to that of the consumer. The present fixation in copyright on the investment interests of corporations is bad news to consumers and

[24] Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern vom 22. März 2002.

individual authors alike and an initiative like the German one certainly suggests a more active role of copyright law to regulate the distribution of the copyright reward and to intervene in a contractual relationship to protect the weaker party.

Taking the i-Consumer to Copyright Law

To integrate consumer interests in copyright law, I recommend action aimed at two levels. On the general level I suggest to rebalance copyright law to include the interests of users on the same level as right holders. On the concrete level I suggest to reinforce the limitations found in copyright.

The two recommendations are from a certain perspective mutually exclusive. In a well-balanced copyright system which recognizes user rights on the same level as author rights there would arguably be no need of specific "limitations" targeting consumers or other users (Drassinower 2005, p. 475). In the best of all worlds the first recommendation—"rebalance copyright"—would suffice. Fundamental changes and perfect worlds, however, are hard to come by and consumers' interest would be ill served if any initiatives aimed at furthering their legitimate and acute interests were to be locked up in a big box labeled "fundamental copyright reform". In the meantime I, therefore, offer some concrete suggestions based on the Users' Rights idea but founded on the existing rules of copyright.

Generally: Rebalance Copyright

The copyright system is in many ways is a very flexible system. It is, therefore, worth pointing out that big changes could arguably take place within the present framework. The requirements for protection for instance leave it very much to the courts to determine which creations to protect. Courts could, as a matter of principle, do as suggested by Geiger (2008a, pp. 186–187) and "raise the bar" to simply deny protection of "the small change." Such an initiative could have manifest effects as illustrated by the decisions from the ECJ in the database cases mentioned see "Subject Matter", above.[25] Similarly, the national courts could use the existing limitations in a more proactive way. The outer limit is defined by the three-step-test, see "Limitations", above. This can arguably be applied in a more flexible and "pro-users friendly" way than has previously been thought (Geiger (2008a) and see also Hugenholtz and Okediji (2008) and the Declaration (2008)). Such a development, which would possibly include abandoning the traditional maxim whereby limitations should normally be construed narrowly[26], would benefit consumers and other users by easing access to information goods and services through an extensive application of existing limitations and through the introduction of new ones. The extent of such "flexibilization" (Geiger (2008a)), however, would seem to be rather uncertain and any "extra" flexibility which might be found in the Berne Convention and TRIPs may well have been cut off by the Infosoc.-Directive (above in "Limitations" section).

In order to address the fundamental problems consumers face in copyright, it would be necessary to adjust copyright's "baseline rules—not simply its exceptions" (Cohen 2005, p. 374). I have elsewhere with Thomas Riis argued that Users' Rights should be brought into copyright in order to stress the social balancing function of copyright and to provide

[25] The classic US example of copyright protection being "reined in" by courts would be *Feist Publications, Inc. v. Rural Telephone Services Co. Inc.*, 499 U.S. 340 (1991), where the Supreme Court raised the bar and denied protection under copyright for a mundane collection of telephone listings.

[26] As in the Canadian case, footnote 21.

users with concrete rights vis-à-vis right holders (Riis and Schovsbo (2007)). The aim of this is not to turn copyright into a crypto "User Protection Act" but to return copyright to its original basis: To serve the interests of society and not just right holders.

We propose to give specific "Users' Rights" to reproduce and communicate to the public copyrighted works in order to engage in:

- democratic use,
- information use,
- transformative use,
- personal use, and
- reasonable commercial use

A change along such lines would effectively change the "baseline rules" of copyright. The result would be a slimmer and le`aner copyright system which would favour access to exclusivity compared to the present system. Such a system would arguably benefit not only users (including of course consumers) but also society at large.

Concrete Initiative: "Consumers' Rights"?

The starting point for developing "Consumers' Rights" should be the acknowledgement that the legitimate interests of i-consumers reach beyond the mere consumption of the protected goods and services. "I-consumers," in the words of the Gowers Review (2006, p. 31) often become "adaptors and innovators themselves". The first initiative should be aimed at these, "creative" sides of the i-consumer. It lies at the very core of copyright to support initiatives to further innovation and creativity.

Geiger (2008b) has proposed a "right" for private copying for "creative purposes", i.e., "uses that serve the creation of future works" (ibid. at p. 123). In the same vein, the Gowers Review (2006) proposes an exception for "creative, transformative or derivative works, within the parameters of the Berne Three-Step test" (recommendation 11 at p. 68). The idea has been taken up by the European Commission (2008) which puts "an exception for user-created content" up for discussion "to allow users to reuse elements of previous works for their own creative or transformative purpose" (Commission 2008, p. 20).[27] Such an exception would not be limited to private use but would only apply to "short takings" which do not infringe the right of adaptation (ibid.). It would make it possible for users to use (parts of) previous works to create new works and to use such new works e.g. to post them on a non-profit website.

The case in copyright for making it possible for follow on creators to use existing works to create their own new works is very strong and has implications which reach beyond the interests of consumers. All authors are at the same time both right holders and users. Society benefits from the ability of authors to use existing works because the author adds to the public domain. In this way restrictions which limit the creative efforts of follow on creators may involve societal costs, i.e., fewer new works.

As seen from the perspective of the i-consumer the initiatives mentioned above should be welcomed. It is, therefore, proposed to expand the present system of limitations to allow i-consumers and others to use previous works for creative/transformative purposes. The limitation should only allow for "fair" uses which do not harm the direct economic interests

[27] The Commission clearly intends this to include consumers, see at p. 19: "Consumers are not only users but are increasingly becoming creators of content".

of right holders. The rule should not be limited to "consumers" or "private use" and should allow new works to be used publicly for non profit purposes.

The next and more difficult question is whether to strengthen the ability of i-consumers acting within their "consumptive" capacity to make private copies. Should private copying be a general "right" which cannot be waived by contract or otherwise? The justification for expanding the rights of consumers who are acting in their pure consumptive capacity is weaker than for consumers acting in a creative capacity: pure consumption entails no societal benefits in the form of creativity. The Infosoc.-Directive, Article 5(2)(b) stipulates that private copying is limited to "a natural person for private use and for ends that are neither directly nor indirectly commercial" and only allows for such copying condition that the right holders receive "fair compensation which takes account of the application or non-application of technological measures ...". These conditions would still apply and consumer would have to pay to have a "right" to copy.

A general right to make private copies would mean that some consumers would have to pay to have a right they would not use. It would arguably also stifle the development of new business models as right holders would not be able to distinguish between products which allow for private copying and products which do not. In the absence of manifest harm from the present system one should, therefore, be very hesitant to reframe the present limitation on private copying as a general right to copy which cannot be waived by the consumer. One could, however, consider a more limited approach. The Gowers Review makes a case for a rule which allows expressly for personal "format shifting",) (i.e., transferring a work from one format to another, e.g. CD to an MP3 player or from video tape to DVD (ibid., p. 63). According to the Review such copying constitutes "an entirely legitimate activity" which should be available to the consumer.[28] The case for format shifting is stronger than the case for "same format" copying (CD to CD). Format shifting allows consumers to choose their preferred technology for consumption and make adaption to new technologies possible (transferring lp's to MP3 players etc.). An initiative aimed solely at platform shifting as a "right" would, therefore, seem to merit further attention.

In order to at the same time strengthen the position of the i-consumer in copyright and allow the market powers to function one could consider to reframe the current private copying limitation as a "right" to make private copies which could be waived by the consumer but only by express consent. This would make private copying immune to unilateral limitations by right holders in the form of standard form contracts. Such a rule would strengthen the position of the consumer by making private copying the default rule but also make it possible for the parties to a contract to opt out. In situations where (lawful) private copying is prevented by TPM the right holder should probably be under an obligation to assist consumers to copy.

Apart from reinforcing the existing limitation on private copying the incorporation of Consumers' Rights to copyright should include a careful examination as to whether new limitations were called for. As a starting point, the discussion could begin in the Users' Rights mentioned above including democratic use and information use.[29] Both of these aspects highlight to role of the i-consumer as citizen and both would seem to also require further consideration, e.g., in the form of a right to "private access" when necessary to

[28] The Gowers Review (2006) recommends (No. 8) "a [very] limited private copying exception" for format shifting only. The limitation would allow only one copy per format, apply only to works published after the law came into effect but would not be accompanied by levies for consumers, ibid., p. 63.

[29] Another starting point could be the "clusters" brought forward by Hugenholtz and Okediji (2008), pp. 43-44 e.g. on "Innovation Promoting" and "Fundamental Freedoms".

obtain access to basic "information" ("facts", "news" etc.). Databases containing such information would often not be protected, but access to basic information should probably be safeguarded also as a User/Consumer Right.

Conclusion

Copyright should welcome a broad discussion of i-consumers because it focuses copyright's attention to the effects of the system as seen from the "other side", i.e., that of the users/consumers. One should not expect copyright to solve all problems facing i-consumers but the problems arising form specific copyright regulation and related to access to information goods and services should be debated in a way which includes copyright and regulated in a way which acknowledges the importance of copyright to stimulate inventiveness and creativity to the benefit of society at large.

The decision on how to implement consumer rights into the copyright legislation involves a difficult trade off between right holder incentives and consumer access. Presently, the legislation is favouring the interests of right holders to a degree which is not in the general interest. Any reforms should, therefore, try to fix the present imbalance and this requires favouring users' access to right holder's incentive. In doing so, one should be very careful not to substitute one imbalance with another. One should also be careful not to take out specific situations and interest groups for special action. What is needed is a general initiative aimed at the whole system of copyright. Consumers play an important role in this. So do right holders. Neither, however, play the lead character. That role is reserved for the "public interest."

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