

Corporate Interests and User Rights:
The Creation of Copyright Policy in the EU
by Karen Rustad

The “Information Society” has been a major buzzword in Europe for the last ten years or so. While EU intervention in intellectual property matters was previously restricted to European Court of Justice decisions enforcing mutual recognition in the Internal Market, eventually members of the Commission saw a need for EU-level copyright policy (Lasok and Lasok). This paper analyzes the forces that go into the creation of such policy, with particular attention to the 2001 European Union Copyright Directive. It expounds cultural and political explanations for the preponderance of corporate interests in EU copyright policies and suggests the possibility of a shift in power in the near to mid-future.

The “Directive on the harmonisation of certain aspects of copyright and related rights in the information society” (known more commonly as the European Union Copyright Directive) is a representative piece of EU intellectual property legislation. The directive sought to harmonize copyright laws in the EU in order to streamline information technology exchange in the Internal Market. The directive delineates the reproduction, communication, and distribution rights of copyright, the types of works that those rights apply to; obligates member states to legally enforce anti-piracy technology, known as digital rights management (DRM); and includes a list of 21 exceptions (Europa “Directive”). The only required exception to unlimited copyright is Article 5 Section 1, which permits the temporary copies and caches involved in viewing websites (an admittedly important inclusion, and one that US copyright law does not specifically address). All the rest are purely optional. Because of the wide variety of copyright environments that could result from mixing and matching the various exceptions (Can

archives digitize decaying filmstrips?¹ Can reviewers use quotations from the book they are reviewing?²), one can hardly say that the EU Copyright Directive really succeeds in harmonizing EU copyright law (The Library Association). The effect of the directive is to make complete rightsholder control the default, while user rights are pre-emptively limited to the exceptions explicitly listed and must be fought for on a state-by-state basis.

Because of Article 6's legal enforcement of DRM, user rights are effectively limited by code as well. While member states must "take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation... the means of benefiting from that exception or limitation," users still have to wait for rightholders to give them the keys to unlock their own content; they cannot write or use programs to do it themselves, for instance to make a DRMed e-book readable by text-to-voice programs for blind people (Europa "Directive" Art. 6, Sect. 4). In the case of Germany's transposition, handicapped and other users disenfranchised by DRM are obliged to "[enforce] their rights in court in order to be able to make use of them two to three years" and an unknown amount in legal fees later--and in the case of online works, they have no rights at all (Privatkopie). Again, the balance of legal power goes to media corporations.

One could explain the EU's maximalist copyright policies culturally and argue that they are due to the majority of Europe's attitude towards creativity. In countries with a common law tradition, such as the United Kingdom and the United States, copyright is understood as not a true form of property but rather as an incentive created by government fiat with the public interest in mind. The US Constitution gives the government the power "to promote the Progress of Science and useful Arts" by giving authors and inventors a limited monopoly over their work (Lessig 130). Unlike physical forms of property,

¹ Art. 5, Sect. 2(c).

² Art. 5, Sect. 3(d).

which this tradition generally considers sacrosanct, copyright is meant as an incentive and must be balanced with the interests of the public at large. The first copyright act, the 1710 Statute of Anne, was such a balancing act. The law was created to protect London's powerful bookselling cartel, the Conger, from cheap Scottish imports by "grant[ing] the author or 'proprietor' of a book an exclusive right to print that book" (Lessig 86). In exchange for the protection of the monopoly, however, Parliament made the booksellers' copyrights only valid "for a limited term." Instead of estates controlling an author's work in perpetuity, the common-law belief booksellers in Britain had previously asserted, now their monopoly was temporary (Lessig 85). This change enhanced competition and brought down the high book prices the Conger had previously been able to charge, thus benefiting the public.

Countries outside this tradition, such as France and most other EU states, have a somewhat different perspective of intellectual property protection. These countries have been heavily influenced by the concept of the "romantic author," where works are intimately intertwined with creative, independent creators. This view dates to the eighteenth century, when the aesthetic views of the Romantics began to permeate society. Beforehand, "[w]riting was considered a mere vehicle of received ideas which were already in the public domain" (Woodmansee 433). As people warmed to the idea of originality through individual "inspiration," they came to see writing instead as "an imprint or record of the intellection of a unique individual" (Woodmansee 447). This has had an impact on continental European views on copyright.

The Europeans are said to view copyright as a "natural right." Natural rights don't need forms to exist. Traditions, like the Anglo-American tradition that required copyright owners to follow form [and register their works] if their rights were to be protected, did not, the Europeans thought, properly respect the dignity of the author. My right as a creator turns on my creativity, not upon the special favor of the government. (Lessig 250)

In accordance with this logic, in countries such as France and Germany arose 'moral rights', a special intellectual property right automatically given to authors and their estates that cannot be sold or given

away. This right protects authors' "right of attribution, the right to have a work published anonymously or pseudonymously, and the right to the integrity of the work (i.e., it cannot be distorted or otherwise mutilated)" (Wikipedia). According to the Berne Convention, moral rights must last at least as long as economic copyright; in France, authors' moral rights never expire (Caslon Analytics). Indeed, in 2004 a French court awarded symbolic damages to Victor Hugo's estate, 119 years after his death, after someone wrote a sequel to Hugo's *Les Miserables* (Caslon Analytics; Riding).

While the cultural explanation is useful for explaining moral rights specifically, it should be noted that these rights have never been directly legislated at the EU level--only in the Berne Convention. Furthermore, there are many citizens of European countries who hold a less restrictive view of copyright law: Sweden hosts Piratpartiet (The Pirate Party) and BitTorrent hub The Pirate Bay, Poland is home to Internet Society Poland, and even France has the Audionautes along with offices of Creative Commons and the Free Software Foundation. Clearly then, the outcomes of EU copyright policy formulation require a political explanation.

Media industry groups have been much more effective at lobbying in Brussels than advocates for user rights have been. They have availed themselves of Romantic ideas about creativity even when the rhetoric does not seem to line up the reality. For instance, for the Directive harmonizing the term of protection of copyright and certain related rights, their argument for increasing the term of copyright for authors from the Berne Convention's life plus 50 years to life plus 70 years was that "the original goal of the Berne Convention was to protect works for two generations after the death of the author, and that fifty years was no longer sufficient for this purpose" because people today have longer lifespans (Wikipedia "Directive harmonizing"). However, on second glance, this justification seems questionable; a longer lifespan means that the "life" part of "life plus 50" would increase, already lengthening the term! Nevertheless, this argument made its way to the preamble of the directive. Another example is the

continuous appeal to feeding musicians and their families. The problem with this rhetoric is that many copyrights are not owned by the original musicians but rather by their record labels or collecting societies (SACEM, SCPP, etc.). Despite these rhetorical issues, media lobbyists have had the money and resources to develop close relationships with MEPs and the Commission and make sure their interests are enshrined in EU directives.

Media lobbyists have used “astroturfing” tactics, creating the illusion of broad-based, grassroots support, through a fake organization called Campaign for Creativity (C4C). The apparently well-funded group was created to pass the EU Copyright Directive and continued work through 2005 (FFII). “Tactics of the C4C have included giving out free ice creams to MEPs...on a hot afternoon and renting [and] sailing big motorized yacht staffed with a huge banner saying "Vote for the CII directive"...next to the European Parliament” (FFII). In 2005 Campaign for Creativity won Alter-EU’s award for Worst EU Lobby for keeping the sources of its funding, believed to be primarily Microsoft, secret³. Nevertheless, Campaign for Creativity was seen as credible by EU legislators; the European Patent Office (EPO) continues to have a link to Campaign for Creativity’s website under “Useful European Connections” even though the site is defunct⁴.

While it is true that large European and American media players have a lot of influence with individual member states as well, the EU serves as an override when their national-level control is incomplete. The UK commissioned a report on whether or not to retroactively extend copyright terms for performers to life plus 70 years. Recently, the report came to the conclusion that such an extension was not in the public interest and would only benefit media magnates, making it unlikely the extension would pass in Parliament. In response, “[r]ecord industry trade body the BPI vowed to send lobbyists to

³ Alter-EU, “‘Worst EU Lobbying’ Award 2005.” <<http://www.eulobbyaward.org/2005/intro.html>>

⁴ EPO, “Patent Information on the Internet - links.” <<http://www.european-patent-office.org/onlinelinks/i/>>

Brussels to push for the extension when the European Commission reviews the relevant directive next year. Gowers [the author of the report] told The Register: 'They [the EU] will surely be descended upon by the lobbyists in the coming months'" (Williams). It appears that the media industry feels that it can make its voice heard through EU directives even when its efforts with national governments prove fruitless.

One person in particular has been significant in the passing the Intellectual Property Rights Enforcement Directive and other intellectual property-related directives: Janelly Fourtou. A MEP from France and a member of the Group of the Alliance of Liberals and Democrats for Europe, her husband is the CEO of Vivendi Universal, one of the largest media conglomerates in France and the EU. As rapporteur of the EU Intellectual Property Rights Enforcement Directive, she avoided having the proposal go to a second reading despite its controversial nature (IP Justice). She also spoke in favor of the EU Copyright Directive and the attempt to create a Community patent (which would have legalized patents on software) (Europa). Other MEPs have shown consistently maximalist views regarding intellectual property policy, but Fourtou clearly has the greatest economic incentive to having those views reflected in legislation. This has made her the target of criticism:

'How can a member of parliament be in the official position to shepherd through a law in which she personally stands to gain millions of Euros?" asked [Robin] Gross, [executive director of IP Justice and] a civil liberties attorney. "Such a glaring conflict of interest calls into question the entire legitimacy of the EU Parliament's law-making capacity'. (IP Justice)

Fourtou is not the only legislator with money at stake in the EU intellectual property debate; MEP Sharon Bowles, a strong advocate of software patents, is a patent lawyer at Bowles Horton, "a patent attorney firm specialising in electronics [which] has major companies on their books" (EU Corporate Europe Observer). Regardless of criticisms, however, as long as Fourtou remains in the European Parliament, however, the media industry is assured of at least one staunch ally at the EU.

Why does Big Media use its lobbying power to *encourage* what amounts to government intervention in its market? First, prohibiting consumers from breaking the locks on their digital content--even for legitimate purposes--protects media conglomerates' revenue streams. If consumers can't make backup copies of their music, for instance, they will have to buy multiple copies of the same song as media formats progress from tapes to CDs to mp3s to the next big thing--or as computers crash and hard drives break. Second, broad copyright scope and strict enforcement create barriers to entry into the media market that benefit large established corporations. Vivendi Universal, Sony BMG, and the other big players can afford licensing costs and armies of lawyers. They can clear all the samples on their rap artists' albums and clear the incidental appearance of a TV show in the background of a documentary, for instance.⁵ Most aspiring independent media producers, on the other hand, cannot afford to play by the rules--or even get adequate representation if they are sued wrongly. This has the effect of enforcing major media players' hegemony over the media market and culture as a whole. An American big-media group, the Recording Industry Association of America (RIAA), admitted to this during the debate over their extortionist copyright fees for Internet radio stations:

[T]he attorneys representing the webcasters asked the RIAA,...“How do you come up with a rate that's so much higher [than for regular radio]? ...[W]e have hundreds of thousands of webcasters who want to pay,...and if you set the rate so high, you're going to drive the small webcasters out of business....”

And the RIAA experts said, “Well, we don't really model this as an industry with thousands of webcasters, we think it should be an industry with, you know, five or seven big players who can pay a high rate and it's a stable, predictable market. (Lessig 198-9)

Reinforcing the oligarchic market model benefits major media players in the long-term. Thus, setting up barriers to entry through restrictive copyright policy is in their self-interest.

The interests of consumers, on the other hand, were largely unaddressed in the passing of the EU Copyright Directive and other directives. This has a lot to do with their lack of representation. User

⁵ C.f. the story of John Else's documentary in *Free Culture* by Lawrence Lessig, p. 95-7.

groups exist in Europe, but they are usually restricted to particular member states and lack presence and influence at the EU level. It also has to do with the political economy of copyright law. The traditional political economy example is taking one dollar from a thousand people and giving the one thousand dollars to one person. The majority would not support such a measure, but their disapproval will be so lukewarm compared with the passionate lobbying of the one beneficiary that such a measure would be likely to pass. Similarly, user-friendly copyright is a lukewarm issue. Most people's livelihood does not hinge on their ability to burn mix CDs for their friends or use cracking tools to watch their DVDs on a computer running Linux. Even though most people would probably agree that such activities should be legal, the odds of getting caught and prosecuted for them are so tiny people do not really feel restricted by the law. Thus, user-friendly copyright reform is a hard thing to get people up in arms about. Meanwhile, the media industry has a concentrated interest in having restrictive copyright laws. They have the money and the motive to see such directives passed, regardless of the will of the unorganized majority.

Regarding EU copyright legislation, there has one exception to this rule: libraries. The Library Association; the European Bureau of Library, Information and Documentation Associations (EBLIDA); and the Special Libraries Association all participated in the debate on the EU Copyright Directive. As a result, libraries were able to negotiate a significantly better outcome.

[During the debate, e]very MEP commented on the huge lobbying which had taken place, most mentioned the interests of users and consumers in the debate and some specifically mentioned libraries. There were many interventions in our favor, in contrast to the first reading, where rightholders seemed to have a monopoly on the copyright issue. ...

The International Federation of Phonographic Industries (IFPI) organized a press conference...supported by EBLIDA [and] handed out balloons to MEPs urging them to Keep the Information Society Afloat by not placing unnecessary restrictions on copyright legislation. Much behind the scenes lobbying by national library associations and individual libraries also ensured that our message got across and was listened to.

In the end, nine of the Boselli compromise amendments were accepted and once again, the damaging proposals for libraries were rejected. (Hackett)

While none of the pro-library exceptions (2(c), 2(e), 3(a), and 3(b)) were made obligatory, libraries' interests did have greater presence in the final directive than other user rights.

Despite the problematic political economy of copyright law, many people are beginning to believe that EU (as well as national) copyright policy has swung so far to the side of Big Media that a backlash is inevitable. National user rights organizations, seeing the damages done by transpositions of EU copyright directives, are increasingly realizing that they must have an EU presence to protect their local rights. American-based organizations like the Electronic Frontier Foundation (EFF) and the Consumer Project on Technology are developing European offices in order to lobby Brussels as well as national governments. Opportunities for broad-base copyright reform organization are also growing. Officially-registered chapters of the radical, Swedish-founded Pirate Party now exist in four EU member states, along with four more unofficial but active ones (Wikipedia "Pirate"). As the online generation grows up and such movements gain greater visibility, the Pirate Party is likely to exert greater influence on national and regional intellectual property issues; while it will never be a majority party, its existence is likely force the major parties to rethink their accommodation of media conglomerates' interests. Already, without winning any seats the Swedish Pirate Party made "The Green Party, the Moderate Party and the Left Party all [change] their policies on copyright to prevent losing votes to the Pirate Party" in the 2006 elections (Wikipedia "Pirate"). Big media still has big money, and the present law is on their side. Nevertheless, it is becoming increasingly likely that balance will be restored to copyright policy at the EU level and in Europe as a whole.

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