



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