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 smartphones 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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