

COMMENTS

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Public sphere: Exploitation /Divulgation

Distinguishing economic rights from moral right : how far?
Public sphere approach is consistent with the rationales of
the right to divulge (moral right)

EXPLOITATION

- (1) exploitation is not purely an economic concept and is not defined by the possibility to trade the work on a market;
- - (2) exploitation is rather related to any activity that disseminates the work to the public, which includes a discussion on the public/private divide;
- - (3) relevant means of such dissemination needs to be defined, without being reduced to an exhaustive list of acts of exploitation;
- (4) the object of the circulation is the work as a communicative act, not as a commodity or as an information (which brings us back to the beginning of our demonstration).

RELEVANT CRITERIAS FOR EXPLOITATION ?

Actual sensitive « contact » with what « makes » a work (a work as work)

And/or ?

The use of the economic value of the work

- *We believe that "exploitation" of musical works thus refers to the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works”*

SENSITIVE CRITERIA : WORKS AS A REFERENCE ? HOW FAR ?

- **Exploitation :Yes ?**
- Audiovisual platforms or *search engines are benefiting from the value of copyrighted works that constitute their very activity.*
- **Subject to copyright : No**
- Of course copyright should not cover all postings made on social networks *as some might be only referential* or not constitute an act of circulation of the work.
- Most of the times, content appearing on social networks are taken from other websites locations, through hyperlinks or references. *For that reason they should be left out of copyright control for they only consist in references to copyrighted works already in the public sphere.* The work is not re-communicated to the public but the user engages in the public discussion the work initiates by *referring others to where it is located* on the web.
- Search engines results should avoid copyright control as they indicate references to works but do not communicate them as works.

SENSITIVE CRITERIA : WORK AS A REFERENCE ? HOW FAR ?

- **Exploitation : May be ?**
- *Hyperlinking to a copyrighted work will in most cases not amount to an act of exploitation, as an hyperlink only sets up a reference to the location of a work, an indication where to find the work. The hyperlinked work is already part of the public sphere and the act of referring thereto does not amount to a new circulation, even though it may contribute to launch new public discussion about the work. Such analysis is not induced from the technique of hyperlink but from its context. Therefore **in some cases**, it may be considered that the hyperlinks are a way to exploit works and to make them available to the public sphere.*
- **Embedding /frame : no positive act from the user to get to the work (no clic) : by default the work can be seen, listened to : the criteria of the cultural consumption is fulfilled +capture of the economic value**

ECONOMIC VALUE OF THE WORK: WHO IS RESPONSIBLE ?

- Considering the communication as a whole : who bears the burden of authorization/remuneration ?
- Platforms *contribute to the circulation* of the work and intervene as intermediaries that publish the author's speech for the public to get access thereto.
- SBS : It results in broadcasters being considered as not making an act of public communication despite the undisputed fact that they economically exploit copyright works in their programmes.
- Initiating the communication ?
- Contributing to the communication (technical/economic intervention)
- Being the the one that enters into communication with the public (end of the chain)
- All of them ?

WHAT IF ?

- Replacing the trilogy : reproduction/communication to the public/distribution by one single « exploitation » right
- New line between :
 - reception of the good for permanent use /marketing a good embedding a protected work
 - access and reception as a ephemeral experience / providing a service or an experience of a work
 - + exploiting a derivative work

DERIVATIVE EXPLOITATION

- *True, not all transformative uses of a copyright work should be covered by copyright and the line might be thin between the derivative works exploiting an existing creation (eg, an adaptation of a literary work into a motion picture version, a remix of a musical work, a translation of a work into another language...) and mere reference to works, follow-on innovation and creation or free expression.*
- *But there is in my view a difference between the screen adaptation of a novel, that is faithful to its plot, characters and even makes literal copying of parts of its text, and an integration of a work into a new creation for parody, critique, appropriation art or experimentation (as in musical remix).*
- *A relevant criterion could be, as advocated by L. Bently, that “‘where as a result of the adaptation or arrangement, a new work with a substantially different meaning, or of a **significantly different genre**, is thereby created”, the ‘adaptation’ would not be infringing.*
- **What about the adaptation of a novel into cinematographic work ?**

DERIVATIVE EXPLOITATION

- Shall we change the perspective for infringement ?
- Not taking into account the resemblances but the differences ?
 - Quantitative approach ?
 - Qualitative approach (what about the Richard Prince case under EU law)

WHAT IF ?

- Replacing the trilogy : reproduction/communication to the public/distribution by one single « exploitation » right
 - What about the transitional period ? (contracts based on the distinction between the reproduction/communication to the public)
 - What about the expression of « transfer », licence of the « the » right :
 - Contractual delineation of the acts subject to the assignment
- Private copying outside the scope of the “copyright”: no more compensation
- Bernt Hugenholtz proposition would be irrelevant (except for exchanges?)

WHAT IF ?

- If the value of the work as a data and/or a work is withdrawn from the copyright
 - Claim for new neighbouring rights : press publishers
 - Activating the sui generis right (any work can be seen as a database): subject to substantial investment
 - What about the actual neighbouring rights of the producers (the phonogram is the file)
 - Locking the access to the file by TPM/ contract without any condition as to the originality of the work, term...
 - In order to achieve the result expected the model would need to revisit also the neighbouring rights and forbid TPM restrictions when no copyright is granted (while for the time being the existence of the copyright is only a condition of a specific legal protection)

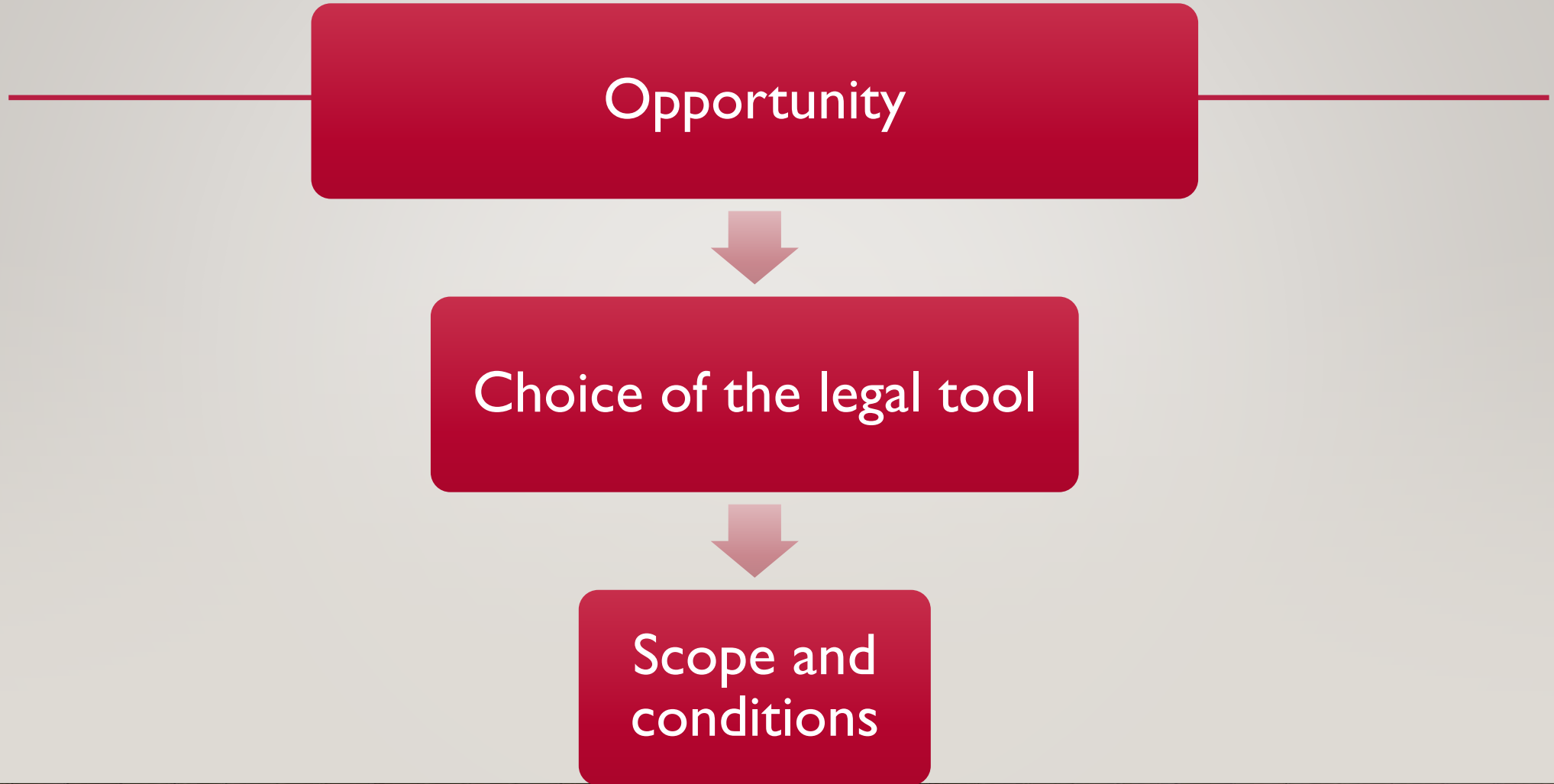
BERNT HUGENHOLTZ AND & JOÃO PEDRO QUINTAIS



TOWARDS A UNIVERSAL RIGHT OF REMUNERATION: LEGALIZING THE NON-COMMERCIAL ONLINE USE OF WORKS

- Starting point of the paper :
 - the exclusive right that has always been an essential feature of copyright has **become practically unenforceable** and is losing moral ground but the rights of creators to fair remuneration retain public support.
 - unauthorized **content sharing** by individual users on a substantial scale is an inherent feature of the open internet, and will not disappear.
- Project :
 - It proposes a legal system that legalizes such exchanges while guaranteeing fair remuneration to creators and other right holders.
 - *universal* remuneration scheme that would generally allow reproducing and communicating works of authorship to the public over the internet, **by individual users acting without commercial purpose, subject to a right of remuneration, while eliminating secondary liability for facilitating such acts.**

THREE LAYERS OF CRITIQUE



OPPORTUNITY ?



A TASTE OF THE GOOD OLD 2005 « LICENCE GLOBALE »

- Not a new proposal
- Same assumptions as the one for « global license » in France in 2005-2006
 - Same grounds
 - Same system : ISPs, flat fee, CMO
- Always discussed by the Quadrature du Net & Philippe Aigrain but only for decentralized non-market exchanges (P2P technology only/not applicable to content distributed by platforms)



A TASTE OF THE GOOD OLD 2005 « LICENCE GLOBALE »

- Why it was finally rejected despite the huge perspective of incomes for RH ? Are RH masochists ?
 - The non-commercial exchange of files is competing with the services that exploit copyright for profit
 - Joelle Farchy : No possibility to make the cake bigger (flat fee-stable amount of money to be shared by rightholders) : no incentive to create and risk on big productions because the only chance of gain is to fight against the other rightholders to obtain a share of the cake
 - Pb of recouping the investment on separate windows of exploitation (time) and markets
 - No agreement on the level of « fair compensation » between ISPs and right holders
 - Difficult to achieve at a national level when many works subject to exchange come from abroad (mostly US) and risk of contradiction with the international instruments

IS THE MARKET MORE READY NOW ?

- On the consumers' side
 - The question of the willingness to pay for a universal remuneration : will the user be willing to pay for **both the « licence » + services ?**
 - Is it fair that every consumer pays for the remuneration even if he doesn't use the works (it amounts to a taxation)
 - If it's an optional payment (first solution of the former global license), risk that many people escape it
- On the distributors' side
 - Would not that hinder the new services based on exclusive right system ?
 - *« The spectacular market success of recently introduced all-you-can-eat content services, such as Spotify and Netflix, illustrate the need for non-exclusive approaches towards copyright. »*
 - Netflix and Spotify are based on the assignement of exclusive rights of the producers : difference between B2B relation (exclusive rights) and B2C relationship (**use** against payment of the file but no assignement of rights)
 - Risk that the mutualized exchange of work substitute to economic models of distribution

IS THE MARKET MORE READY NOW ?

- On the RHs' side
 - Still willing to rely on exclusive rights
 - Even the performers have changed their mind and after a strong lobby succeed to increase the level of remuneration on the streaming services (Loi Création) by a model copied-pasted from the rental right : remuneration that cannot be waived
- On the side of debtors (ISPs, platforms)
 - No general agreement on the level of compensation
 - ISPs try to maintain a low price to keep/compete on the market (see Free contracts for internet access / box and or mobile) + offer triple play or quadruple play
 - ISPs launch added-value content to attract people and either negotiate exclusive distribution of preexisting works or produce their own content (see Orange model)

**Direct sharing of revenues
between different categories of
RH : not depending on market
power but fixed by the law (higher
% for authors and performers)**

**No expectation of any increase of
revenues globally**

**Difficulty to differentiate different
markets of exploitation on
Internet**

Avoiding the question of liability of the
intermediaries: collect the
remuneration on behalf acts committed
by their clients

Difficult to keep an economic model
based on exclusive right assignment if
the global remuneration system is
substitutable of the service

Problem of the « source » of the
exchange

LEGAL INSTRUMENT



LEGAL TOOL ?

- More a question of understanding than a critique
 - List of different instruments (voluntary CM, ECL, Mandatory Licence, Statutory Licence and Tax system)
- In the end, what is the choice ?
 - P. 15 : « However, in light of the limited scope available for statutory licensing in international law, a legalization model of this type will likely affect the nature of the exclusive rights of reproduction and communication to the public, transforming them (for the licensed uses) into non-exclusive rights of remuneration or compensation. Thus, in contrast to the legal structures discussed above, a statutory licensing model would need to comply with the ‘three-step test’ enshrined in EU law and various international treaties. Such issues of compliance are, however, outside the scope of this paper. »
 - P. 21 : Assuming the universal remuneration right is designed as a compensated limitation to the rights of reproduction and communication to the public in the InfoSoc Directive, it would make sense to design it as a fair compensation right benefiting the rights holders identified in Articles 2 and 3 of the directive.

COMPENSATED LIMITATION ?

- The model seems to be the private copying levy system : exception + fair compensation
- Need for an introduction of an exception for « private & non-commercial sharing » ?
- What are the consequences of such an introduction on the other exceptions ?
 - Will they remain ?
 - Will the system of compensation remain ? (what about the copy levies for private copying)
- As it is an exception or a limitation the three Step test discussion cannot be avoided

IF NOT A MANDATORY EXCEPTION

- What about the « universal » scope: territoriality ?
- If the geographical extension is voluntary-based : no agreement of the american studios
- If ECL : they may opt-out
- Mandatory CM might be seriously at risk (see the pending question before the ECJ as to the out-of-print system)

SCOPE AND CONDITIONS



« NON-COMMERCIAL » EXCHANGE

- « Given the scheme's underlying premise, i.e. that copyright is no longer effectively and efficiently enforceable in the online world, it would be disproportional to extend it beyond the digital realm. The scheme would, therefore, only apply to **content exchanges** over the Internet, including other interconnected wired or wireless networks. »
- File-sharing is still the main issue : personal use might otherwise not be covered by any exclusive right (see Dusollier) and should not lead to compensation so it would be unfair to pay a price for something that shall not be covered by copyright and is not an extra-service with added value
- Is file-sharing the main challenge when distribution is based on access to remote services ?
 - If I can exchange file, it means that I could previously acquire and/or download this file
 - But in the current business models, users are subscribers of services to which they only access from a remote computer and have no ability to « exchange » the file.
 - The sharing risk to be dried up by the legal/technical impossibility to get access to an exchangeable file.

« NON-COMMERCIAL » EXCHANGE

- Thus, the concept of *'non-commercial' use should refer to online activities carried out by individuals for personal enjoyment of works and outside the market sphere*
- Are File-sharing and Streaming (to whom) **personal enjoyment** ?
- Is it a subjective criteria (the type of the person : natural versus legal)?
 - Not including legal bodies acting non-for profit (libraries...) which are key to the non-market access to the works
- An objective criteria ? The nature of the activity : for profit/non-for-profit ?
- What about the intervention of a commercial intermediary to facilitate the exchange ?
Would it be incompatible with the licence (Quadrature du Net model) ?

« NON-COMMERCIAL » EXCHANGE

- *The concept should exclude online uses of a work against profit, within the context of a business activity of an individual, or directed **at a commercial advantage or monetary compensation**. For example, such a license would not cover “the use of the work in combination with ads, publicity actions or any other similar activity intended to generate income for the user or a third party”. The proposed scheme would also not extend to content services provided by entrepreneurs.*
- Monetary compensation ? What about access to personal data : is it considered as a commercial advantage ?
- What if the content is being posted with no economic intent by the individual on a platform (Youtube, Facebook) ?
- Limited to certain P2P instruments : what if they earn money ??

« NON-COMMERCIAL » EXCHANGE

- To be sure, the notion of ‘commercial’ is a much narrower concept than – and should not be confused with – the notion of ‘economic’. Whereas non-commercial acts of file sharing or streaming would be exempted under the proposed scheme, they would likely have an economic impact.

➤ Three-step-test again...

WHAT ABOUT THE SOURCE ?

- In sum, a more proportionate approach would be to limit the model to traditional categories of copyright and neighboring rights protected creation: music, text, visual and video.
- What about the added-value, transformative works ?
- How do you organize the sharing of the revenues when the work is subject to parodies or non-compensated exceptions but still attract users ?

WHAT ABOUT THE SOURCE ?

- Surely, *the scheme should only apply to works lawfully published or made available online. It would not however impose a requirement of lawfulness of source of the copy* of a work for its subsequent online use by individuals, or else the model's aim of general legalization would be defeated.
- How do you do that ? Presumption of lawful publication ?

WHO WILL PAY WHAT ?

- *Broadband ISP's the obvious candidates : deep pockets*
- *Other possible candidates are content sharing platforms such as YouTube or Facebook. less well-positioned to transfer the costs of the license to the end users, since they usually do not have a direct billing relationships with consumers. In addition, many platforms have entered into collective licensing agreements. All this, makes these platforms less likely candidates.*
- *What about those licensing agreements (we still don't know on which legal basis) if the use of the users is covered by the license ?*
- *Is it a EU-wide system ? How deal with the pricing issue as regards the potential competition between ISP ? How will they share the revenues at the EU level ?*