

CEIPI-BETA Seminar in Law & Economics of IP

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Presented article: J. Pénin (2013), “*Plaidoyer pour adapter le droit d’auteur a l’économie numérique*”, *Economie & Management* Vol. 148, pp. 36-42.

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I) Summary of article’s scope, analysis and conclusions

1) The article is devoted to analysis of adequacy of the legal framework of author’s rights for the digital economy. The protection of moral rights is excluded from the scope of the article. The analysis is specifically focused on the authors’ rights (including the right to authorise or prohibit use of works) that last 70 years after authors’ death.

2) The author employs economic (“functional”) approach to examination of the subject-matter. The approach supposes that IP has to perform certain functions and that the rules may have to be changed because of the changed conditions.

3) The paper concentrates on economics of authors’ rights in digital environment, in particular through comparison of economic conditions in the analogue and digital world.

4) The analytical part of the article, among other things, contains interesting economic analysis comparing costs of copyright in digital and pre-digital environment. As the authors himself puts it, the analysis neglects the fixed cost of production and the question of incentives but it permits to oppose the credible arguments to the analysis that neglects the cost of the limitation of diffusion of works.

5) The articles applies only economic reasoning for proposed changes to the system, putting legal and political constrains related to implementation of the changes aside. Some may argue that it is of importance to integrate different considerations. However, it seems that this was not the purpose of the article, which aim was to shed economic perspective on some rights granted under copyright law.

6) The following conclusions/proposals for change are presented in the article:

- Reduction of duration of copyright (in some cases 10 or 20 years are deemed sufficient);
- Distinguish between active and passive consumers for the purpose of preferential treatment of active consumers, whose intention is use of work for future creation;

Remark: The actual situation today is that active consumers (users) pay more (since they perform more types of uses restricted by copyright, they have to acquire and pay for authorisations of holders of respective rights. In the context of the arguments for different treatment of different uses, it can be mentioned that the law and jurisprudence sometimes differentiate between commercial and non-commercial uses (depending on their purpose), with the consequence of preferential treatment of the latter.

- Grant of copyright on request of creators (not automatically);
- Introduction of annual payments for copyright by rightholders.

Remark: The last two proposals of the author make rights granted under copyright similar to some legal titles granted under industrial property (e.g., trade marks).

II) General comments

Scope of analysis and conclusions

Unlike industrial property titles such as patents or trade marks, authors' rights (copyright) define a bundle of different rights that are granted to creators and disseminators of creative works.

The economic analysis of the article is specifically focused on the authors' rights (including the right to authorise or prohibit use of works) that last 70 years after authors' death.

Authors' rights that are limited in their scope by a legislative provision of compulsory (statutory) license are not analyzed in the article (e.g., right of holders of authors' rights to remuneration for private copying of their work, without the possibility to prohibit their use, *inter alia*, Art. L. 311-1 of French Intellectual Property Code (CPI)).

Neighboring rights, which as a general rule last for 50 years from the year of publications or communication to the public in France (Art. L. 211-4 CPI), as well as neighboring rights that are limited by a statutory licence (e.g., right to remuneration of performers and producers of phonograms for use of phonograms published for commercial purposes, without the possibility to prohibit their use Art. L. 214-1 CPI) are also outside of article's scope.

It can be argued that as the base for analysis were the most extensive in scope and duration authors' rights, the conclusions should be limited to the analyzed category of rights. Analysis of the least and the most restrictive category of rights can lead to different conclusions about existence of the balance in the system and the necessary changes. This line of argument can

be supported by, for example, rejection of acceptance of extension of conclusions about a need to strengthen authors' rights after analysis of the least restrictive titles under authors' rights (e.g., titles limited by compulsory licenses)

Perhaps, if the analysis of the least restrictive rights leads to the conclusion that the scope of these rights is too restrictive, it can be then argued that the same conclusion can be applied in relation to more restrictive categories of authors' rights.

It can also be stated that conclusions of analysis of any of the titles (the most or the least extensive in scope and duration) separately should be taken with caution since the system is supposed to function as a whole. This perhaps poses a great challenge to comprehensive analysis of the system of authors' rights.

Economic approach of the article

The article states that it employs economic ("functional") approach.

In the legal literature on copyright, more than one economic approach is often presented as a justification for copyright law. The approach employed in the article seems to be close to the justifications provided by neo-classical economics. Incentive-based theories are also referred as justifying copyright law, particular design of copyright law.¹

It would be interesting to know whether the contemporary economic literature concurs on a dominating economic approach to the analysis of copyright law.

It seems that different countries or regional intergovernmental organisations, depending on their export/import of IP-related goods and services, might have some macroeconomic concerns when designing their legal architecture of copyright.

In the context of the Seminar Series on Law and Economics of IP, it would be interesting to know whether the above-mentioned concerns are of relevance to the law and economics approach to IP.

It is important to acknowledge limitations of purely economic approach to the subject, as it excludes non-economic reasons for change of law. A recent example of change of copyright law at international level on humanitarian concerns is adoption 27 June 2013 of Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. This consideration is important since conclusions of the most comprehensive analysis of all aspects of copyright law might not be able to explain and justify some changes.

¹ The differentiation between different economic justifications and their short description can, among other sources, be found in: L. Bently and B. Sherman (2009), *Intellectual Property Law*, 3rd ed., Oxford University Press, New York, pp. 37-38.

Additional (fifth) proposal of the article

One proposal, although not listed at the end of the article, could be drawn from statements made in relation to the solution to the problem of fragmentation of ownership (as shown on the example of feudal privileges of charging fees for trespassing on the Rhine): administration of multiple rights by a single manager.

III) Considerations for future research

It would be interesting to see economic analysis of solutions providing for single managers of multiple rights. In the domain of authors' rights, it can be functioning of collective management organisations (*cociétés de perception et de répartition des droits*). In France, activities of these organisations are regulated, among others, by Art. L. 321-1 – 321-13 CPI (general provisions).

Problems with access and use of copyrighted works caused by the unregistered nature of a bundle of rights with fragmented ownership regime that last for a relatively long time are known to policy-makers and are being addressed by some recent initiatives at EU and French national level.

Below is a very short description of two recent initiatives aiming at simplification of access to copyrighted works that can be of some interest to future research on economics of copyright in the framework of the Seminar Series on Law and Economics of IP.

EU solution to the problem of works whose rightholders cannot be identified or located

One of consequences of the features of copyright is the so-called problem of “orphan works” – works whose rightholders cannot be identified or located and thus no authorization for use of works can be legally obtained. Several options were proposed for solving this problem (or at least mitigating its effects). One of solutions to the problem of orphan works has been adopted at the EU level last year. The Orphan Works Directive² provides for an obligation for the Member States of the EU to introduce an exception or limitation to the rights of reproduction and making available to the public to permit certain public establishments undertake certain uses of certain copyrighted works on non-profitable basis. Rightholders of works that are orphan retain the rights to fair compensation when they appear (become known) and put an end to the orphan status of works (orphan status of a work can be established only after negative result of a special search aimed at identification and location of rightholders).

The Orphan Works Directive leaves some space for implementation of the provisions of the Directive into national law of the Member States (e.g., to decide how the right of rightholders

² Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ, L 299, 27.10.2012, pp. 5-12.

to fair compensation can be realized, to decide whether to add additional sources to the list of sources that have to be consulted for the purpose of establishment of the orphan status of copyrighted works).

The provisions of the Directive have not yet been completely transposed into national legislation of France. The due date for transposition is **29 October 2014** (Art. 9 of the Orphan Works Directive). French government might be still in the process of consideration of the practical ways for implementation of the solution.

French solution to the problem of out-of-commerce books

Publishers of books published in XX century often do not have rights necessary for distribution of the works in digital form, because old publishing contracts did not foresee the digital form of exploitation. In order to make available books in digital form it is necessary to obtain respective authorisations from their rightholders. It is believed that it is possible to give a “second life” to the books that were published in paper form and are no longer available for purchase or are not in the process of re-publication (“out-of-commerce books”). Through the modern market of books in digital form the works of the past may generate new revenues for their rightholders. Digitisation of such books shall also contribute to the creativity and innovation in the society in general.

In order to facilitate the process of digitization and distribution of books of the XX century in the digital form, the French legislator introduced a mechanism of transfer of administration (NB: not ownership) of authors rights necessary for digital exploitation of out-of-commerce books from their rightholders to a collecting society appointed by the Ministry of Culture and Communications³. By Decree (“*arrêté*”) of the Ministry of Culture and Communications, of 21 March 2013, SOFIA (*Société Française des Intérêts des Auteurs de l’écrit*)⁴ was assigned with the management of out-of-commerce books in France.⁵ Starting from **21 September 2013**, rights for digital exploitation of out-of-commerce books that are listed in the free and open national database of out-of-commerce books⁶ (the listing of which in the database was not opposed and which were not withdrawn from collective management) will be administered collectively by SOFIA.

³ Loi n° 2012-287 du 1er mars 2012 relative à l’exploitation numérique des livres indisponibles du XXe siècle, NOR: MCCX1133814L, *JORF* n°0053, 2 March 2012, page 3986, texte n° 1. The law introduced 11 new Articles into the CPI.

⁴ More information about SOFIA is available at its website: <http://www.la-sofia.org>.

⁵ Arrêté du 21 mars 2013 portant agrément de la Société française des intérêts des auteurs de l’écrit, NOR: MCCB1307162A, *JORF* n°0076, 30 March 2013, page 5420, texte n° 27.

⁶ The national open and free database of out-of-commerce books has been fully operational since 21 March 2013: <http://relire.bnf.fr>. It is administered by the National Library of France.