

Copyright Law in the Digital Environment

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Copyright law seems to have drifted away from finding a balance between the rights of authors and the public interest in the availability of works. Authors now have almost absolute control over their works and the information therein, with narrowly defined, limited rights being given to the public. This is especially true in the digital environment. There is very little interference from regulatory bodies so private parties are free to restrict access to information in almost any way, which allows them to maximise profits. This essay will discuss some of the current problems with copyright law in the digital environment and will use the topic of databases to illustrate some of the effects of the underlying trend, which seems to favour the rightsholders.

As Jessica Litman notes, 'current copyright law is based on a model devised for print media, and expanded with some difficulty to embrace ... digital media.'¹ However, two issues arise when traditional copyright ideas are applied to the digital environment. Firstly, digitally created copies are potentially perfect substitutes for the original works. Many copies can be produced at a low cost compared to previously when very few people had the means to engage in large scale copying. Secondly, in order to access work in the digital environment, such as viewing web pages on the Internet or running a computer programme, it is necessary for the computer to temporarily reproduce and store them in the memory of the computer. In Europe, attempts have been made to address the second issue through Article 5(1) of Directive 2001/29/EC,² but these issues illustrate how the whole area of access to information has been revolutionised by the Internet. It has removed many of the physical barriers to dissemination of information. Should this mean that stakeholders in the copyright industry should get increased protection? That seems to be what is happening as can be seen in the USA with the Copyright Term Extension Act 1998, The Digital Millennium Copyright Act 1998,³ the White Paper of the Clinton administration and most recently the Database and Collections of Information Misappropriation Bill 2004. In Europe a series of directives (such as the Software Directive,⁴ the

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¹ J Litman 'Revising Copyright Law for the Information Age' [1996] Oregon L Rev 19, 19.

² Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (hereinafter the Infosoc Directive).

³ The Digital Millennium Copyright Act 1998 (hereinafter the DMCA).

⁴ Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs.

Rental Right Directive,⁶ the Term Directive⁷ and the Infosoc Directive) were introduced in the late nineties and in the early years of the 21st century with the intention of harmonising copyright law among EU member states. These Directives had the effect of extending the rights of the rightsholders, most notably in Directive 96/9/EC,⁸ which introduced the so-called database right, which will be discussed later.

As it has become so futile to prohibit copying in the digital environment, many copyright owners prefer instead to restrict access to the protected works using technological fences or rights-management containers. This goes against one of the basic principles of copyright law that only expression can be copyrighted but not the facts and ideas in the work.

These technological fences also circumvent the other limitations placed on copyright law; and therefore, public access to the information is significantly diminished. In the past, the first sale doctrine allowed the purchaser of a copyrighted work to give, sell, loan or lease it to somebody else but now the situation has changed as it has become so easy to widely distribute perfect copies. The copyright industry has counteracted this by using technological fences, which allow them to control every interaction between user and content. These technological fences also allow copyright owners to withhold works indefinitely from the public domain. This infringes the limitation on copyright that rights over creative works only apply for a limited period.

These technological protection measures are being supported by legal provisions, which alter the balance between the rights of authors and the public interest. This is particularly evident in the USA. Section 1201 of the DMCA, in particular sub-section (a)(1) makes it illegal to circumvent technological measures, which restrict access to a copyrighted work. This effectively extends copyright protection beyond a right of reproduction to a right to directly restrict access. People will have to pay to access the information regardless of the purpose for which they want to view it. In Ireland, section 370 of the Copyright and Related Rights Act 2000 introduced a similar provision.

Courts and legislators have also been narrowing the scope of fair use. For example, in Ireland, pursuant to section 392 of the Copyright and Related Rights Act 2000, the fair use exception does not apply to electronic databases. In the US case of *Sony Corporation of America v Universal City Studios Inc*,⁹ the Supreme Court stated that, 'every commercial use of copyrighted material is presumptively ... unfair.'¹⁰ Courts in the US have gone on to limit the doctrine of fair use further in cases such as *Harper & Row, Publishers, Inc v*

⁶ Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property.

⁷ Council Directive 93/98/EEC of 29 October 1993 on Harmonizing the Term of Protection of Copyright and Certain Related Rights.

⁸ Directive 96/9/EC of The European Parliament and of The Council of 11 March 1996 on the Legal Protection of Databases (hereinafter the Database Directive).

⁹ *Sony Corporation of America v Universal City Studios, Inc* 464 US 417 (1984).

¹⁰ *ibid* 451.

*Nation Enterprises*¹¹ and *Stewart v Abend*.¹² As Maureen Ryan noted ‘the Court construed copyright to give an author a property right defined by the prerogative to extract all actual and potential economic value from a creative work.’¹³ In other words, the copyright owner could extract all possible revenue from the work in question and only when the user did not affect this revenue would they be given any rights of access under the doctrine of fair use. There is no mention of the benefits of allowing people access to each other’s work in order for them to build on it and progress. It is apparent that copyright law is not succeeding in balancing the rights of copyright owners against the rights of the public.

In order to assess where the balance should be struck we must examine the basic principles underlying copyright law. Professor Joseph Sax noted that:

[E]ven those who have thought up an idea, or discovered a fact, frequently get no right of property in that accomplishment- despite their efforts- because the law so greatly values open access to the basic building blocks of human achievement.¹⁴

According to this view, copyright should be interpreted from a baseline of a public right to access. Only limited rights given to authors, which provide an incentive to create, should restrict the access. Therefore copyright uses the economic rewards of the market to stimulate the production and dissemination of new works. This is the incentive theory upon which copyright is supposedly based but in recent years the reality has been that copyright is based upon a neoclassical economic theory, which aims to ensure that resources are allocated to their highest valued use. Instead of public access to works it has become the accepted norm that copyright owners have a property right over their creative work and are free to extract the maximum possible economic benefit from it. The market is becoming ever more privatised and authorities are reluctant to interfere with market forces. They do not want to disrupt wealth maximisation by broadening limitations on copyright such as first sale doctrine and doctrine of fair use etc. Consequently, these limitations are continually being eroded so copyright owners have an alarming amount of freedom in how they choose to manage their creative works and the information and ideas therein.

Both Litman and Ryan argue that the stakeholders are winning the war for control over copyrighted material. Some of the reasons for this are as follows: firstly, the diffuse interest of the public is seldom represented in discussions on the future of copyright law therefore it is not taken into account. Secondly, copyright law is so confusing that much of the public do

¹¹ *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539 (1985).

¹² *Stewart v Abend* 495 US 207 (1990).

¹³ M Ryan ‘Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World’ [2000] Oregon L Rev 647, 662.

¹⁴ JL Sax *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press Ann Arbor 1999).

not understand it so they cannot form independent views on it. Thirdly, many of the decisions regarding copyright law are made beyond the general notice of the public. Fourthly, as the public are not consulted, the stakeholders are usually the only people consulted when the law is being drafted. The result is that the major players in the copyright industry are the ones behind many of the laws that are supposed to regulate them.

In her article *Cyberspace as a Public Space*, Ryan argues the case for information as a public trust resource. This doctrine held that some resources, (eg waterways, shorelines) due to their importance, are inherently property of the public at large. According to Professor Joseph Sax, when there is some sort of process defect that allows 'low visibility decision making' over an important resource, then a public trust may be required to prevent or correct this. Carol Rose observed how open access to some resources could increase the total social value of them by maximising common public use. Ryan argues that information falls within this category:

Copyright policy governing the assignment of rights to information suffers from the same defective processes that Sax has identified as justifying the application of public trust.¹⁵

Perhaps Ryan's proposal for a public trust may be a little extreme or unrealistic. However maybe a balance could be found if information was held as a public trust resource but expression could still be copyrighted. This would have the effect of making instruments such as technological fences and the database right illegal because they restrict access to information. That suggestion, however, may prove difficult to enforce.

As was noted earlier, multiple reproductions have become a great deal easier in recent years and a lot less costly. Therefore the question must be asked; is reproduction still an appropriate way to measure infringement? Jessica Litman argues that it is not. She argues that infringement should be measured by the commercial harm inflicted on the copyright owner: '[m]aking money (or trying to) from someone else's work without permission would be infringement.'¹⁶ Copyright infringement is so widespread these days that this is closer to the reality anyway. For instance, it is impossible to track down and prosecute every person who downloads a song illegally from the Internet. This idea of protecting investment of the copyright owner seems to have been one of the reasons behind the database right in Europe.

The original aims of the *Database Directive* were to harmonise the rules of member states regarding legal protection of databases, safeguard the investment of database makers and to ensure that legitimate users could still access information. It was also hoped that the incentive provided by the *sui generis* right would stimulate growth in the database industry thereby reducing the gap between the US database industry and the EU industry. It appears that, other than safeguarding the investments of database makers, none of these aims have been fully achieved.

¹⁵ Ryan (n 12) 23.

¹⁶ Litman (n 1) 31.

Firstly, there is still a lot of confusion as regards database law in the EU. There are some ambiguous phrases in the directive, for example ‘substantial investment.’¹⁷ Furthermore, with the twelve new member states there is even more diversity. A simpler, less ambiguous law is needed. The issue of the fair use exception in Ireland and the UK can be used to illustrate how states can differ when implementing the Directive. In Ireland, the defence of fair use only applies to non-electronic databases but in the UK it applies to electronic databases too, so long as there was no commercial purpose involved.¹⁸ It is easy to see how users may be confused as to their rights.

On 12 December 2005 the first evaluation of the Database Directive¹⁹ was published. It did not provide any evidence that the European database industry had grown. In fact, according to the Gale Directory of Databases (GDD), the number of database entries dropped just as most of the 15 EU member states implemented the Directive into national law in 2001. While the GDD figures are not completely reliable, the database industry certainly was not growing. At the same time the US database industry was thriving.

This survey to assess the impact of the Database Directive was flawed in the manner it was carried out. It was conducted on the basis of a restricted online survey addressed to 500 companies and organisations involved in the database industry.²⁰ It did not consult the users of databases such as the scientific research bodies. This again shows how a fair balance is not being struck between users and copyright owners in the digital environment. The evaluation is not very useful. It gives statistics such as ‘65% [of stakeholders] believe that today the legal protection of databases is higher than before harmonisation.’²¹ It seems to just state the obvious – that stakeholders are happier now than before the *sui generis* right was introduced. The evaluation of the Database Directive also notes that ‘repealing the Directive altogether or repealing the *sui generis* right in isolation would probably lead to considerable resistance by the EU database industry.’ Of course there would be resistance, now that the copyright industry has gotten these extra rights they are not going to give them back without a fight.

The *sui generis* right allows copyright to subsist in compilations of factual material. This could potentially result in copyright owners effectively owning facts. This could prove very harmful in the case of sole source databases especially since the provision regarding compulsory licensing was dropped in the final version of the Directive. However, the ECJ narrowed the

¹⁷ (n 7) Article 7(1).

¹⁸ Copyright and Rights in Databases Regulations 1997 (UK) SI 1997/3032, regs 19, 20 and sch 1; Copyright and Related Rights Act 2000 (IE) s 327, ss329-336.

¹⁹ First evaluation of Directive 96/9/EC on the legal protection of databases, 12/12/2005.

²⁰ *ibid* 5.

²¹ *ibid* 12.

scope of the *sui generis* right in a quartet of decisions in 2004,²² known as the *Fixtures Marketing cases* and the *British Racing Board case*. It was held that creating data does not count as ‘substantial investment.’²³ Although it was not mentioned in the judgement, the ECJ seemed to follow the ‘spin-off’ doctrine, which follows from the incentive rationale. Hugenholtz and Davison note that there is ‘no reason to grant protection to data compilations that are generated quasi “automatically” as by products of other activities.’²⁴ The decision partially solved the problem of the absence of compulsory licensing and went some way to ‘cure the anticompetitive effects of sole source information monopolies.’²⁵

However, the ECJ still left some questions unanswered. Any ‘substantial change’²⁶ in the database will result in a new 15-year term of protection for that new part. The question remains whether dynamic databases such as that of the British Horseracing Board should be regarded as a series of databases each with its own term of protection, commencing every time a substantial change is made.

It may also be unclear as to how to make the distinction between creating and obtaining data in some cases. For instance, is meteorological data created or obtained? There is also the problem of database makers trying to find ways around the ECJ decision. Hugenholtz and Davison note that ‘[a] clear chronological and procedural distinction between the two processes might support the argument that verification has occurred separately from the initial act of creation.’²⁷ Notwithstanding these problems the ECJ still somewhat reined in the potential effects of the Database Directive.

Scientists have expressed their concerns about the possible effects the Directive may have on their research. The Internet is extremely important for science as it allows instant worldwide dissemination of scientific facts thereby allowing others to use them and build upon the work of others. There could be detrimental effects to scientific research if copyright owners were allowed to lock these facts away and only allow access to those who can afford it. The Royal Society is not satisfied with the situation that may arise where rightsholders have control over scientific facts which they may not have even discovered but just gathered and presented.²⁸ There are very few legal restrictions on the terms that can be imposed on database users. The Royal

²² Case C-338/02 *Fixtures Marketing Ltd v Svenska AB (Svenska)* [2004] ECR I-10497; Case C-444/02 *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou EG (OPAP)* [2004] ECR I-10549; Case C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus Ab (Oy Veikkaus)* [2004] ECR I-10365; Case C-203/02 *British Horseracing Board Ltd v William Hill Organisation Ltd* [2004] ECR I-10415.

²³ (n 7) Article 7(1).

²⁴ B Hugenholtz and MJ Davison ‘Football Fixtures, Horseraces and Spinoffs: The ECJ Domesticates The Database Right’ [2005] *European Intellectual Property Rev* 4.

²⁵ *ibid* 5.

²⁶ see (n 7) Article 10 s 3.

²⁷ Hugenholtz and Davison (n23) 6.

²⁸ Royal Society Working Group on Intellectual Property ‘Keeping science open: the effects of intellectual property policy on the conduct of science’ (Royal Society London 2003) 24.

Society is also concerned about the advantages the copyright owners hold when it comes to enforcing the law.²⁹ Due to the uncertainty of the database right and the high cost of litigation the threat of enforcement may be enough to cause the user to back down. In Ireland, pursuant to section 339 of the Copyright and Related Rights Act 2000, which transposed the Database Directive into Irish law, there is a presumption that the database right subsists unless the contrary is proved and that the plaintiff is the owner of the database right. The balance of power is firmly in the hands of the rightsholders. The Royal Society recommends that the *sui generis* right be 'repealed or substantially amended.'³⁰

The *sui generis* right was created by the EU with no precedent anywhere in the world. In the USA, mere 'sweat of the brow' in putting together a database will not qualify it for copyright protection. An element of creativity is required. This was confirmed in the Supreme Court decision *Feist v Rural Telephone Services Co Inc*.³¹ Nonetheless, attempts were made to push The Database and Collections of Information Misappropriation Bill 2004 through US congress with the backing of major database companies. However, the Bill did not make it past the debate stage because proponents of the Bill could not identify a gap in the existing law that needed to be filled and they were not able to demonstrate that their businesses had suffered because of any lack in the law. It would have effectively introduced the *sui generis* right into US law. Unsurprisingly, opponents to the Bill feared that access to facts would be restricted and only those who can afford to pay would have access. However, Article I, Section 8 of the US Constitution states that Congress shall have the power to 'Promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'

As Maureen Ryan points out, the phrase 'limited times' means copyrighted works can not be granted indefinite protection.³² Due to the words 'author' and 'writings' the Court in *Feist* emphasised that 'originality is a constitutional requirement.'³³ It is possible that the *sui generis* right may not be constitutional in the USA.

In conclusion, as the rights of copyright owners have been extended so far, the public seem to accept that it is natural that rightsholders should be allowed exploit copyrighted works to their maximum economic value. However, it should be remembered that there is no natural right of copyright. Copyright itself is a state intervention and when rights are given to the public they are not being taken away from the copyright owner, they are simply not being given to him in the first place. Copyright needs to once again be viewed from a baseline of public rights if the balance is to be successfully found

²⁹ *ibid* 26.

³⁰ The Royal Society (n 27) 27.

³¹ *Feist v Rural Telephone Services Co. Inc.* 499 US 340 (1991).[hereinafter *Feist*]

³² Ryan (n 12) 683.

³³ *Feist* (n 30) 346.

between the rights of authors and the public interest in availability of works in the digital environment.