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Intellectual Property Law in the Digital Age

1. Right-owners striking back

Digital revolution delivered unseen freedom of communication. People from all over the world started to access new invention called "internet" where they created and shared information, made up spontaneous internet communities without restrictions and levies and "Indeed, the very design of the Internet seemed technologically proof against attempts to put the genie back in the bottle".[1] But these expressions of freedom abused rights of a certain segment of society, that which asserted ownership or authorship of various digital contents being so vigorously and joyfully exchanged by newly emerged "internet generation". Right owners, especially big, powerful industries realized that something has to be done to restrict acts prejudicing them financially. Thus Digital rights management systems (DRM) were introduced, gradually evolving and becoming harder to penetrate and circumvent. Technological systems soon gained legislative support, protecting DRMs with anti-circumvention rules. Thus, right owners recovered from digital revolution and found themselves exercising power over their products to the extent that had seemed impossible before. Right owners struck back but the question is, whether the scales have leaned to the opposite side?

2. "The right to read is a battle being fought today"[2]

In order to incentivize creators they should be rewarded for their labour. For this purpose they are granted for a certain period of time with a dangerous tool – *monopoly*.[3] To avoid encapsulation of knowledge and ideas some exceptions were allowed to copyright. Exercise of those exceptions contributes to the progress of society as a whole. Students and researchers, libraries and educational institutions are entitled to those exceptions, therefore deepening human knowledge in all directions by researching. Enabling people to access copyright works for purposes of news reporting, criticism, review and parody which also qualify for the exceptions are very impor-

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[1] Walker, John (September 13, 2003). "The Digital Imprimatur: How big brother and big media can put the Internet genie back in the bottle", at: http://www.fourmilab.ch/documents/digital-imprimatur/

[2] Richard Stallman, "The Right to Read", at: http://www.gnu.org/philosophy/right-to-read.html

[3] Thomas Babbington Macaulay, Yet Monopoly is an evil. For the sake of the good we must submit to the evil", speech to the House of Commons on 5th February 1841

tant for freedom of speech. So that information important for public could not be concealed under the excuse of protection of intellectual property rights. Limitations to copyright for disabled people also represent great public interest and concern and reaffirm the idea that public interests in certain circumstances outweigh the interest in enforcing copyright.[4]

Technological protection measures (TPM) pose obvious threat to statutory exceptions. Infosoc Directive provides that "Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation the means of benefiting from that exception or limitation".[5] UK met these requirements by transposing it to CDPA[6], and interpreting somehow vague "appropriate means" into a quite awkward procedures involving Secretary of State is supposed to demand from right holders to enable beneficiaries to access particular information they are entitled to. In the digital era though, this procedure seems to be quite slow and therefore less effective, or as it was put by AIG report this procedure "lacks teeth".[7] More or less same level remedies are offered to beneficiaries elsewhere[8], rendering it impossible at present to adequately respond to TPM, carrying on with depriving beneficiaries from legal exceptions. Basically they are doomed to neglect those exceptions as far as they cannot distinguish lawful use from unlawful one "without first assessing the user's intentions"[9].
Hence it is necessary to clarify whether the persons acting within the scope of UK "fair dealing" exceptions and permitted acts will be liable for circumventing TPMs or not. Granting them right to circumvent TPMs for lawful use of the content would be the good relief for beneficiaries.

Moreover, Infosoc Directive, while addressing member countries to protect beneficiaries, provides in the same article 6 (4) that those "appropriate measures" should be undertaken by members "In the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned".

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[4] Hector MacQueen, Charlotte Waelde, Graeme Laurie, Contemporary Intellectual Property: Law and Policy, 2nd edn, OUP, 2007

[5] Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001, Article 6(4), paragraph 1

[6] Copyright, Designs and Patents Act 1988, s. 296ZE

[7] Christina J. Angelopoulos, 'Modern intellectual property legislation: warm for reform' (2008), Ent. L.R. 2008,19(2), 35-40

[8] The Implementation of Directive 2001/29/EC in the Member States, G. Westkamp, Queen Mary Intellectual Property Research Institute, February 2007 (In France the same functions are adhered to Authority of Regulation of Technological Measures, which has two month time frame to deal with situations occurring between right owners and beneficiaries of exceptions)

[9] Digital Rights Management: Report of an Inquiry by the All Party Internet Group (2006), at: http://www.apcomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management.html

CDPA[10] makes it clear that application to Secretary of State can be possible only if copyright works are not "available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them." While the "voluntary measures" taken by right holders can really replace the need for exceptions in certain situations, the reference to contracts requires further interpretation. Such interpretation can be twofold:

a) Contracts may override copyright law in certain circumstances

This basically suggests that only in case of total lock-up of access may beneficiary apply to Secretary of State.[11] (Macqueen) leading to the conclusion that "however unreasonable the price demanded may be, this contract cannot be overridden by fair-dealing limitations to copyright."[12] The consequences of such interpretation can already be noticed through so-called shrink-wrap, click-wrap, and browse-through licenses, which are quite similar to technological measures in terms of rigidness towards non-variation to the approach characterized as "take it or leave it".[13] The accumulation of such contractual and technological power could represent a "powerful mixture for a fully automated system of secure distribution, rights management, monitoring, and payment of protected content"[14]

b) "agreed contractual terms" may be interpreted in favour of beneficiaries

Such an interpretation could mean a contract mutually agreed and negotiated between parties, and will exclude any unilateral contracts and obligations, thus giving beneficiaries at least some leverages to protect their rights.[15]

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[10] Copyright, Designs and Patents Act 1988, s 296ZE

[11] Hector MacQueen, Charlotte Waelde, Graeme Laurie, Contemporary Intellectual Property: Law and Policy, 2nd edn, OUP, 2007

[12] Christina J. Angelopoulos, 'Modern intellectual property legislation: warm for reform' (2008), Ent. L.R. 2008,19(2), 35-40

[13] Terese Foged, 'US v EU anti circumvention legislation: preserving the public's privileges in the digital age?' E.I.P.R. 2002, 24(11), 525-542

[14] Lucchi, N., The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society, IJL&IT 2007 15 (192)

[15] "Such an interpretation of the exception in article 6(4), fourth paragraph, of the directive would be in line with the presumed intention of the European legislator, since it would preserve the respective parties' freedom of contract while protecting the licensee from an unbridled use of standard form contracts" - Study on the Implementation and Effect in Member States' laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, report to the European Commission, DG Internal Market, February 2007. B Hugenholtz, L. Guibault, G. Westkamp, T. Rieber-Mohn, et al.

3. Exceeding copyright boundaries

a) "everyone has rights to freedom of expression ...freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers"[16]

TPMs might endanger freedom of speech by restricting access to information which can be used for critical review or parody, or for reporting current news. These exceptions should be guaranteed by effective measures.

b) "Everyone has the right to respect for his private and family life, his home and his correspondence"[17]

Privacy is one of the fundamental human rights. Julie E. Cohen in her article "DRM and privacy" divides privacy values in two major parts – individual activities connected with intellectual explorations and private physical space, important for carrying out those activities and then refers to "constraint", "monitoring" and "self-help" as to three significant features or functions of DRM systems purporting to undermine privacy values. The first and the third features can be respectively defined as controlling access as well as copying to the digital content and managing externally the use of the content, with possibilities of disrupting user in the process of consumption of information. These features abuse sensation of privacy by all means, but the "monitoring" function is one, probably most subversive of private values. Surveillance over certain behaviours of users, over their preferences or even detecting the existence of non-licensed copies of works on users' hard discs might be alarming.

Important step towards resolving privacy issue would be to urge lawmakers to give to the privacy-enhancing mechanisms, allowing users to protect their personal data, the same sort of statutory backing as copyright-protective technologies have.[18]

There should be awareness of the data protection issues as well, "such as profiling for marketing purposes and targeted advertising, the premise being that vast amounts of data regarding internet use, purchasing preferences and the content of communications could be collected by DRM sitting on a CD, your hard drive or your mobile phone".[19]

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[16] Article 10(1)European Convention on Human Rights and Fundamental Freedoms

[17] Article 8(1) European Convention on Human Rights and Fundamental Freedoms

[18] Lee A. Bygrave, 'The technologisation of copyright: implications for privacy and related interests' E.I.P.R. 2002, 24(2), 51-57

[19] Catherine Stromdale, 'The problems with DRM' Ent. L.R. 2006, 17(1), 1-6

4. Interoperability issues

Non-interoperability of products may pose threat to a) users privacy and b) competition.

With respect to privacy we note that the research,[20] aimed at investigating the traditional rights and usages of media users, ascertained that among their main media habits are: quotation, personal copying, space and time shift use, private communication, anonymous use etc.[21] These acts, especially space and time shifting are tightly connected with privacy issue discussed above. People are keen on creating comfort for themselves for instance by transferring their favourite music from PC to CD to listen it in the car, not knowing that such act will usually infringe UK copyright law. People think that once they purchased a product they can do with it whatever they want[22], (first-sale doctrine) but technological revolution and digitalization have "First of all.... determined the independence of content from the medium.[23] The TPMs guard mediums together with content. Right owners decide when and how they want to change medium and what mediums are not appropriate for their business models. There are no necessity for tangible ways of delivery of content and "without the mediation of the material support, the restrictions posed by technological environment could have the effect to substantialize the offered product; and because these restrictions are governed by contractual agreements, the result is an equation where 'the contract is the product' or it is merged into the product"[24]. The issue is whether restricting format shifting, thus achieving non-interoperability unduly interferes in users' privacy. If so can this right to privacy be unilaterally be replaced by limitations dictated by right holders?

We can differentiate the impact of restrictions on interoperability with respect to private individuals seeking comfort and privacy from the potential harm such restriction may have on market, thus invading sphere of com-

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[20] L. Chiariglione, A table of Traditional Rights and Usages (TRU) of Media Users, The Digital Media Project (2004) <http://www.chiariglione.org/contrib/2004/040102chiariglione01.htm>.

[21] Yu-Lin Chang, 'Looking for zero-sum or win-win outcomes: a game-theoretical analysis of the fair use debate' I.J.L. & I.T. 2008, 16(2), 176-204

[22] J. Halton "Managing the Digital Future" (2006) 156 N.L.J. 1430

[23] Lucchi, N., The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society, IJL&IT 2007 15 (192)

[24] Lucchi, N., The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society, IJL&IT 2007 15 (192)

petition law. When powerful companies deprive downstream competitors of using certain techniques essential for overall evolution and development, and neglecting "essential facilities" doctrine, there seems to be little room for fair competition.

According to the decision in Radio Telefis Eireann ("RTE") and Independent Television Publications Ltd ("ITP") v Commission of the European Communities, exceptional circumstances for constituting an abuse of the dominant position in the market contrary to article 82 of EC Treaty are as follows: (1) the refusal prevents the creation and marketing of a new substitute for which there is potential consumer demand; (2) there is no justification for the refusal; and (3) the refusal monopolises a separate secondary market and thus causes potential losses to consumers.[25] Legal protection of TPMs has given opportunity to manufacturers with dominant market position to control their secondary markets through non-interoperable products, which may be harmful for competition, therefore users.

Further, the commission stressed in its decision on Microsoft that the need for interoperability may supersede any intellectual property justifications,[26] and thus implicitly recognised that the need to secure competition on the market was a value with a higher rank than private rights.

Competition law may become a basis for certain concessions in copyright law. Private individuals are less likely to manage and fight out interoperability possibilities from wealthy corporations, but if market itself opposes its powerful players, beneficiaries may gain some benefit.

Conclusion

The hazards attached to DRM systems sound really menacing. Accusations are substantial: Neglecting exceptions to copyright for beneficiaries (among them - disabled people), subversion of individual privacy and freedom of speech, abusing market power and hampering progress and evolution. In comparison with these threats, protection of right owners' moral and economic rights as a justification of technologies with almost apocalyptic image may seem quite a weak argument. However DRM systems represent the only means for defending

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[25] Mikko Valimaki, Ville Oksanen, 'DRM interoperability and intellectual property policy in Europe' E.I.P.R. 2006, 28(11), 562-568

[26] Case COMP/C-3/37.792 Microsoft, Commission decision of March 24, 2004

content providers and it would have been very unfair to deprive them of those shields. Therefore, redressing balance cannot and should not be done by moving backwards, on the contrary users should be granted with efficient tools, backed up by clear and rigorous legislature to face new reality and challenges. Right management techniques and technologies should survive but at the same time exceptions to copyright cannot be sacrificed. Neither can be there any concessions in terms of fundamental rights. It is important that all the nuances, all the weaknesses outlined above are given cautious consideration and a subtle legal tools are introduced aimed at incorporating the same balance in digital world, as is found in physical world. If this goal is achieved then DRMs will serve as a catalyst of progress in the information age.

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