IMPRIMATUR

Fourth Consensus Forum

Contracts and Copyright:

The Legal Framework for

Future Electronic Copyright Management

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FEAR AND GREED IN COPYRIGHT CITY

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1. Introduction

At this Spring's Fordham Conference on international intellectual property, prof. Paul Goldstein expressed his concern over the increasing polarisation of the ongoing copyright debate. The problem is, prof. Goldstein observed, that all players in the arena are motivated, to some extent, by *fear and greed*.

Fear and greed, indeed.

Let's look at the right holders first. From a copyright owner's perspective the emerging digital networked environment is the ultimate nightmare come true. For right holders the Internet appears as a global copying machine, enabling an unruly horde of anonymous pirates to make perfect digital copies of protected works, and circulate them among their fellow hackers across the globe. Right holders wishing to enforce their rights are met with hostile reactions from an arrogant anarchist Internet elite, that perverts piracy into a virtue and ownership into a vice. Digital pirates seek shelter in *copyright havens*, where no law is enforced but the law of the jungle.

Fear turns to greed where right holders discover that the digital environment creates novel and potentially unlimited possibilities to extract value, down to the last half penny and the very last bit, from copyrighted works. The mechanics of the Internet present right holders with an irresistible legal argument to underscore their claims. If every transaction involving copyrighted works leaves a trail of multiple transient copies on the net, why not expand the reproduction right - the traditional "core of copyright" - to reflect this technological reality?

Users of copyrighted works (intermediaries and end users), from their part, are equally motivated by fear. The *copyright grab* at the Internet presents users with a nightmare scenario of their own. The Internet, once hailed as the ultimate vehicle of democracy and empowerment, will succumb to the evil forces of monopoly and capitalism. Microsoft, Time-Warner and Disney will conspire to divide among themselves the Internet "commons", and for ever stifle the free flow of information for which the Internet was once invented. Dominant right holders will force intermediaries and end-users to sign unconscionable licenses, and pay hefty fees for such innocent acts as browsing, viewing and caching.

Users, too, are motivated by their share of avarice. Why pay for content that is freely available? If the marginal costs of reproducing information are near-zero, why not compensate right holders accordingly? If information is a public good, how can there be harm done by copying it? "Information wants to be free", so let it be.

The mutual fear and distrust between right holders and users is exacerbated by the underdog mentality underlying each party's actions. The right holders' claims for enhanced copyright protection still reflect the "romantic author" rhetoric of the late 19th century. Until today, the image of the author as the lonely, underpaid and vulnerable creator (to the mercy of greedy, unscrupulous users) is still the preferred projected image of the copyright industry. This romantic ideal is, obviously, at odds with 21st Century reality. Authors have become large corporate content producers, in some cases totally overwhelming intermediaries and users.

The users' self image is that of the underdog as well. Users portray themselves as the poor, publicly (thus sparsely) funded good guys of the game, mercilessly being exploited by monopolistic rent-seekers. In reality, users may be large universities, musea or libraries, representing a user base of tens of thousands. Internet service providers, clad in the dress of non-profit do-gooders, may in fact be large telecommunications operators, representing more market force than all right holders in the universe combined.

As any dog owner will have observed during his daily chores in the park, two underdogs growling and biting at each other make a dangerous couple. The "troubles" during the WIPO Diplomatic Conference in Geneva, the nasty copyright debate in the United States, the ruthless lobbying at the European level, all are ample proof that all is not quiet in Copyright City.

Unfortunately, regulators both on the national and international level, have failed - or sometimes not even tried - to diffuse this explosive situation. In some instances, captured agencies have unashamedly taken sides in the debate, thus undermining any "social contract" regulators would be expected to enhance.

Clearly, there is an urgent need for a reconciliation mechanism. The IMPRIMATUR project is just that. One of its primary aims is to establish consensus between the various, potentially conflicting, interests of all parties concerned with the development of electronic copyright management systems. Since its inception, the IMPRIMATUR project has initiated and fostered an ongoing dialogue between right holders, intermediaries and users, applying a unique methodology. In contrast to the autocratic solutions imposed by national or international regulators, the IMPRIMATUR consensus building process seeks to foster mutual understanding and compromise on a "horizontal" level.

The recent "Washington Compromise", reached by copyright holders and intermediaries on the issue of Internet provider liability, is an illustration of the fruitfulness of such an approach. Presently, the compromise is finding its way into legislation in the United States Congress. The IMPRIMATUR model suggests that at the European level similar results may be achieved.

Newcomers to the IMPRIMATUR consensus building activities may wonder what the IMPRIMATUR acronym really stands for. Is it a thinly disguised wordplay on the abundance of premature legislative initiatives in the field of copyright and the information society? Is it proof of an international catholic conspiracy? Or do the letters simply spell out: Intellectual Multimedia Property Rights Model and Terminology for Universal Reference? Five months from the end of the project, I will now reveal the true meaning of the acronym. What the letters I.M.P.R.I.M.A.T.U.R. really mean is this: **I**ncredible **M**ethod for the **P**acification of **R**ivaling **I**nterests between **M**ultimedia **A**uthors, **T**raders and **U**sers of **R**ights.

2. Legal work

The Institute for Information Law of the University of Amsterdam joined the IMPRIMATUR project in February 1997. In its Legal Work Plan, the Institute identified a number of legal issues crucial to the development of electronic copyright management systems. IViR's legal work has resulted in a handful of reports published under the responsibility of the Institute, available both electronically (on IMPRIMATUR's price-winning web site: *http://www.imprimatur.alcs.co.uk*) and in paper form (published by the Institute). The conference materials that you have received prior to this forum contain summaries of these reports, identifying several key issues.

Let me give you a short summary of each report, and *en passant* introduce you to the issues of this Consensus Forum:

1. *Liability for on-line intermediaries*

This report deals with the liability of the "providers" acting as go-betweens between content creators and consumers. The liability of Internet providers is perhaps the most controversial legal issue to emerge from Cyberspace. Are providers to be equated to electronic publishers, and thus directly liable for all the infringing gigabytes flowing through their servers? Or are they merely the postmen of the Superhighway, common carriers exempt from any liability? As always in the realm of the law, the answer probably lies somewhere in the middle.

The study describes current regulation and case law on the intermediary's position on a country-by-country basis. It deals with liabilities not only stemming from copyright law, but also from tort law (e.g., defamation, product liability and misrepresentation) and data protection.

Underlying the report is the fundamental question of whether the liability of on-line intermediaries should be regulated in a "horizontal" fashion, i.e. by formulating a liability rule that is valid for *all* areas of the law.

Assuming service providers will be subjected to a certain level of liability, what then should be the standard? Should a duty of care be imposed upon the provider, as in the recent Swedish act? Or should liability be assumed only in cases of actual knowledge of infringement? What then should be the proper form of notification?

The answers to these questions have obvious, and immediate contractual repercussions, e.g., for the way in which the various actors in the IMPRIMATUR business model ECMS (content provider, media distributor, purchaser) re-allocate potential liabilities among themselves.

2. *Contracts and copyrights exemptions*

This report deals with another highly topical issue, the so-called interface between copyright and contract law. To what extent may the terms of a copyright licence override copyright principles such as statutory exemptions aimed at preserving user freedoms?

The study goes a step further than the questions discussed at the Amsterdam Consensus Forum in October 1997. There we were looking for the rationale of existing exemptions. Here the question is whether and to what extent we can set them aside contractually. Are copyright limitations default or mandatory rules? More fundamentally, should there be limits to the freedom of copyrights contracts and, if so, on what grounds should such contracts be regulated? Should we differentiate between negotiated contracts and mass-market licenses?

3. *The law and practice of digital encryption*

This report first describes the state of the art in digital encryption, and then examines national, regional and international legislative efforts that impact on the use of encryption. The survey includes a review of current problems as regard exports and controls of encryption technology from various countries. It then turns to legislative policy outlining the various options available, the impact on right holders and users and on the development of the information society.

4. *Privacy, data protection and copyright*

This report investigates the way in which legal rules for the protection of privacy, data protection and related interests can impinge upon the design and operation of electronic copyright management systems. The report first focuses upon rules that specifically regulate various stages in the processing (collection, registration, storage and dissemination) of personal data. To what extent does the monitoring of individual usage comply with data protection law?

The second part describes the legal and technological balances that have been struck between the privacy interests of users and the interests of copyright holders, and considers the impact that an ECMS might have on the existing equilibrium. Do so-called PETs (privacy enhancing technologies) make a difference?

Questions of privacy and data protection, obviously, have immediate contractual ramifications. May the users of an ECMS simply "sign away" their privacy interests, or will data protection laws necessitate other solutions?

5. *Formation and validity of on-line contracts*

This reports deals with the legal questions of contract formation in an on-line environment. Are so-called mouse-click or click-wrap licenses concluded in a dialogue between man and machine as valid as their equivalents in paper form? The report describes various national and international initiatives, including the UNCITRAL model law, and the draft article 2 B of the Uniform Commercial Code of the United States. The latest news is that the United States have proposed an international convention that would implement the UNCITRAL provisions.

All reports but one (the last) have been discussed, prior to publication by the Institute, in a series of one-day workshops with representatives of right holders, intermediaries, users and academics. The results of these *Legal SIG's* have been condensed in the form of minutes that are appended to the reports. They may serve as important input to the questions we will discuss today.

3. The rise of contract law

The main theme of this Consensus Forum is "contracts and copyright". In many respects, contract law is emerging as a viable alternative to copyright protection on the Internet. The structure of the net enables information producers to engage in multiple contractual relationships directly, or through intermediaries, with end users and re-sellers. The Internet, especially the World Wide Web, is uniquely equipped for that purpose. The "textual" context of the Web and the interactive features of the Net are ideal preconditions for the development of a contractual culture.

Contract law appears to be the instrument *par excellence* to fill the legal vacuum of the Internet. In theory, information producers, intermediaries and end users are able to experiment and implement their own set of rules without any intervention by regulatory authorities. Ideally, new legal norms will emerge from this self-regulatory contractual laboratory.

In the context of the Internet contract law has the added value, by permitting parties to a contract to freely determine the applicable law, of being practically immune to the concept of territoriality which is becoming copyright law's Achilles heel. Standardised international contractual solutions may be viable alternatives to a floundering "patchwork" of national intellectual property laws.

However, contractual self-rule has a darker side as well. Cyberspace is no egalitarian society with equal chances for every *netizen*. In a world totally ruled by contract, weaker parties may loose out, and fundamental freedoms may be jeopardised. Freedom of contract may become contractual coercion, especially when dominant undertakings abuse their market power to impose contractual rules on powerless consumers, as if they were public authorities. Unfortunately, consumer protection in many countries is ill-suited to the economy of information. Today's consumer law deals mostly with transactions in physical goods, not information. Here lies, perhaps, an important area of future regulation.

The increasing importance of contract law in the digital networked environment is illustrated by the current European Commission (DG XV) initiative on "Electronic commerce without frontiers". A future directive, now under construction in Brussels, will propose rules on a panoply of legal issues relating to electronic commerce. It goes without saying the directive will have an important impact on the ECMS community. What is an ECMS other than a method of enabling electronic commerce in intellectual property? It is expected the proposal will contain rules on a number of E-commerce

related issues, including contract formation and online liability. As announced in the Explanatory Memorandum to the Commission's proposed Directive on Copyright in the Information Society, the Commission has opted for a horizontal approach in dealing with the latter issue.

Contract being the ultimate expression of consensus, it is only fitting that this (fourth) Consensus Forum focus on questions of contractual law and related issues. On behalf of the Institute for Information Law we wish you happy consensus hunting. Let's set fear and greed aside, and let love and happiness rule for the next two days - until the World Cup will resume on Friday at 3.30 PM.

Thank you very much.

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