



Introduction

Usually we try to bring quite short news in EBLIDA News, but in the case of the following article by our good colleague from Denmark, we have made an exception. Jakob Heide in his article entitled "Economic reasoning, copyright regulation and digital libraries" puts forth some convincing arguments as to how lengthy terms of IP protection do not produce or produce only very small real economic incentives for creative endeavours, while at the same time limiting the availability of works in the public domain has consequences, not least in economic terms, for society in general.

Economic reasoning, copyright regulation and digital libraries

By Jakob Heide Petersen, Biblioteksstyrelsen

Introduction

The ongoing efforts to establish a European digital library are part of the i2010 initiative whose primary aim is to secure EU competitiveness - primarily in economic terms. In most of the preparatory work for the i2010 initiative the challenge is described in economic terms where cultural initiatives are seen as instrumental in achieving other objectives such as job creation and increased competitiveness.

The founding of the European digital library initiative is however also based on other motives which emphasises the intrinsic value of a common digital mediation of European culture and the need to coordinate national initiatives. These different objectives are combined in the justification for the initiative presented by the Commission in its impact assessment:

"The availability of cultural content, accessible for all anywhere, anytime, can both fuel creativity and strengthen European cultural identity. Users can be offered new engaging cultural experiences through services built on rich digital content; and applications reusing digital material of a cultural nature can yield major productivity gains in sectors like education, media and tourism." [Commission Staff Working Document, Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation Impact Assessment, p. 4]

The combination of the cultural and economic justifications makes an extremely powerful case for a digital library initiative that can fulfil some very important objectives. There seems to be the promise of an access and use of digital culture like never before. There are, however,

obstacles on the road to fulfilling these promises. One of these obstacles is striking the right balance in copyright legislation between "the availability of cultural content, accessible for all anywhere, anytime" on the one hand and protection of the interests of rights holders on the other.

The digital library and copyright

According to the Commission there is reason to lower the expectations in regard to the kind of cultural content that will be offered by the European digital library:

"If there is not such an explicit consent [from rights holders], material that is under copyright can only be made available by public libraries in an on-site consultation service. Therefore a European digital library will in principle be focused on public domain material. An online library offering works beyond public domain material is not possible without a substantial change in the copyright legislation, or agreements, on a case by case basis, with the rights holders. As a consequence, digitisation of Europe's cultural heritage is likely to lead to a wide online availability of older material that is no longer protected by copyrights." [Commission Staff Working Document, Annex to the : Communication From The Commission "i2010: Digital Libraries", p. 11 http://ec.europa.eu/information_society/activities/digital_libraries/doc/communication/annex1_en.pdf]

As the initiative primarily focuses on text this means that the digital library will focus on material where more than 70 years have passed since the death of the author. Following the assessment cited above this means that the library will contain no material from the 20th century.

There will probably be sceptics arguing that there is a risk that the material most likely to attract users and fulfil the objectives of the initiative will not be digitised. An answer to these sceptics could be that the material will be digitised instead by the rights holders themselves and offered to users on a commercial basis. If there is a genuine demand among users the law of supply and demand would seem to virtually guarantee it. There is, however, reason to believe that it will not be commercially viable to digitise most of the materials in question on a traditional commercial model.

The member states are thus about to use a lot of resources on digitisation, preservation, and mediation but not necessarily on the materials most demanded by users. At the same time the materials in demand may never be digitised because it is not commercially viable.

Apart from the possible failure to meet the overall objectives of the initiative such a situation would also mean a

dead weight loss to society, including both a loss for rights holders and consumers.

Unfortunately the work on copyright in regard to the initiative has primarily focused on out of print and orphan works. The legal issues surrounding these works are very important, but there is a need to look at more flexible legal frameworks to ensure the digitisation of those works that might be referred to as commercially orphan because they cannot be digitised on a traditional commercial model.

Economic reasoning and copyright

In order to examine how it is possible for a work to be commercially 'orphan' it is helpful to look at copyright from an economic perspective. A good starting point is the very important American legal case of *Eldred v. Ashcroft*. The case was initiated by a private citizen, Eric Eldred, against the United States represented by US attorney John Ashcroft.

Eric Eldred wanted permission to upload material that was no longer protected by copyright on the Internet. The American Congress had passed a law in 1998 that extended copyright protection from 50 years after the death of the author to 70 years after the author's death.

With reference to the American constitution's provision about free access to information Eldred wanted the Supreme Court to declare the law extending copyright protection unconstitutional [Eldred's attorney the founder of creative commons, Lawrence Lessig from Stanford Law School has written a very informative commentary on the case: http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp]. Eldred lost the case and with its ruling on January 15th 2003 the Supreme Court thus upheld the law passed by Congress on the extension of copyright.

The most remarkable aspect of the case isn't the upholding of increased copyright protection as this has been a tendency in most legal initiatives regarding copyright in the past 20 years. What made the case quite extraordinary was that a number of economists contributed to the case with their assessment of which ruling would secure the most socially efficient outcome for society as a whole [<http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>].

These economists were some of the most renowned Nobel Prize winners in economy (Coase, Friedman, Akerlof, Arrow and Buchanan). In an economic analysis of the copyright extension act they concluded quite unequivocally that an extension of the protection from 50 to 70 years would harm social efficiency in society as a whole. In order to understand how that might be possible it is useful to look at the principles of copyright from an economic perspective.

Copyright is basically as much a ban on production as it is a right to dispose of the work. The World Intellectual Property Organisation (WIPO) thus emphasises that "*The right of the copyright owner to prevent others from mak-*

ing copies of his works without his authorization is the most basic right protected by copyright legislation." [WIPO om ophavsret. http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf side 9]

Obviously this means that there is a risk that too few copies are produced. On the other hand copyright is a precondition for production of intellectual works in the first place. Copyright establishes a market for intellectual works by providing incentives to produce those works. The ban on copying the work allows the author to receive a payment that reflects the effort used to create the intellectual work. Without the ban on copying the author would presumably only be able to sell very few copies of the work which would then be copied and sold at a price that only reflects the costs of copying and not the intellectual effort in producing the work. In order for authors to invest time and effort in producing original works there has to be a protection against unauthorised copying.

From this perspective, copyright is closely linked to market economy which is commonly regarded as the most efficient mechanism for allocation of goods. Copyright creates a market for intellectual property and an incentive structure that ensures that more intellectual works are created than without this regulation.

While this line of argument is correct it is not a complete description of the economic consequences of copyright regulation as the legislation has also some unfortunate effects especially in a digital environment.

Legal regulation as a barrier to production

When focusing on the ideal of copyright as a means to ensure incentives to production it can seem paradoxical that the net effect of copyright can be a barrier to production.

According to classic economic thinking one should continue to produce until the cost of the next unit produced is larger than the benefit of this extra unit. This means that the optimal level of production is found where marginal cost equals marginal benefit.

The cost of producing an additional copy of a digital work is very close to zero. In economic terms this means that the marginal costs are close to zero. The value of an extra copy for an individual user is often larger than zero and the overall social benefit of increased production is thus significantly larger than zero.

It is therefore entirely possible to have a situation where copyright protection prohibits production (copying) but where society's marginal benefit of production exceeds the marginal costs. Such a situation with an inefficient allocation of resources where neither consumers nor producers benefit is termed a dead weight loss.

The cost of copyright

As copyright legislation is very general it also covers intellectual works that are not produced for commercial pur-

poses. The legislation thus also covers works that are part of an ongoing dialogue within a community such as research collaboration or similar professional activities. The presumption in copyright legislation is that a work is protected and authors without commercial interests are therefore forced to explicitly state if they are making the work freely available. This means that these authors are forced to incur costs in terms of time and effort to facilitate the distribution of their works. The legislation also incurs costs for readers who have to determine the legal status of a work if they for instance want to distribute or amend it.

These transaction costs associated with the exchange of intellectual works are a particular problem for digital information on the Internet. This is a problem in a knowledge society where the access to information and the processing of information is central to society's value creation. The information on the status of an intellectual work is often not available and in the absence of explicit information the presumption is that the work is protected. The transaction costs associated with identification of rights holders, communication with these and obtaining permission for intended use will probably grow as the use of digital information and the internet increases.

These costs will increase as copyright protection is strengthened, for instance by imposing more serious sanctions for copyright violations, because this will increase the motivation for establishing the legal status of a particular work.

As the marginal production costs of digital works are close to zero the transaction costs associated with copyright compliance accounts for relatively larger share of total costs of exchange of digital works. This should be considered when attempting to find the right balance in copyright between protection and use.

The Creative Commons licenses are a way to reduce the transactions costs incurred by copyright legislation by making it easier for both author and reader to establish the legal status of an intellectual work.

A political regulation that employs copyright to promote cultural activity and production of knowledge should therefore consider supporting initiatives such as commons in order to reduce the unintended costs that copyright legislation creates for non-commercial activities.

Eldred v. Ashcroft revisited

The brief by the famous economists in *Eldred v. Ashcroft* looks at the extension of copyright protection for existing works and new works separately. For new works the increased protection offers an increased incentive to produce, but as the benefits lies far out in the future so its present value is very small, and the economists estimate it to be as low as being less than a 1% improvement compared to the previous protection. The present social costs of the extended protection for new works are similarly quite small because the effect lies many years into the future.

By contrast the economic effect of extending the protection for existing works is quite significant. There are no significant

benefits for society because the works have already been created and there are consequently no gains in terms of increased incentive. There are huge costs associated with the extension because it allows rights holders to impose above-cost pricing for a longer period, and it increases the costs of producing new works as these are often inspired by existing works that are no longer freely available.

An economic perspective on copyright thus highlights some of the unintended consequences of the regulation and more detailed economic studies might allow legislators to determine whether present legislation achieves the optimal balance between use and protection.

Such a study is carried out in a British report on copyright. The report suggests a number of changes to the British legislation, and the author Andrew Gowers summarises the general principle that also underlies the economic analysis in *Eldred v. Ashcroft*: "...the optimal length of IP protection from an economic perspective would be just long enough for the innovator to recoup his initial investment. Any longer, and the monopoly prices that IP allows are an unnecessary inefficiency." [Gowers Review of Intellectual Property, http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf, p. 24]

Remedies and solutions

The optimal balance in copyright protection presents a challenge in a digital environment. Producing intellectual works has become much easier as the means of production (pc's) and distribution (the Internet) have become more widespread. The transaction costs for non-commercial exchanges imposed by copyright are thus likely to increase.

One solution would have been to reverse the presumption of protection for some kinds of works on the Internet and have authors explicitly state if they wish a work to be protected. This is probably not feasible, and it is important to bear in mind that copyright protection is very important as an incentive mechanism in many commercial activities. It would make sense to have a more detailed legislation that ensures better protection of commercial works that demand substantial investments while deregulating the protection of non-commercial activities.

Under the present legal framework it would probably be a good idea for governments that want to develop the knowledge society and like the EU Commission feel that digital content could boost many downstream economic activities to support creative commons. Also, it would probably be a good idea to support other initiatives that can promote the exchange of intellectual works by reducing transaction costs.

In regard to digitisation there is reason to believe that a large part of the works from the 20th century covered by copyright will not be digitised on a traditional commercial business model. [An estimate in an article from Financial Times thus claims: "Since only about 4 per cent of copyrighted works more than 20 years old are commercially available, this locks up 96 per cent of 20th century culture to benefit 4 per cent." <http://www.ft.com/cms/s/39b697dc-b25e-11d9-bcc6-00000e2511c8.html>]

There are large fixed costs associated with digitisation and often also costs associated with determining the rights held by publishers and authors respectively and with obtaining the

relevant permission to digitise. There is also a low willingness among users to pay for digitised content on a unit basis, for instance using micro payments and subscription based models are probably equally difficult to sustain.

The large fixed costs of digitisation could be covered by libraries and partly be financed by decreased handling costs of physical materials, as we have witnessed in the transition from print to digital scientific journals. The rights holders could receive payment for the use of materials and thus gain revenue that they wouldn't otherwise obtain.

In order to ensure efficient digitisation of materials covered by copyright there must be an efficient way to handle the rights management of many different intellectual works instead of seeking permission on a case by case basis. The extended collective licensing model reduces the transaction costs of rights management by appointing one organisation to represent all rights holders in respect to a certain kind of intellectual works. This organisation negotiates terms of payment and use of these works with the organisation that wishes to digitise and distribute the works.

The mechanism deliberately creates a monopoly situation on the side of the rights holders, thereby reducing transaction costs related to rights management. In order to ensure that this situation is not exploited to extract excessive payment or to obstruct digitisation efforts, it is important that the legislative provision, allowing for extended collective licensing, be accompanied by a signal from legislators that there should be a fair agreement for the specified works.

Conclusion

The development of the European digital library could be an excellent opportunity to discuss whether the copyright legislation in general has the right balance to promote the development of a knowledge society in a digital age. The public interest in these matters is quite often fragmented and confronted by very strong commercial interest. The European digital library is a very concrete expression of the public interest and an opportunity to consider whether the existing legislation might be amended to provide for a better functioning regulation of intellectual works.

The initiative also presents an opportunity for rights holders to assist in ensuring that The European Digital Library offers works from the 20th century, thus giving the rights holders a new revenue stream and users the content they demand and fulfilling the promises of the library initiative.

Finding the information By Andrew Cranfield, EBLIDA

One of the major challenges of the European Commission's launch of the i2010 initiative and the European Digital Library is to gain a solid overview of the situation in the various member states in regard to digitisation activities in archives, museums and libraries. To harness this information the European Commission has financed Numeric – *a study...that will define the empirical measures for digitization activities and establish the current investment in digitization and the progress being made by Europe's cultural institutions.*

Numeric will cover all 27 member states and make comparisons on activities with relevant other countries, e.g. the USA. Numeric will seek to find appropriate indicators that describe value rather than simply volume, e.g. the number of analogue materials than have digitized (as for example the % of a library's holdings). Numeric is a two year project running until April 2009. The project team consists of experts in the various fields and will collaborate with other institutions/bodies already involved with collecting data on digitization activities, such as UNESCO and Eurostat.

More information about the project can be found at the project website: <http://www.numeric.ws> and also a survey for institutes to report on their digitization activities. I would like to encourage EBLIDA members to contribute to this survey and/or to send it on to relevant institutions and organizations in the respective member states. I am sure that the data and information to be collected and structured by the Numeric project will be a valuable tool for all cultural institutions in our efforts to digitize cultural and scientific information in Europe and to make it accessible for our users.

From the Secretariat

On the 29th of August Andrew Cranfield attended and spoke at the Annual Meeting of the Swiss Library Association (BBS) in Sierre. The session was devoted to the issues of lobbying and advocacy and speaking on the same topic were Claudia Lux (IFLA's President) and Jean-Frederic Jauslin (Director of the Swiss federal office of culture).

Annual Council Meeting 2008

EBLIDA's Annual Council Meeting will be held from the 8th – 9th of May 2008. The Council Meeting itself will take place from 15h00 – 18h00 at the Peace Palace in The Hague on the 8th of May and afterwards the conference dinner at a restaurant in The Hague.



Peace Palace, The Hague

On the 9th of May the new Amsterdam Public Library will host a joint EBLIDA/VOB/FOBID programme from 10h00 till 16h00.

More details will be posted in due course on the EBLIDA Website.