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Copyright law between ideological pincers

How the Web 2.0 is polarising a previously strictly mono-paradigmatic debate in Germany - and an attempt at calming things down

A. Introduction

Copyright law is not the stuff of everyday discourse. No politician will win an election with it, and an artist will accept his or her royalties as an inevitable part of life, like a day job to make ends meet. And the end users (consumers) of copyrighted material? They also do not notice the law of copyright. It does not affect their everyday lives. Hardly ever do they run up against the frontiers of what copyright law allows. Making their own private copies is an entitlement. And with only tape recorders and video cassette recorders, it is too difficult to make more than a handful of private copies. Recompense is provided silently and without fuss for the many pages of scholarly works that are copied. End users of material therefore just do not come into conflict with copyright law. They are not interested in it either.

B. The problem

I. Could Web 2.0 make copyright law superfluous?

To avoid misunderstandings: what I have just said is nothing less than a situation report from earlier times. The change for which the concept "Web 2.0" has been coined also constitutes a major caesura in the history of copyright law. It is no longer only major economic players which are concerned about copyright law and can obtain political influence without attracting the public's attention. And it is no longer dry legal analysis which provides the structure for discussions of law and policy among jurists.

The debate is no longer just about this or that exception in the law of copyright which might be integrated more or less adequately into the law from a systematic or constitutional or some other point of view. Rather, the system of copyright law as a whole has for some time now itself been up for debate. That is

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because it is now most certainly something which affects the everyday life of the end user, and by doing so produces dissatisfaction.

II. Legalisation of illegal copying?

Peer-to-Peer-copying allows for massive amounts of digital copying on the Internet, but the legislature has restricted the right to make private copies more narrowly than ever before. Thus private copying no longer takes place *sub silentio*, but rather is a battleground for the struggle between good and evil. The end user is no longer the beloved partner of the music industry. The end user is rather the potential illegal copier, against whom the music industry must protect itself and on whom it has declared war. A state of enmity exists.

In this respect we are not merely talking about economic or legal interests. It's also about moral superiority. An admitted culture of illegal copying – even among young people – could not arise if it did not combine the attractions of breaking the rules and the feeling of moral superiority and recognition.

If I wish to feel good about myself in this culture I must know that the music industry's cake is divided up among a greedy oligopoly of major labels that deserves to be abolished. Nothing could be sweeter than taking part in the destruction of an evil, the psychological certainty that one is *David* in a morally worthy battle with *Goliath*. This feeling makes one immune to the legal and economic claims on one's moral conscience made by the music industry which relies upon copyright law's protection for rights of use.

III. The end user as the key actor in copyright law

The elevation of the end users of works protected by copyright to the circle of participants in political debate on copyright law is however not due solely to the circumstance that copyright law is now obviously and suddenly becoming a matter of concern in end users' everyday reality.

My **first thesis** is different. The Internet constitutes a piece of technical infrastructure which permits the user – until now merely a passive viewer or listener – to enter a network in a way that is decentralised, fast and efficient. That creates well-known new methods for democratic participation.

The debate about copyright law therefore is not just centred around Web 2.0; Web 2.0 has brought the debate into existence. The debate has produced a form of self-government by affected parties somewhat like traditional forms of local government by local authorities. The Internet community has appointed itself custodian and advocate of its own interests. In doing so it has ad-

vanced itself to the status of a political actor and in that we find the roots of the most recent debate on copyright law.

IV. Against the predominant economic and natural-law justifications of copyright law

In order to start a debate without going through the traditional agenda-setting rituals of the centres of power in the economy, politics and the traditional media, it was necessary to polarise the argument starkly. Theories and emotional appeals had to be produced, and that is my **second thesis**: the need was felt for an ideological counterweight to the predominant economic and natural-law justification for copyright law. This justification, as we shall see, has its own elements of ideology.

If I am to make a contribution to calming things down in this paper, then I readily concede that the debate was begun with a clear conscience and in the best traditions of ethical debates; after all, the discussion has long since been in progress and could be safely left to continue burning merrily even without the addition of ideological kindling.

But leaving the realm of ideological polar opposites for paradigms that are capable of synthesis and of supporting a balancing of various interests, it will become clear by the end of this paper that we do not possess a better system than the system of copyright and that it would therefore be simply irresponsible to throw copyright overboard.

C. Classical justification of the law of copyright and its ideological contents

As a form of intellectual property, copyright needs to be justified. That would be so even without the current debate. Copyright, after all, privatises the products of knowledge and culture, which it removes from unrestricted public access. Reasons must be adduced for the very idea of property in intellectual works.

I. Copyright law as natural law

In the Continental legal tradition the author and copyright owner can call upon the law of nature. In a vulgar quasi-philosophical adaptation of *John Locke's* theory of property, intellectual property is seen as also part of humanity's natural freedom and potential for self-realisation.

If human beings may have property in their persons and their work, there must then also for the same purpose of self-preservation be a natural right to re-

tain that portion of nature which has been adapted for use by human labour. If and whenever the creative impulse produces a combination of art and natural raw material, nature gives also a right to intellectual property. This justification however does not advance the law of copyright beyond the status of the law of nature itself: an idea.

II. Copyright law as a means of stopping artists from starving

While attempts to justify intellectual property on a natural-law basis soon collapse, the idea often remains capable of affecting opinion. Not merely in German constitutional law, but also in international copyright conventions have individual property rights become part of the dogma of copyright law. The creator should be appropriately involved in the economic exploitation of what was created. For that purpose a right of exclusivity is provided.

Given that the creator will often need help in the distribution of his or her intellectual property, this idea has proved to be attractive to publishers. Even today it is mainly the middlemen in the form of publishers who propagate the romantic myth of the starving artist in order to profit from a continual expansion of usage rights conferred by copyright law. Publishers retained the commanding heights in decisions about the just relationship between the common good and the law of copyright, between knowledge and property, and between participation and exclusivity.

One does not hear very often about the need for the creative artist to have resort to existing cultural resources in the very process of creation. Too often the dominant picture is that of the lonely genius who from his own mind – as if *ex nihilo* – creates works. This picture is cultivated because it is strategically useful.

III. The efficiency theory: a utilitarian view of copyright

Alongside the irrational idea of copyright law as a natural right there exists a line of argument from the Anglo-American legal world which attempts to justify the existence of the law of copyright from the economic utilitarian point of view: to create *a market for works protected by copyright*.

Now, the capacity of an object for exchange in a market is not a value in and of itself. Therefore this utilitarian justification of copyright law must dig a bit deeper: it is claimed that without the law of copyright and the market it creates there would not be *sufficient incentive to create cultural and knowledge-based products*. To create such an incentive, in order to ensure that there exist some of the economic preconditions for innovation – this is said to be the purpose of copyright law.

IV. Criticism of the efficiency theory

The incentive theory which I have just briefly outlined is most plausible when substantial investments are required in goods. The classic creative act of the individual copyright holder does not depend upon an economic incentive to the same extent as does the resource-intensive business of a manager of rights in copyright law.

If then *the incentive theory* is above all *that of the middleman*, and if that same circle is responsible for the concept of the natural entitlements of the individual author/copyright holder, then the first glimmers of an ideology are visible. These glimmers become stronger when one has regard to the types of innovatory products for which this incentive theory is largely plausible: *for something created from nothing*, which has no reliance on what came before.

In reality, however, such things are infrequently found. In fact, innovation is always a matter of '*standing on the shoulders of giants*' who have produced past sources of knowledge and culture. The more such sources are made inaccessible by exclusive rights of user in copyright law, the harder innovation becomes – in particular, the transaction costs associated with it are magnified.

Here (if not earlier) the incentive theory has reached a point at which it no longer convinces. Too much protection alone suffices to choke innovation. It is therefore not absolutely true to say, as the often repeated theory would have us believe, that stronger copyright law means a more effective promotion of innovation.

Nevertheless the paradigm of the incentive theory has dominated the discourse of copyright law to the present day almost as if it had a monopoly – not infrequently in the form of a simple equation between copyright protection and the promotion of innovation. In contributing to the continual expansion of copyright protection, this conception has shown ever more clearly a distinct ideological tinge.

D. The opposing ideology of an open source culture

The ideological monopoly of the classical paradigm for justifying the law of copyright is passé. An opposing pole has been discovered, which also has a strongly ideologically tinged paradigm and which has alone enabled the most recent debate on copyright law to unfold on a broad basis. Web 2.0 has developed into an entire movement, a subculture in its own right.

We have witnessed its development from a mere project into the project of a community and then into the project of nothing less than a whole movement. It

is not sufficient to observe that *Linux* has produced free software on the market which enables artists to download their works free of charge for non-commercial purposes, or indeed that the Internet as a whole would grind to a halt without free access to technology and software.

All those things could in the end be nothing more than just projects. But they have become the projects of a *veritable movement*. Communities on the net with their own net culture need some social cement. They must become communities of self-justification which defend their own existence among themselves and *vis-à-vis* each other.

I. Social-ethical justification for copyright law

For this purpose the best justificatory models are provided on the plane of social ethics such as may be found in the open source movement. The dogma of *homo oeconomicus* is, as a first step, rejected on that plane: rather, the community is seen as the source of a rich society. This talk is not just about the democratisation of innovation.

The rhetoric takes on an evangelistic tone, when software developers such as *Eric Raymond* become the ideologues-in-chief of open source culture. Even legal scholars such as the head and initiator of the creative commons, *Lawrence Lessig*, have participated in the provision of ideological armaments to Web 2.0. The most frequently found idea is that of the commons, the grazing area belonging to a community. This creative commons is the field open to all which, if it remains free to all, is the motor of innovation.

The return to natural-law freedoms is not apparent in this rhetoric even on a second glance. It postulates that every culture is reducible to agriculture. And: that if a culture is to remain innovative in the future, it must take on the basic form of a commons conforming to the laws of nature.

II. The natural law ideology of the commons

The *natural law ideology* of the commons has become the opposite pole to the natural law ideology of the individualistic property-owner's law of copyright. One ideology replaces the other. That is not enough to justify the rejection of the whole system of copyright law. But it is also certainly not the end of the debate given that the open source movement, far from providing an entirely unobjectionable alternative theory to copyright law, reveals itself as in fact wedded to copyright law: its examples of innovation on the commons are not a replacement for copyright law, as the creative commons is by no means inconsistent with copyright.

Rather, creative commons licences are very much dependent upon the existing framework of copyright law. The creators who use such licences are very far from being romantic believers in a field open to the whole community. They have simply recognised that the Internet offers them an opportunity as users and creators to become known to the community. Once they have become known, the reins of copyright law will be drawn in again.

Creative commons, like the Internet portal "*MySpace*", is a market for attention. Someone who has attention suddenly needs copyright law again. Even *Linux's* free operating system is perhaps not to be imagined without a system of copyright law, given that the Linux community obtains its public enemy no. 1, its hacker's ethics and its self-esteem from competition with Microsoft.

E. Summary

What then can we conclude from our analysis of the copyright debate in which a criticism of the various ideologies has been essayed? We can first of all remain calm: *copyright law does not need to be abolished.*

I. Retention of the system of copyright

Far from it. It must not be abolished if we can believe the economist *Fritz Machlup*, who in 1958 considered the economic efficiency of patent law: If one does not know whether a system as a whole (as opposed to various elements or components) is a good or a bad thing, the most certain conclusion that one can draw is this: that one should carry on with it – either with the existing system if it has been in place for a long time, or without any system if so far things have been managed without one reasonably well. *As there is no better alternative, the copyright system stays.*

II. Systemic improvements

As far as systemic improvements are concerned, one should draw lessons from the copyright law debate: the simple equation between strong copyright protection and a lively cultural and artistic scene will become less convincing and be revealed ever more clearly as an ideological means of promoting the power of the middleman. The *strengthening of end users' influence* in the market of public opinion and in the market for copyrighted works should be seen as an opportunity to re-orient copyright law between the paradigm of protection for economic interests and the end users' paradigm which is becoming more prominent. This opportunity is the great service that the copyright debate has performed for us.