

Reconstructing the Economic Rights: *Taking Copyright Seriously*

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Copyright mismatch in the digital era (digital machine)

All-encompassing reproduction right:

- the numerous temporary copies (for ex. on the RAM memory)
- the transitory and cache copies on the Internet servers and routers
- the non-transitory copies made by the Content Delivery Networks (CDNs)
- the copies made for indexing data
- the copies for text & data mining
- the copies for checking mistakes and plagiarism, etc.

How to reconstruct copyright

Taking copyright more seriously!

- Putting the fundamentals of © at the core:
 - Economic rights are there to remunerate for the exploitation: role for the economic analysis
 - Commission's Dec. 2015 Communication: new developments
“put into question the ability of these rights to transpose into the online world the basic principle of copyright that acts of exploitation need to be authorised and remunerated”
 - Other basic principle: a work is an elaborate way for speakers to communicate with an audience:
 - Need to refocus copyright on its core communicative value (nexus between authors & audience)

Charles Clark

**"THE ANSWER TO THE MACHINE IS IN THE
MACHINE" AND OTHER COLLECTED WRITINGS**

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Rather: ***“the answer to the machine
is in the mechanics of copyright”***

Asymmetrical reconstruction

- Communication to the public right:
 - The communicative dimension (the « public ») is already embedded in the notion
 - Some economic parameters in CJEU case law
 - *Light touch fix*: strengthen the economic analysis (by adding a double market test)
- Reproduction right:
 - No « public » and formalistic interpretation
 - *More sweeping fix*: by relying on the communicative nexus, develop an adequate infringement test: requirement of ‘use as a work’

Right of communication to the public

- Parameters for the CJEU:
 - Any (re)transmission: technological neutrality
 - Two main conditions:
 - An « act of communication » : «indispensable role » of the user (action or intervention)
 - A « public »: quantitative criterion (minimum)
 - Two additional parameters:
 - A «new public »: broadening the audience
 - The user motive: «profit-making nature » = to attract consumers (“not irrelevant”)
 - Three parameters have an economic dimension:
 - For-profit motive + public + *new* audience
 - Thus, CJEU inclines towards economic view

Reconstruction by adding the double market analysis

- Impact on the market of the work
 - Fair use Art. 107 © Act: « *the effect of the use upon the potential market for or value of the ©ed work* »
 - Whether « competing substitute » and deprivation of « significant revenues » (>< « some loss of sales »)
- Impact on the market of the user's service
 - See *Reha Training*: when impact on the « standing and attractiveness » of the service, « thereby giving it a competitive advantage »
 - Test: value extraction that can be passed in the price
- For the « border(on)line cases only!
- Objective economic analysis (>< « profit-making nature » of the user's act)

Application: hyperlinking (1)

- No communication to the public: no “new public”
- But additional conditions for CJEU:
 - *Svensson*: no TPM circumvention
 - « where a clickable link makes it possible for users ... to circumvent restrictions put in place by the site on which the protected work appears » then « new public » (§31 *Svensson*)
 - *BestWater*: authorization prerequisite
 - “in so far the copyright owners have authorized this (i. e. the first) communication” (§18 *BestWater*) on the linked-to site
 - It therefore seems that in the absence of a first authorization, there is direct liability by communicating to the public
- Then: posting hyperlink = direct infringement
 - Should be a TPM violation or a case of indirect liability

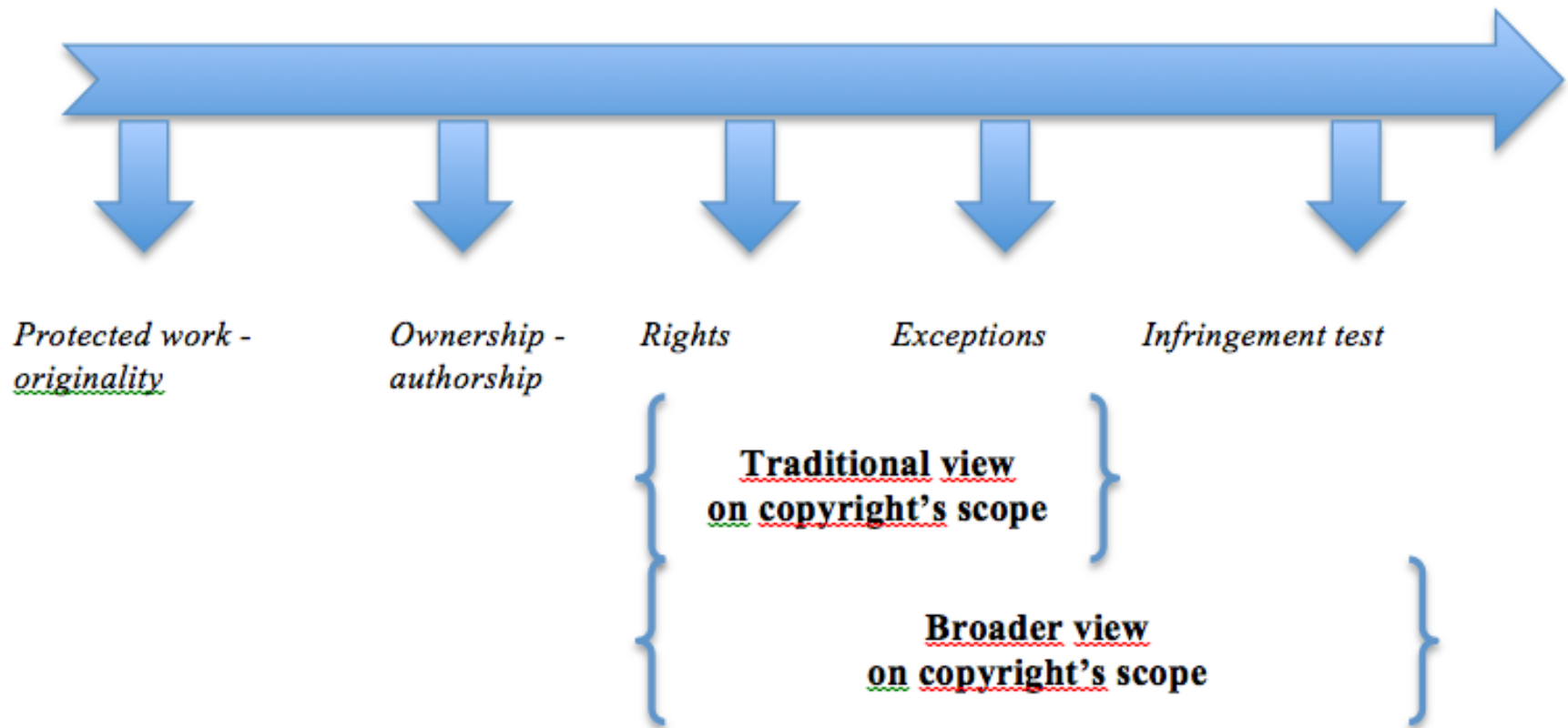
Application: hyperlinking (2)

- With *GS Media* (Sept. 2016): the profit-making nature of the act of transmission is core
 - Higher importance: *“it is relevant that a ‘communication’ (...) is of a profit-making nature”*
 - Positive (>< double negation previously: « it is not irrelevant »)
 - Enhanced role of the circumstances :
 - When link posted for “the pursuit of financial gain” presumption of knowledge as to the illicit nature of the linked-to content → commercial transmission = communication to the public
- Economic parameter more central than in *Svensson/BestWater*
- But confusion between direct and indirect liability

Right of reproduction

- Delineation of the right (CJEU case law):
 - No reference to a “(new) public”
 - No condition of economic/commercial/for-profit nature
- Economic reasoning is only marginal + at the level of exceptions:
 - With the numerous copies on Internet, need to exonerate some temporary copies without an independent economic significance + other conditions (art. 5(1))
 - Exclusion of some reproductions for “non-commercial purposes » (art. 5(2)(c), (d) + 5(3) (a), (b)...))
- The acts of reproduction are less directly linked to the true exploitation of the work
- Yet, ubiquitous technical/digital copies

Scope of protection: includes the infringement test



Adjust the infringement test

- Infringement test: requires i) substantial similarity + ii) copying (presumed if access is proven)
- Proposal to add a requirement to ‘use as a work’:
 - See TM infringement test: ‘use as a TM’
 - Old standard in the UK, supported in U.S.: no infringement if TM used in a non-branding way
 - Some descriptive/indicative use are excluded by law
 - Some informational/referential uses are TM uses
 - But still a filter for technical uses (ex. keyword sale)
 - © : « use as a work »: nexus for a communication between the author and a public
 - Not in case of data mining, technical copies, etc.

Reconstructing the economic rights

- Communication to the public right:
 - Emphasise the economic parameters (ex. for-profit motive) already in CJEU case law
 - For border(on)line cases, develop an economic test: impact on double market (copyrighted work and user's service)
- Reproduction right:
 - Develop the infringement test: 'use as a work'



Thanks for your comments and questions!

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