

Intellectual Property Rights in the Creative Economy

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Why Intellectual Property Rights (IPRs)?

- Art 7 TRIPS: “The protection and enforcement of intellectual property rights should contribute to the **promotion of technological innovation** and to the **transfer and dissemination of technology**, to the **mutual advantage of producers and users** of technological knowledge and in a manner **conducive to social and economic welfare**, and to a **balance of rights and obligations.**” (Emphases added)



IPRs protect creativity in original works

- Copyright for **authors** of original works
 - Books, music, paintings, plays, architecture, dance, software, etc.
 - Prevent others from copying, communicating to the public (Internet), distributing
- “Related rights” for **intermediaries** that make works available to an audience
 - Performers (actors, musicians)
 - Producers of phonograms (record labels)
 - Broadcasting organizations

IPRs protect creativity through reputation

- Trademarks designate origin (producer)
- Certification marks confirm production standards
 - E.g. textile production label “Green Button” by Government of Germany
- Geographical indications (GIs) refer to origin of product and links origin to quality, reputation or other characteristic
 - Wines, cheeses, coffee, carpets, handicrafts

IPRs protect creativity in appearance

- Industrial designs: outer appearance of a product, not its technical function
 - Textile patterns, design of clothes, shapes of smart phones and other devices, ornamental elements of architecture, etc.
 - Technical functioning protected by patents or utility models

IPR system was designed for individual creators

- Communal rights in traditional cultural expressions & traditional knowledge (e.g. indigenous communities)
 - Copyright requires individual author
 - Patents require novelty
 - Trademarks and GIs protect a sign or label, but not the product or an expression
 - Need to design *sui generis* IPRs (WIPO negotiations)

Comparing the scope of IPRs

- Patent:
 - At least 20 years
 - The product as such
 - Any making of the product
 - No “reverse engineering”
- Copyright:
 - At least author’s life + 50 years
 - The expression of an idea, not the idea itself
 - Defense of independent creation
- Designs: choose between the above

Comparing the scope of IPRs

- Trademarks: confusion of origin
 - Use of identical signs for identical goods or services
 - Use of similar signs where likelihood of confusion
- GIs: confusion of product characteristics
 - Signs misleading the public as to true place of origin
 - Signs misleading the public about the nature, characteristics, manufacturing process, etc of the products

IPRs in the digital context: Unresolved issues

- IPRs designed for the analogue context
- Fit for the digital economy?
- Value in
 - Digital reproductions
 - Multiple sharing
 - New business models (e.g. music streaming)
- Particular challenges for copyright



Tom Kabinet case (CJEU)

- Digital platform for sale of used e-books
- Upload under two conditions
 - Own copy obtained from authorized source
 - Own copy deleted from hard drive
- Buyers can download from Tom Kabinet website
- Dutch Association of Publishers files case for copyright infringement: no consent
- Tom Kabinet: consent not necessary

Tom Kabinet case (CJEU)

- Buyer of hard copy book may resell that copy
- S/he must not copy that book and make it publicly available (for use or sale)
- What can the buyer of an e-book do?
 - Upload = resale?
 - Upload = copying & making available to the public?

Platforms and copyright infringement

- Upload of unauthorized content - User infringes copyright
- Is platform liable?
 - Notice & take down approach
 - Strict liability approach: avoid upload
 - Use of upload filters?
 - Can filters distinguish infringing from non-infringing content?
 - Are small platforms up to the task ?

Copyright and artificial intelligence (AI)

- AI enables mass data analysis for research
 - Medical R&D, e.g. diagnosis of cancer, etc
 - Newspaper articles
- Scans data in copyrighted texts (scientific journals, etc)
- Do you need to request authorization from each right holder?

Text & data mining: different approaches

- EU: limited copyright exception
 - For research organizations and cultural heritage institutions – non-commercial purposes only
 - Commercial purposes only if rights holders do not reserve their rights
- US: much broader exception
 - For any purpose, including commercial
 - More attractive for AI developers, journalists, pharma industry, etc.

Creation of software

- Copyrightable
- Copyright protects expression of an idea, not the idea itself
- Hard copy book: read it and express the same idea differently
- Idea / concept of software is in its source code
- To read it, you need to decompile the software
- Decompilation = copying entire program

Creation of software

- Decompilation = Copyright infringement?
- If you consider only the process of copying: yes
- If you consider the overall purpose: no. Copying is necessary to understand the idea behind the software
- Some national laws authorize decompilation to enable inter-operability of software programs

New business models – Can creators benefit?

- Traditionally artist received royalties for each sold phonogram
- Streaming of digital content (music, movies)
 - Royalties not for each song (downloads), but negotiated percentage of user subscription fees
 - Weak negotiating power *vis-à-vis* music labels or platforms
 - Artists need labels
 - License their copyright to them



Conclusions: Creative economy, digital context and IPRs

- Scope & application of IPRs in the digital context are not clear
- Technology will not wait for the law!
- Right time for developing countries to build awareness and design IP regimes for the digital context
 - In line with needs of their domestic creative sector

Thank You

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