DIGITAL COPYRIGHT: THE END OF AN ERA[1]

by Dr Martin Kretschmer
Reader in Intellectual Property; Joint Director, Centre for Intellectual Property Policy & Management, Bournemouth University (www.cippm.org.uk)
Visiting Professorial Fellow, Queen Mary Intellectual Property Research Institute, University of London

---

Europe is rushing into the trap of digital copyright laid by the Digital Millennium Copyright Act (DMCA), at the very moment when an increasingly restless public is probing the rationale of American copyright law. In the US Supreme Court appeal in *Eldred v Ashcroft* (15 January 2003)[2], the majority judges hinted that repeated extensions of copyright law may have been unwise, even if they could not challenge the powers of Congress. Justice Breyer argued in a blistering dissent that copyright statutes may seriously, and unjustifiably restrict the dissemination of speech, information, learning, and culture while not providing any decisive incentives to the creator.

In 2003, digital copyright will finally arrive in Europe with the much delayed implementation of the Directive "on the harmonisation of certain aspects of copyright and related rights in the Information Society" (2001/29/EC). Europe is about to follow the Digital Millennium Copyright Act of 1998 in ratifying the 1996 Internet treaties of the World Intellectual Property Organization (WIPO).[3] According to some of the imminent provisions, selling all region DVD players will become illegal; copying lines of electronic literature for research, parody or criticism can be prevented by contractual terms of the right owner; librarians will have to monitor what is being copied on their premises; and participating in P2P networks may land you in prison (UK draft implementation).

The legislative strategy of these draconian copyright interventions was conceived in the early 1990s, before the introduction of Netscape's Navigator in 1994, the browser that turned the Internet almost overnight into a mass communication and electronic commerce medium. In 1994, about 1 million computers were directly connected to the Internet (so-called Internet hosts, the most widely accepted measure of Internet adoption). The 2002 World Telecommunication Development Report identifies about 140 million Internet hosts, rising daily. Unauthorised copying accounts for a significant part of the traffic from these hosts, with trade organisations reporting apocalyptic figures. According to IFPI, the global lobby organisation of the music

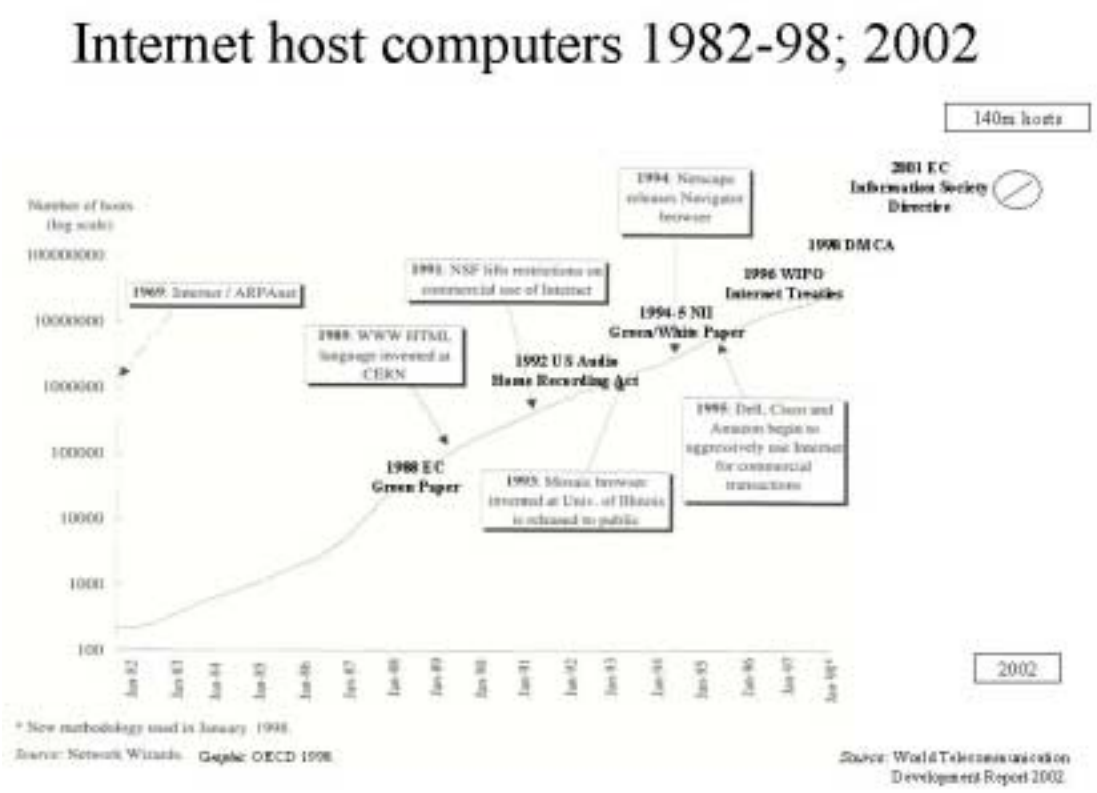
---

[1] Forthcoming in *European Intellectual Property Review* (2003). An earlier version of this paper was delivered at a Heinrich-Böll-Stiftung Intellectual Property Policy conference, Berlin, 8 November 2002.

[2] *Eldred v. Ashcroft Attorney General*, 537 U.S. (2003) S.Ct. 01-618, challenging the constitutionality of the 1998 Sonny Bono Copyright Extension Act, extending the term by 20 years to 70 years *post mortem auctoris*, and to 95 years for "works for hire". The court held by a seven to two majority that the Act was constitutional.

[3] DMCA: Pub. L. No. 105-304, 112 Stat.2860 (1998), relevant provisions codified at 17 U.S.C. sec. 1201-04. WIPO Internet Treaties: World Intellectual Property Organisation Copyright Treaty (1996); World Intellectual Property Organisation Performances and Phonograms Treaty (1996).

industry, one in three songs in circulation is pirated (www.ifpi.org); for the software producers, the Business Software Alliance claims annual losses in the region of $23 billion in Europe alone (www.bsa.org).



If digital material can be manipulated into ever new shapes of untraceable origin, if every local copy becomes a master of global reach, is it not indisputable that we need a radical shake-up of copyright laws? The legislative proposals of the digital copyright agenda focus on “the industry’s right to say NO in the on-line environment”, as the president of a multinational record company told me about their lobbying efforts during the 1990s.[4] Following the WIPO Internet Treaties of 1996, a combination of three legal measures hope to achieve this: extending exclusive rights (as opposed to entitlements to remuneration), privileging technological locks (securing these rights), and targeting copyright users (as opposed to commercial competitors).

In this article, it is argued that this legislative strategy is fundamentally ill-conceived, and bound to fail. Rather than demanding the right to say NO, right owners should have focused on rewards from an inevitable YES. A small royalty percentage on content traffic revenues generated for Internet Service Providers (ISPs) and telecommunications firms would have been the obvious legal innovation. The resources of existing copyright law should have been targeted at unauthorised commercial exploitation by competitors. It is predicted that the failure of the digital agenda to secure widely acceptable and enforceable exclusivity to content owners will

[4] This study is reported in M. Kretschmer, G. M. Klimis and R. Wallis, “Music in Electronic Markets: An empirical study” (2001) *New Media & Society* 3(4), 417-441.

prove a turning point in the history of copyright. In the near future, investor and creator rights will be treated as separate issues, with the next generation of copyright laws rejecting the current premise of information control.

A whiff of desperation

In some ways, the imminent new European copyright laws are already an act of desperation. In countries where the norms of the digital agenda have been in force for some years, they have not succeeded in stemming the tide of digital copying (e.g. United States). Globally, there are very few successful business models for the on-line distribution of copyright materials. Exceptions include proprietary financial and legal information services (e.g. Bloomberg or Lexis-Nexis, relying on continuous updates often in real time), academic publishers (with a small and highly profitable customer base and often unsatisfactory terms of access), Internet radio stations (which in some jurisdictions have been able to take advantage of blanket non-exclusive licences), and pornography. Mass market consumer offerings, such as the Napster phenomenon in 2000, were driven back underground. Short of turning the Internet into an Intranet of licensed content servers (a solution proving unsustainable in China), copying appears here to stay.

In the conclusion of his recommendations, Enrico Boselli, the rapporteur of the second reading of the Information Society Directive in the European Parliament wrote tersely (14 December 2000): “In the last three years, the information society has evolved in the direction of ever-more advanced solutions which could scarcely have been imagined in 1997, the year in which the Commission’s proposal for a directive was drawn up... It is, therefore, desirable that the directive be adopted as rapidly as possible, since if not it may become prematurely outdated.”

Boselli’s argument sounds like a stand for legislative caution. If the evolution of technology and consumer behaviour is still dynamic, regulatory intervention may need to be cautious, reaching out for a new normative consensus.[5] Instead, the European Parliament recommended a rapid implementation of the Information Society Directive, with a transposition date into national law set for 22 December 2002 (18 months after its adoption by the European Council). In the face of still vigorous disagreement, major national drafters such as the UK Copyright Directorate, and the German Justizministerium had to admit that there was “no prospect” of meeting the date -- even though they had adopted the legislative route of least resistance, focusing on minimal amendments to existing copyright laws. Indeed the transposition date passed with only two EU member states (Denmark and Greece) succeeding in implementing the directive.

The Digital Agenda: where did it come from?

An international policy process that results in norms that threaten to be “prematurely outdated” before their implementation cannot count as an unqualified success. Why

[5] For an opposite view, see J. Reinbothe and S. v. Lewinski, “The WIPO Treaties 1996: Ready to Come into Force” (2000) E.I.P.R. 199-208. The authors praise the WIPO Internet Treaties which “instead of reacting to developments in technology and in the market, prepared the ground for the functioning of the new services of the information society with due respect for intellectual property”. The article is peculiar in dressing up extensions of copyright in the language of progress.

did the digital agenda take the shape it did? The first mass market digital carrier was the music CD launched in 1983. Software fell under copyright law with the US Software Protection Act 1980 which strongly influenced the EC Software Directive of 1991 (91/250/EC). During the 1980s, some software vendors began to experiment with copy protection technologies, but soon even Microsoft abandoned such measures. Widest distribution of software seemed the most promising route to commercial adoption (and thus revenues).

A Green Paper by the European Commission of 1988 ("Copyright and the challenge of technology") usefully reflects the debate at the time. Bernhard Posner, then at the helm of the copyright unit, summed up the Commission's approach: "Creative artists, industrialists and consumers alike share common needs and interests. One cannot live without the other. As the pace of technological innovation quickens, copyright will in future serve the interests of right holders best by generating new resources of remuneration and by stimulating interest in and demand for products, rather than by acting as a restrictive or prohibitive instrument."[6]

Despite these premises, the Green Paper is one of the first policy documents advocating a technological lock as the general counter-measure to digital copying. For example, a binding legal instrument is proposed "requiring the introduction ... of regimes making the possession of digital audio tape commercial duplicating equipment dependent upon a licence to be delivered by a public authority and the maintenance of a register in respect of licensed equipment", backed by sanctions under criminal law.

A life experiment for this policy was the US Audio Home Recording Act 1992 that required a serial copy management system in all digital audio recording devices (DAT), allowing only first generation copies. Additionally, technologies whose "primary purpose" was to circumvent copy restrictions were prohibited. As an early implementation of the digital agenda, the law proved a failure. Music studios routinely circumvented the copy management system. Consumers simply refused to upgrade their homes to DAT equipment, instead retaining unrestricted cheap analogue tape recorders or increasingly experimenting on the personal computer (PC) with audio compression techniques, such as the MP3 standard.

Right holder circles soon came to view the general purpose PC linked to the Internet as duplicating equipment that would respond to closely circumscribed, industry issued copy management systems -- extending the DAT strategy of creating a closed circuit of licensed content. The earlier approach of stimulating demand was abandoned: If the only legitimate content available is copy protected, people will eventually be prepared to pay for it. Transgressors will live to regret their actions as criminals.

The proposals of the Clinton/Gore task force on the National Information Infrastructure (1994-5)[7] accepted this right holder blueprint for a global regime of

---

[6] B. Posner, "Purposes and scope of the Green Paper on Copyright and the Challenge of Technology", pp. 2-8 in F. Gotzen (ed.) (1989), *Copyright and the European Community: The Green Paper on Copyright and the challenge of new technology*, Brussels: Story Scientia, at 8.

[7] Report of Working Group on Intellectual Property (chaired by B. Lehman), Information Infrastructure Task Force, *Intellectual Property Rights and the National Information Infrastructure* (Sept 1995): the NII White Paper.

digital copyright, rejecting the compulsory licenses of cable re-transmissions models in favour of an exclusive right, covering Internet transmission. Criminal sanctions were devised against the importation, manufacture, distribution of circumvention devices, as well as against the provision of circumvention services and the removal of copyright management information. This was later reflected in the language of the WIPO Internet Treaties (1996), requiring contracting states to provide "adequate legal protection and effective legal remedies" against circumvention technologies.

[Textbox] Some memorable digital copyright provisions

Digital copyright protects the technology that protects the law that was to protect creative material in the first place. According to section 1201 of the Digital Millennium Copyright Act 1998 (DCMA, the US implementation of the WIPO Treaties) wilful circumvention of copy-protection measures to gain access or copy can be punished on first offence with a fine of $500,000 or a five year prison sentence, raising on second offence to $1m or up to 10 years in prison. The first DCMA anti-circumvention cases have been played out in court, dealing for example with the publication of the DeCSS code decrypting DVD movies (*Universal City Studios v. Corley* 2001) or a Russian program circumventing copy protection on Adobe's electronic book software, a criminal case (*United Stated v. Elcom Ltd.* 2002).

The European Information Society Directive explains under Recital (48) that devices or activities "which have a commercially significant purpose or use" should not be deemed to be "primarily designed" to enable or facilitate circumvention. Only the latter, member states must prevent under Article 6(2). Thus the general purpose PC should remain on the European market. European criminal sanctions are generally set lower. The UK draft[8] (s.296ZB) provides for a fine and/or up to two years prison if circumvention affects "prejudicially" the right owner's interests. The new German law[9] (§108b) provides for a fine, or up to three years imprisonment if circumvention takes place for commercial gain.

The WIPO Internet Treaties of 1996 expressly permit the development of "new copyright exceptions and limitations that are appropriate to the digital environment" (Agreed Statement to Article 10). "Fair use" exceptions generally allow certain user activities without the right owner's consent. Under the WIPO Treaties, existing exceptions, such as the German *Schranke* of "illustration for teaching and scientific research" (§52a)[10], or the UK "fair dealing" defence of "criticism or review " (section 30), can be carried forward into the digital environment if they conform to a so-called three-step-test in that they are confined to (1) special cases, which (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interest of the authors (Article 10, paragraph (1)). However, with digital right management technology almost every exploitation can be normally licensed, and

---

[8] Issued for consultation 7 August 2002.

[9] Passed 11 April 2003.

[10] The proposed new §52a became the main battle ground of the revised German law. Academic and educational publishers placed large advertisements against a draft that permitted the inclusion of published works on school or university intranets. The Christian Democrats (CDU/CSU) demanded the deletion of §52a altogether. In the event, the exception was retained but limited to "parts" of works for scientific research, and "small parts" for educational use.

any unauthorised copy for teaching, research or review may be against the economic interests of the right holder.[11] Thus the scope of possible exceptions is very narrow. Additionally, it is not clear how the user can take advantages of exceptions if the copyright material is already technologically locked.

The European Information Society Directive forgoes straight away the already limited opportunity to explore new user rights in the digital environment. It prescribes an exhaustive list of 20 possible exceptions, member states of the European Union may introduce or maintain. No new exceptions can be introduced nationally, if the information society should develop unexpected services! Only one exception is mandatory: temporary reproductions as "integral and essential" part of a technological process (Article 5(1)). This covers so-called "cache" copies which Internet hosts make in the process of transmission or PCs in the process of accessing web sites. Thus Internet Service Providers do not have to acquire licences for the material accessed through their services.

If copy protection technologies prevent users from exercising their statutory freedoms, say if no non-encrypted version of a scientific journal article is available on the market, the Directive allows member states to overrule copy protection through appropriate measures (Recital 52) -- provided the encryption is not part of an on-demand service (Article 5(5)). There is no "fair use" for copy protected on-demand services, full stop. When a person who thinks she should benefit from a copyright exception, is unable to access a work, she "may issue a notice of complaint to the Secretary of State" who may issue such directions "to the copyright owner as appear to the Secretary of State to be requisite or expedient" (proposed new section XXX of the UK draft implementation). The new German law includes a similar provision for specific benefits available to social, charitable and educational institutions (§95b). In practice, it can be predicted that these cumbersome procedures will be bypassed. Users may simply take advantage of unauthorised copies, technically turning into pirates.

Under §53 of the German draft, digital private copies for domestic non-commercial use will remain permitted. Existing UK law is more favourable to the music industry, an important exporter, and does not have such a general exception. The German draft does not explain how private copying, for example of a CD or DVD, should take place where the work is copy protected. Exclusive rights protected by a technological lock can override these general user freedoms. However, copyright owners will be required to clearly label copy protected products, perhaps facilitating informed market choices by consumers.

The UK draft amendments include a particularly draconian provision which is not required by the Directive. According to the proposed new section 107(3A), a person

---

[11] The three-step-test is taken from Article 9(2) of the Berne Convention where it defines permitted exceptions to the reproduction right *only*. The compulsory licence available under Article 11bis(2) (communication to the public, including by broadcasting) of the Berne convention would not appear to pass the WIPO hurdle. The compulsory licence available under Article 13(1) (reproduction of musical works in sound recordings) seems inconsistent even on Berne's own terms. Indeed the European Parliament in an unsuccessful amendment to the Information Society Directive tried to narrow the three-step-test even further. For good analyses, see Th. Heide, "The Berne Three-Step Test and the Proposed Copyright Directive" (1999), E.I.P.R. 105-109; B. Hugenholtz, "Why the Copyright Directive is Unimportant, and Possibly Invalid" (2000), E.I.P.R. 499-505.

communicating a work to the public without consent of the copyright owner, commits an offence if the owner's interests are affected "prejudically". This would appear to cover private individuals participating in P2P file-sharing networks because large numbers will have access to unauthorised copies stored on domestic PC hard discs, affecting the right owner's ability to sell legitimate copies. Again, the sanction can be "imprisonment for a term not exceeding two years or a fine, or both". Kazaa users be warned.

[end of Textbox]

A legitimacy gap has opened

Copyright law always has limited the amount of control right owners can exercise via the concept of exclusive rights.

First, right holders have never been able to fully prevent access to the works they own. In the phrase coined by US scholar Jessica Litman in an early polemic against the digital agenda, there is no "exclusive right to read" (1994).[12] Similarly, under traditional copyright provisions (such as the "first sale" doctrine, or the "exhaustion of right" concept), right owners often cannot prescribe what a user can do with the copy of a work after sale. The user may bin a bad book, pass on a good CD, or re-sell a piece of merchandise. In many countries, there are compulsory licences for radio broadcasts and cable re-transmission of copyright works.

Secondly, certain user freedoms are explicitly endorsed by copyright laws, such as copying for the purpose of criticism or review, copying for the purpose of scientific enquiry or personal study, copying for the purpose of reporting news. For example, the US has a flexible multi-purpose concept of "fair use" covering activities that can be undertaken without the consent of the copyright owner; the UK has some closely circumscribed "fair dealing" defences; Germany relies on the strange concept of *Schranken* [literally "barriers"] to owner controls.[13]

Thirdly, under all copyright laws, protected works eventually fall into the public domain. This may take a long time for works written by young creators, such as Stravinsky's *Sacre du Printemps* of 1913 that will stay in copyright until 2041, 70 years after the composer's death. But eventually, every product in the creative domain can be copied, adapted and distributed by anybody who cares to effect such circulation, leading to significantly cheaper prices for competing copies of classic works.

---

[12] J. Litman, "The Exclusive Right to Read" (1994), 13 *Cardozo Arts & Ent. L.J.* 29

[13] It has been argued that owner control is also balanced by its limit to the specific "form of expression" (e.g. *Eldred v. Ashcroft*, 537 U.S. (2003) S.Ct., majority opinion delivered by Ginsburg J, at 6). According to this reasoning, copyright does not extend to ideas, procedures, methods or mathematical concepts (cf. TRIPS, Art. 9(2); WIPO Copyright Treaty, Art. 2), and thus does not unduly restrict third party expression. This doctrine is muddled either way, because it is difficult to conceive of an idea that is not expressed, or because copyright extends in practice beyond "actual language or notation" (as Laddie, Prescott and Vitoria hold: *The Modern Law of Copyright*, 3rd ed., 2000, at 98).

The digital agenda blatantly attacks this trade off. Recital (3) of the Information Society Directive acknowledges fundamental principles of law, "especially of property, including intellectual property, and freedom of expression and the public interest". However, in the text of the Directive, the principles of freedom of expression and public interest (which underpin the traditional copyright exceptions) are largely handed over to the right owner. Under the digital agenda of exclusive rights, research of material made available via on-demand services can be contractually prevented by the right owner (Article 6(4)). This amounts to the possibility of a perpetual copyright. If the argument in this article is right, this outcome will not happen in practice, either because right owners will make more acceptable licences available, or because copyright user will simply ignore the licensing terms. This however begs the question whether a provision that turns fundamentally desirable engagement with cultural materials into pirate activity can be acceptable law.

In the second half of this article, some principles will be introduced that should guide the development of the next generation of copyright laws.

Creators and Investors: an unholy alliance

Property claims can be defined negatively as rights to exclude. Access to property becomes conditional on the discretionary decision of the owner. Property entails the right to say NO. It is widely accepted in economic theory that property rights are justified if they prevent a so-called "tragedy of the commons".[14] For example, fish stocks held in common are liable to deplete because there is no individual owner who has an incentive in their preservation. From a public interest perspective, property rights should not be more far-reaching than needed to achieve this purpose. In the case of intellectual property, in particular, they should not encroach on others' "freedom of expression" more than is necessary to incentivise creative expression in the first place.[15] A second family of property justifications comes from John Locke's notion of men's "natural" entitlement to the fruit of labour, and from the Hegelian notion of rights as the expression of personality.[16] The form and scope of acceptable rights under these premises is somewhat elusive. In particular, it is not clear how far other people's expression can be justifiably limited by "natural" property claims.

In a typical response to the seminal Commission Green Paper of 1988 "Copyright and the challenge of technology", Margret Möller, a civil servant in the German Ministry of Justice, attacks the concept of copyright as a balance of property and user interest. Among other things, the Commission evaluated the effect home-taping had on the audio-visual industry -- as any serious policy maker should. The Green Paper argues in favour of preserving private copying exceptions off-set by a compensatory levy scheme, a new rental right (introduced with the 1992 Rental Directive, 92/100/EC) plus a technological copy lock on digital audio equipment. But according to the author lobby, this already was far too permissive.

---

[14] The phrase stems from G. Hardin, "The Tragedy of the Commons" (1968), 162 *Science*, 1243-1248.
[15] For a widely cited incentive analysis, see W. Landes and R. Posner, "An Economic Analysis of Copyright Law" (1989), 18 *Journal of Legal Studies*, 325-366.
[16] John Locke (1690), *Second Treatise of Government*, chapter five; G. W. F. Hegel (1818-1831), *Vorlesungen über Rechtsphilosophie*.

Möller: "[The Commission] reflects on the admittedly high rate of home taping of protected works (97%) and on the damage to the rightowners. Insofar, the Commission is of the opinion that home taping off-air even benefits the rightowners because they become popular by it and are more in demand. The Commission then speculates on how often privately copied phonograms or videograms are used for listening or viewing. Needless to say that all these reflections are more or less irrelevant from the point of view of author's rights."[17]

A trade-off between the audio-visual industry, consumer electronics and consumer interests may be appropriate under the Anglo-American copyright approach but not under the European concept of the author's intrinsic personal and economic links to her work. In the notorious phrase of Prof. Schricker, then director of the influential Max-Planck-Institute for Intellectual Property in Munich, by engaging in economic evaluation, the 1988 Green Paper shows "un droit d'auteur sans auteur", author's rights without authors. Thus the absolutist conception of author rights ties in with the exclusive rights demanded by the digital agenda.

The rhetoric of property rights contributes little to determining the appropriate scope of copyright. It glosses over fundamental differences of interest at the heart of claims to the fruits of creative endeavour. I shall now unbundle the concepts of creator and investor which have formed an unholy alliance in modern copyright law. The argument is presented from premises which attempt to capture widely held views in modern societies. Then conclusions are drawn on principles for a reform of copyright law.

Thesis 1: There is no unified category of right owners, covering creators (authors) and investors (producers). **Creators** have four main interests:

to see their work widely reproduced and distributed
to receive credit for it
to earn a financial reward relative to the commercial value of the work
to be able to engage creatively with other works (in adaptation, comment, sampling etc).

Regarding the structure of author rights, this leads to three conclusions:

The creator has little to gain from exclusivity (it prevents widest distribution; it prevents access to other works; it does not ensure financial reward)
The creator has little to gain from transferability (under normal contractual practices, particularly in the media, the creator will be bought out in a one-off commercial transaction)
The creator has a lot to gain from the so-called *droit moral* (a kind of creative trade mark, ensuring integrity of origin).[18]

---

[17] Margret Möller, "Author's Right or Copyright", pp. 9-20 in Gotzen [note 1 above], at 18.

[18] The *droit moral* was introduced with the Rome revisions (1928) of the Berne Convention (1886), the cornerstone of the international copyright regime: Article 6*bis* provides for the right to claim first authorship of a work (paternity right) and the right to object to any distortion, mutilation or other modification which would be prejudicial to the honour or reputation of the author (integrity right). The

In the past, these wishes could only be met under considerable economic inefficiencies (mainly caused by the costs of administrating rights). Digital technology offers new possibilities of tracing use and rewarding the creator. Transforming collecting societies into regulatory bodies answering to society at large (not only right owners) may be the best way forward.[19]

Thesis 2:
Investors want exclusive and transferable property rights, to extract maximum returns from their investments. Exclusive rights, however, come at a cost to society.

- Useful works become more expensive than they would have been (this is a direct consumer loss).
- Works become available for creative engagements only on the terms of the right holder (this is a loss of cultural diversity, innovation and critique).
- Automatic returns from a backcatalogue of works subsidise existing large right holders, creating an entry barrier to the creative industries (this is an anti-competitive effect).

Regarding the structure of copyright as property right, this leads to one conclusion:

- Investors should be granted exclusive terms of protection only as a response to market failure: i.e. where without the incentive of exclusivity, a work in the "useful arts" would not be produced at all.

The normal exploitation cycle of cultural products suggests that a short exclusive term would be sufficient. If the first statutory copyright, the English Act of Anne of 1709/10, granted a term of 14 years (renewable once), the faster dissemination and exploitation environment of digital technologies would suggest an even shorter term.

Star creators
Many creators have demanded control over their artistic output which, they say, can only be ensured through exclusive rights. In commercial practice, however, artistic control is only available to a few star creators whose bargaining power is sufficient to benefit from the transferability and exclusivity of rights. The interests of star creators are thus similar to investor interests. They benefit disproportionally from the current copyright system:

Figures provided in the 1996 UK Monopolies and Mergers Commission Report on the British Performing Right Society (PRS) show that 80% of author members earned less than £1000 from performance royalties for 1993 distributed in 1994; and that 10% of authors received 90% of the total distribution. Similarly, according to German

---

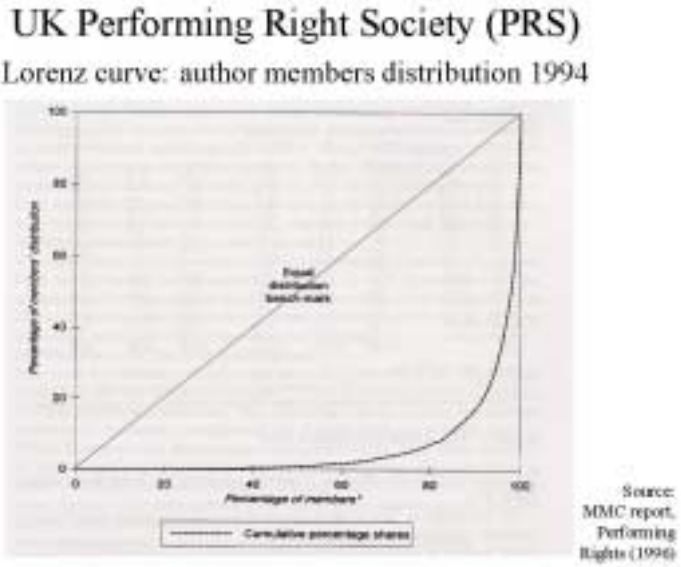
droit moral is distinct from copyright as an economic property right in that it cannot be transferred or waived.

[19] I have argued this point in detail in M. Kretschmer, "The Failure of Property Rules in Collective Administration: Rethinking copyright societies as regulatory instruments" (2002), E.I.P.R 126-137.

music copyright society GEMA's yearbook 1996/7, 5% of members received 60% of the total distribution. I have calculated that in Germany and the UK between 500 and 1500 composers can live substantially of copyright royalties. There are indications that such winner-take-all markets are prevalent in most cultural industries. For the US, Tebbel has claimed in a 1976 study that only 300 self-employed writers can live of the copyright system.[20] For 90% of authors, the copyright system does not provide a sufficient reward. The creative base of a modern society is supported by other means.

Early in their careers, many creators wish to become known by all available means, including being copied without permission. Piracy is welcome if source credits are given. Once creators have become famous, they typically perform a U-turn. Their monetary interests suddenly can compete with investors, aligning both in their defence of exclusive rights. "Take a stand for creativity. Take a stand for copyright." implored a petition to the European Parliament signed by 400 recording artists in 1999. "We make our living through our music. The music that we create touches the lives of millions of people all over the world. Our creativity and our success depend on strong copyright protection. We now need your help."[21] This dubious harmony of interests remains the official industry line in its piracy campaign: "Ultimately, if creators do not get paid, you will not get music" (John Kennedy, President and Chief Operating Officer, Universal Music International, Letter to the *Financial Times*, 23 January 2003).[22]

Lorenz curve[23]



[20] J. Tebbel, *The Book Business in the US* (1976), The Modern World: Reactions Vol. 3.

[21] Petition "Artists Unite for Strong Copyright", led by Jean Michel Jarre with the assistance of IFPI (19 January 1999), signed by among others Boyzone, the Corrs, Robbie Williams, Tom Jones, Eros Ramazotti, Mstisalav Rostropovich, Barbara Hendricks, Die Fantastischen Vier, Aqua and Roxette. Note that Robbie Williams recently declared that Internet music file sharing is "great" (MIDEM music trade fair, Cannes, January 2003).

[22] The German publishers' campaign against the copyright exception for teaching and scientific research (§52a) argued: "If copies of books are free, nobody will buy originals. If nobody buys originals, nobody will publish books or journals. The result: If nobody publishes, Germany's thinkers will soon have to look for a different employment" (Advert *Frankfurter Allgemeine Zeitung*, 31 March 2003).

[23] *Performing Rights*, UK Monopolies and Mergers Commission, HMSO Cm 3147 (1996).

Future gazing

By advancing the proprietary conception of copyright to its limits, the digital agenda is leading to a re-examination of the premises of copyright. We are at the end of a period of expansion, stretching back to the Act of Anne, the author laws of the French revolution, and the great intellectual property conventions of the late 19th century.

In his dissent in *Eldred v Ashcroft*, Supreme Court judge Breyer follows a brief by a group of economist, including five Nobel laureates, suggesting that a copyright term of life plus 70 years provides 99.99% of the value of protection in perpetuity; i.e. virtually perpetual copyright economically speaking.[24] Summing up his constitutional analysis of the 1998 Sonny Bono Act extending the US copyright term by 20 years, Breyer concludes: "This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public."[25]

Within a generation, I predict that Judge Breyer's views will have become the new orthodoxy; and the laws of the digital agenda a temporary aberration. Copyright laws will change, so as to be unrecognisable. There will be short burst of exclusivity, encouraging fast exploitation, followed by a remuneration right for the life time of the creator. Criminal law will retreat to the traditional domain of unauthorised or deceptive commercial exploitation. As we reflect, digital copyright at the turn of the millennium will have marked the end of an era.

---

[24] *Amici Curiae* brief of George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser (20 May 2002).

[25] 537 U.S. (2003); Breyer, J., dissenting, at 26.

Copy control symbol for CDs (IFPI)

Optional logo informing consumers that a CD incorporates technology to control copying (September 2002)

April 2003, Martin Kretschmer (mkretsch@bournemouth.ac.uk)