

The economic value of flexibility v.s. exceptions and limitations

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Workshop on Empirical Study of the Social and Economic Benefits of Copyright Flexibilities





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Background

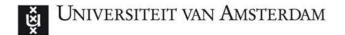
- Loosely based on study for Dutch Ministry of Economic Affairs 'Flexible Copyright: The Law and Economics of Introducing an Open Norm in the Netherlands'
- High expectations: 'some GDP impact of flexible copyright'
- Defining flexibility along the way:
 - □ Not: flexible © instead of draconian ©
 - Nor: flexible © instead of exceptions and limitations
 - But: adding flexibility to current system of E&L





The economic logic of ©

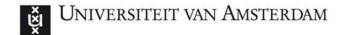
- Temporarily granted monopoly on reproduction and distribution of a work
- Monopoly power is generally known to lead to:
 - higher prices, causing lower demand
 - higher profits for monopolist/producer, lower consumer surplus
 - overall: welfare loss (DWL) + redistribution towards monopolist
- Static analysis:
 - Copyright reduces welfare by reducing the consumption of copyrighted works
 - Less copyright is better for welfare





The economic logic of ©

- Dynamic analysis:
 - Protection of revenues from © gives rights holder incentive for the production, distribution and exploitation of works
 - But: it may also hinder producers of new works and technologies who use works as an input through uncertainty and DWL
- Overall, a trade-off of the dynamic effect for rights holders, weighted against the negative static effect for consumers and negative dynamic effects for producers using works as an input
- Touch stone for flexibility discussion: how does the value of flexibility for users of this material weigh up against the incentives for production and distribution of works?





Examples that may require flexible ©

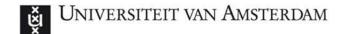
- Search engines (indexing, thumbnails, news)
- User generated content
- Cloud computing
- Text & data mining
- eLearning
- Transformative use e.g. in documentaries, user created content
- Online archives, orphan works
- Yet unknown applications and technologies...
- → Often, European judges find a way to somehow apply an exception or limitation to allow such applications





Costs and benefits of flexibility: rights holder perspective

- License fees for many of these examples are windfall profits for rights holders:
 - License fees for digital use where no license was required for physical formats
 - License fees for material that has decayed physically (e.g. archives) or economically
 - License fees for types of use that have nothing to do with the initially intended use (e.g. indexing for search engines or detecting plagiarism)
- Windfall profits give no incentives, unless one expect them always to occur





Costs and benefits of flexibility: user perspective

- Saving out on license fees is a zero sum game, the real economic benefits lie in:
 - New uses and technologies
 - Reduction of transaction costs
 - Reduction of risks because of legal certainty
 - Resolving anti-commons problem in case of a large number of rights holders





Costs and benefits of flexibility: empirical issues

 Studies on the value of industries making use of fair use or exceptions and limitations are just as use[full/less] as studies on the value of copyright dependent industries

Rogers et al., 2010, Akker et al., 2010, Lateral Economics, 2012

'Evidence' for chilling effects thin and inconclusive

IFF research, 2011, Lerner, 2011/12, Booz & Co, 2012, Lateral Economics, 2012

- Methodological challenge: you can't interview a company that does not exist
- Lack of good ex ante or even ex post evaluation studies in Israel and Korea
- Judges tend to find their way around rigid application of ©-law





Conclusions

- Value of flexibility for consumer / producer using works:
 - Lower license fees
 - Reduction of transaction costs and dead weight losses
 - Less uncertainly
- Touching stone: how does this weigh up against incentives for the creation and distribution of works: is it windfall profits or reasonable expectation
- Welfare effects hard to determine in practice, need for ex-ante and ex-post evaluations of policy change