

IP law, the Internet and contents' digitalization: How can we adapt copyright to the new economy?

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Preamble

Technological change and the necessary adaptation of the law: Example

- ❑ The evolution of land property rights in the US (Lessig, 2008, *Free Culture, p. 2*)
 - Land property in the US originally defined in three dimensions (*you own not just the surface of your land but all that is below and above it*)
 - Then came the first planes and the first lawsuits
 - Decision of the supreme court: **Change the law!** planes have the right to fly above private land without any compensation
- ❑ Conclusion: Law must adapt to technological changes

Preamble (2)

Technological change and the necessary adaptation of the law: Example (2)

*“The doctrine has no place in the modern world. The air is a public highway, as congress has declared. Where that not true, every transcontinental flight would subject the operator to countless trespass suits. **Common sense revolts at the idea.** To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest”*

United States vs. Causby, US 328 (1946).

Plan

- 1) The standard economics of copyright
- 2) The increasing social cost of copyright
 - 2.1 Monopoly deadweight loss is growing
 - 2.2 Obstacle to creation by recombination
 - 2.3 Anticommons
- 3) Some ideas to adapt copyrights to the new economy
- 4) Even more provocative thoughts: Can creation flourish without copyrights

1. The standard economics of copyright

- ❑ Preliminary remark: copyright versus French “droit d’auteur”
- ❑ The rationales of copyrights: Economic rationale versus natural rights doctrine
 - Economists have a **functionalist view of IPR**
 - Copyrights are not natural / they have been implemented in order to perform a function, i.e. increase social welfare
 - The efficiency of copyrights depends on the context (technological among others)
 - If the context change, rules must change
 - ❑ Examples: the arrival of video tape recorder in the early 80s

2. The standard economics of copyright (2)

- ❑ The economic role of copyrights: To increase social welfare
- ❑ **Monopoly deadweight loss versus incentives to create**
 - Copyrights increase expected benefit of creation, i.e. increase incentives to invest into those creation
 - ❑ Incentives to create versus to commercialize creations (creation vs creanovation)
 - Copyrights induce monopoly positions (market power), i.e. generate a loss of welfare (the co-called monopoly deadweight loss)
- ❑ In order to optimize social welfare the legislator must attempt to balance those two effects
 - That explains why copyrights are limited in time

Important to remind: Copyrights is a question of equilibrium

2. The increasing social cost of copyright

- ❑ The emergence of new technologies (internet, digitalization) may have change the equilibrium

- ❑ The social cost of copyrights is higher today than in the old economy
 - Monopoly deadweight loss is growing
 - Obstacle to creation by recombination
 - Anticommons

2. The increasing social cost of copyright

Monopoly deadweight loss is growing

- ❑ Digitalization and the internet have two opposite effects
 - 1) Ease circulation of cultural goods and illegal copy, i.e. **incentives to invest in creation decrease**
 - 2) Reduce cost of production and distribution of those goods, i.e. the **social cost of copyright protection (monopoly deadweight loss) increases**

- ❑ Diffusion has indeed an important social value
 - Copyright, by limiting this diffusion, reduce social welfare
 - And in the new economy the cost of reducing diffusion is more important (since marginal costs of production are smaller)

- ❑ Yet, all the public discourses today are centered around the issue of incentives
 - The benefits of diffusion are totally neglected!

2. The increasing social cost of copyright

Monopoly deadweight loss is growing (2)

A simple numerical illustration

Tableau 1. Perte sèche et coût marginal : un exemple numérique

	Nombre d'individus	Fans 1 million	Amateurs 10 millions	Curieux 1 milliard	Reste du monde 5 milliards				
	Prix de réserve (euros)	100	10	1	0	SC total	SP	SS total	PSM
Cas 1 : économie pré-Internet : CM = 5	SC si droit d'auteur : prix = 15	85*	0	0	0	85	10	95	50
	SC si pas droit d'auteur : prix = 5	95	50	0	0	145	0	145	
Cas 2 : économie numérique post-Internet : CM = 0	SC si droit d'auteur : prix = 15	85	0	0	0	85	15	100	1100
	SC si droit d'auteur : prix = 0	100	100	1 000	0	1 200	0	1 200	

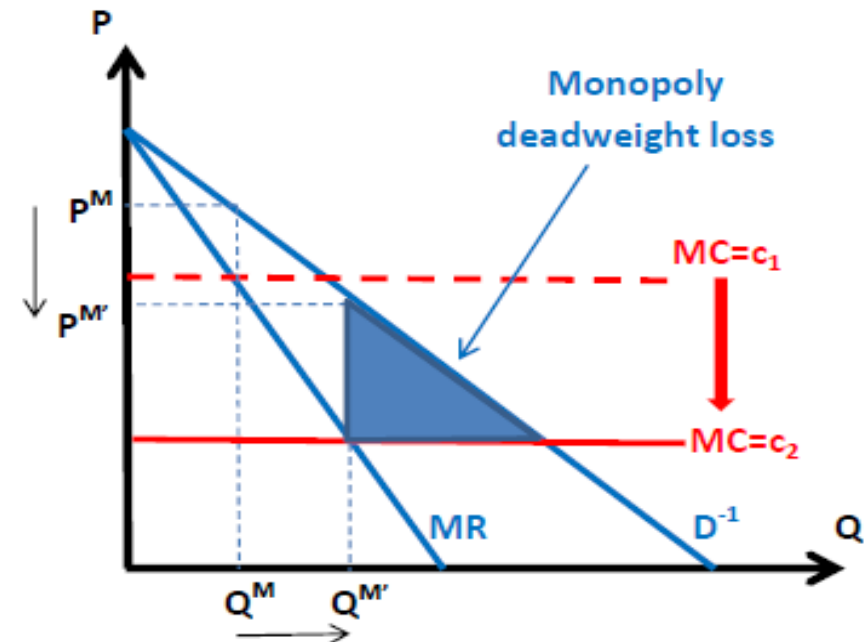
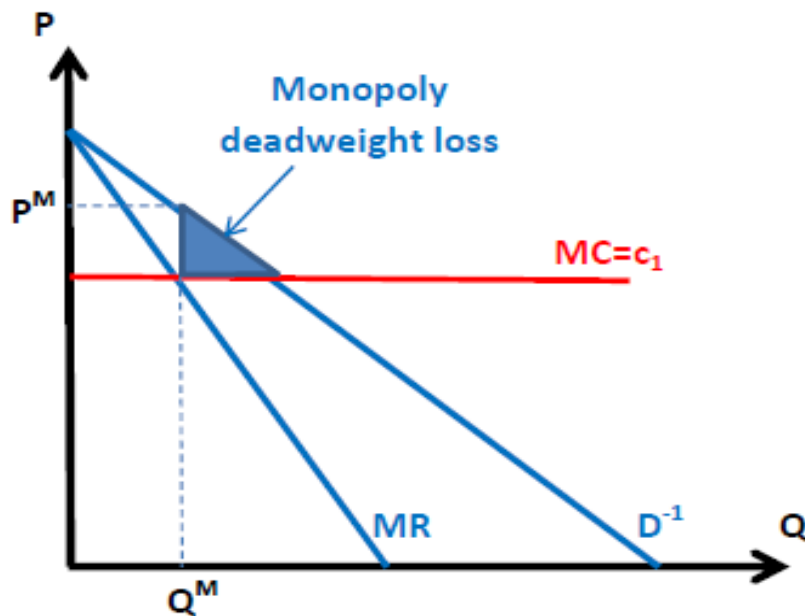
Note : en millions d'euros ; SC = surplus des consommateurs ; SP = surplus des producteurs ; SS = surplus social ; PSM = perte sèche de monopole ; le tableau se lit de la manière suivante : le chiffre 85* s'explique par le fait qu'un million de consommateurs est prêt à payer un disque 100 euros, mais ils le paieront 15 euros. Par conséquent, le surplus dégagé par ce million de consommateurs est de 100 millions moins 15 millions.

2. The increasing social cost of copyright

Monopoly deadweight loss is growing (3)

- It is indeed well known in industrial economics that the **monopoly deadweight loss is a decreasing function of marginal cost**

Illustration if $D(p)=b-aP$ and $MC = c$: then $MDL=(b-ac)^2/16a$



2. The increasing social cost of copyright

Monopoly deadweight loss is growing (4)

Conclusion:

- With the new economy, the social cost of copyrights has increased
 - Ex: Walt Disney movies, Midnight Oil CD, etc.
- And the longer the protection, the higher the loss for society
- Open question: Is this the price to pay in order to maintain a high level of incentives ?

2. The increasing social cost of copyright

Obstacle to creation by recombination

- ❑ Creation is a cumulative process
 - The « shoulders of giants »
- ❑ In order to create one has to reuse things from the past
 - Creation as an activity of combination
- ❑ Yet, copyrights are exclusive rights
 - They forbid access to past creation
 - “The opposite of a free culture is a permission culture, a culture in which **creators get to create only with the permission of the creators from the past**”*
- ❑ Copyrights can therefore impede creation

2. The increasing social cost of copyright

Obstacle to creation by recombination (2)

- ❑ In the **old economy** this problem is not very important
- ❑ Copyrights protect the expression, not the content
 - Copyrights prevent cut and paste (c/p)
 - Content can hence be freely reused in order to create new things
- ❑ In the old economy pure c/p is costly
 - i.e. creation by c/p of past creations is scarce
 - Creation rather proceeds via the recombination of different contents
- ❑ Copyrights are thus not a real obstacle to creation

- ❑ Yet, this is not the case in the new economy!

2. *The increasing social cost of copyright*

Obstacle to creation by recombination (3)

- ❑ In **the new economy** c/p is cheap and easy
- ❑ Creation by recombining exactly past creations is made possible (Lessig, *Remix*, 2008)
 - Mashups
 - Electronic music, movies, etc.
- ❑ Yet, copyrights do not allow such creations, i.e. they can be an obstacle to creation

2. *The increasing social cost of copyright*

Anticommons

- ❑ Generalization of the problem just mentioned
- ❑ Creation requires the *recombination of many different things*
- ❑ If all the past creations are (copyrighted), creators need to obtain the permission from many different right holders
- ❑ Obtaining access to all those owners might be too costly
 - Transaction cost
 - Multiple marginalization (Cournot, 1838)
 - Increased risk of hold-up
- ❑ At the end, due to the proliferation of copyrights, creation may slow down (costs to create may be too high)
 - Tragedy of the anticommons vs. tragedy of the commons
- ❑ Clearinghouses, clearance center and copyrights collective agencies as a solution (patent pools in the case of patents)

2. The increasing social cost of copyright Anticommons (2)

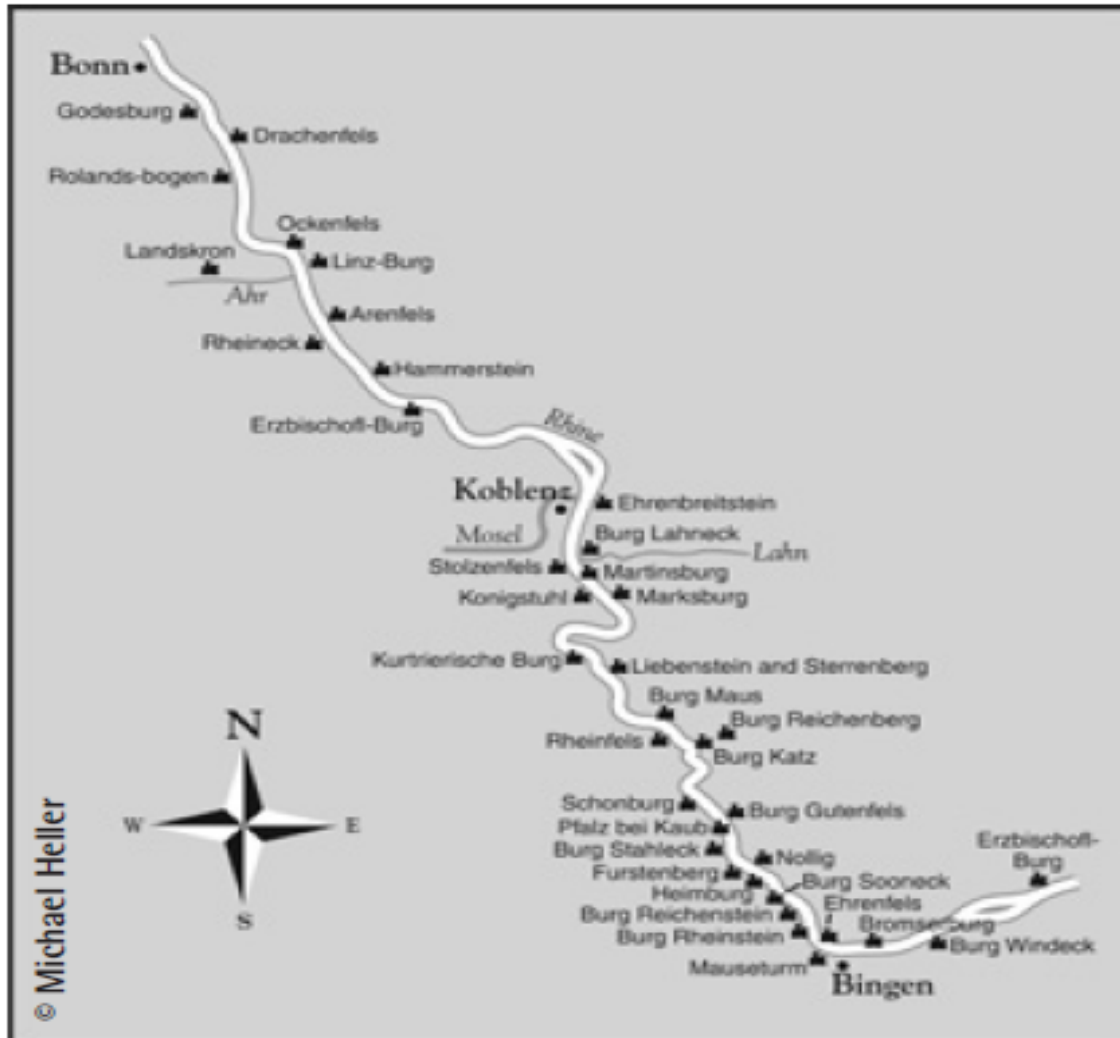


Figure 1 : un exemple de tragédie
des anticommons : les péages sur le Rhin
au Moyen Âge.

Carte extraite de *The Gridlock Economy: how too much ownership wrecks markets, stops innovation ad costs lives* publié aux États-Unis par Perseus Book Inc., 2008.

3. Some ideas to adapt copyrights to the new economy

Objective: build a balanced copyright system which takes the needs of all the actors into account (today creators, past creators and consumers)

- 1) Shorten the duration of copyrights
 - 70 years after the death of the author is not reasonable for consumers
 - Reduce the monopoly deadweight loss
- 2) Require creators to apply for a copyright (moral right still automatic)
 - Reduce the proliferation of copyrights
- 3) Require creators to pay annuities (moral right free of charge)
 - Reduce the proliferation of copyrights
- 4) Distinguish between active and passive consumption (Lessig)
 - Facilitate creation by recombination

4. Even more provocative thoughts: Can creation flourish without copyright

- ❑ What is the common point between « haute cuisine », « arts de la rue », « arts de la scène », « haute couture », ect.?
- ❑ Creation is intense although IPR are almost absents
 - Low IP regimes
- ❑ Existence of alternative incentives
 - Complementary assets, intrinsic motivation, natural protection, network effects, norms, etc.
- ❑ Easy copy induces new business models
 - Service versus product (ex. software)
 - Music: live performance vs. CD
- ❑ Creation will not vanish if copyrights disappear! (even in the movie sector)