It' s not a right, silly!
The private copying exception in practice
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Abstract: Not all consumers are willing to accept DRMs. This article tells the story of two consumers who were not, and who went before the courts to claim what they thought was their good right - the "right to private copying". It tells the story of their cruel awakening, and why it had to come like this.

The case of Stéphane P.
Mr Stéphane P. in France bought the DVD of Mulholland Drive. As he realized later, it was a purchase with consequences. Mr. Stéphane P. was about to make a copy of the DVD for his personal use, perhaps he wished to copy the DVD on to his computer harddrive so that he could watch the film the next time he was on the train. But then, suddenly, he realized that this time the copying did not work. What he did not know when he bought the DVD was that it was electronically protected against copying. He could not have known either – the fact that electronic copy protection was employed was not mentioned anywhere on the DVD.

Mr. Stéphane P was annoyed. Understandably, one may add. In fact, he was so annoyed that he decided to sue both the production companies and the distributor in France. He found an ally in the French consumer organization L'Union fédérale des consommateurs "Que Choisir" (UFC). Together, they started proceedings before the Tribunal de grande instance de Paris 3ème chamber (Tribunal Paris 2004). The plaintiffs claimed, among others, a violation of Mr. Stéphane P.'s "right to personal copy" under the French copyright act. In addition, they also claimed that according to French consumer protection law there was a duty for the seller of the product to inform the consumer about the substantial characteristics of a product.

The court's decision
The court was not impressed. It took one sentence to correct an error that Stéphane P., and, together with him, probably the majority of consumers had maintained all these years: there is no right to personal copying. The personal copying exception in French copyright law, so the court says, has not the quality of a "right". Instead, the personal copying exception describes the (exceptional) case that consumers who want to make a copy for personal use are not obliged to acquire the rightsholder's permission before doing so. The court went further and argued that nothing different could apply once France had implemented the European Copyright Directive. The Directive left it to member states whether they would provide for a personal copying exception. But even if France decided to do so, the personal copying exception must, according to the Directive, not conflict with the normal exploitation of a work or unreasonably prejudice the legitimate interests of rightsholders. The court then decided that the selling of copies of DVDs was a case of normal exploitation, and rightsholders had a legitimate interest to recoup the investments made. Voila. But it got even worse. Not content to reject the claim, the court

ordered Stéphane P. and UFC to pay damages of 9,000 Euro to the defendants.

The case of Michel D. A decision in Belgium before the Tribunal de Premère Instance de Bruxelles went in a similar direction (Tribunal Bruxelles 2004). This time, it was Michel D. who bought a CD that could not be copied, again because electronic copy protection was in place. And similar to the court in France, the Belgian court concluded that the personal copying exception is not a right that can be invoked by consumers. Instead, the court called the personal copying exception a "legally granted immunity against prosecution". From the perspective of the consumers, the most significant difference between both decisions was that this conclusion turned out to be less costly in Belgium – less than 1,000 Euros.

Discussion

These two (rough) sketches of recent pieces of case law in France and in Belgium may illustrate a particular feature of copyright law: copyright law defines rights of the rightsholder with respect to the use of her work. It does not define rights of users in relation to rightsholders. Insofar, copyright differs from other property orders that have carved out clear rights to protect the interests of the public (e.g. rights of way, rights of inhabitants of rental flats, access rights in information and telecommunications law, etc.). On the contrary, consumers have no clear legal standing under copyright law. This might sound at first surprising: scholars, policy makers and legislators emphasised often enough not only the need for adequate copyright protection, but also the importance to limit ownership in intellectual resources where the interest in free use of such resources has precedence. And, after all, copyright law does define limits to what rightsholders are entitled to do, respectively the duration of exclusive rights, the sorts of uses of intellectual works that are considered desirable where exclusive rights are granted or the kind of intellectual resources that shall not be made subject to copyright protection at all. Once a right has expired or an exception applies, consumers are entitled to use that piece of film, music, literature etc. The rightsholder has no legal standing to prevent this. And the concept worked – until DRMs entered the scene.

Copyright exceptions and electronic fences

DRMs are a technology to manage and enforce rights and interests in digital works. This can be copyrights. But it can also be more generally economic interests to recoup investments, or to control forms of usage that, so far, could not be easily controlled. Copying for personal purposes is such an example. Whether or not users of DRMs may override existing limitations and exceptions in copyright law is one of the prominent questions in the recent copyright law discussion. An introduction to this controversial discussion would lead too far (for an overview of the discussion see Helberger 2004; see also Lambers 2004). But let's assume for one moment that the following was true (needless to say that the matter is far more complicated (see Guibault 2002): If someone was to fence in a piece of land (or information) that does not belong to him, or if someone was to exercise control to which he is not entitled, he would be acting contrary to the law, and therefore such behaviour would be simply not permissible. Provided, thus, an electronic fence would prevent a consumer from benefiting from a personal copying exception, such a behaviour cannot be permissible. Or would it?

Why the Copyright Directive does not solve the problem

Article 6 (4) of the Copyright Directive addresses the case that DRMs overrule exceptions and limitations of copyright law. In simple words, the Directive does not declare explicitly if such behaviour is permissible or not. It only suggests that rightsholders should take – voluntarily – measures to make sure that consumers could benefit also in the future from exceptions. And maybe the makers of the directive already suspected that DRM controllers might have few incentives to do so, because if rightsholders fail, member states are to take appropriate measures

to make rightsholders do so. Meanwhile, member states had to implement the Directive, and with it, Article 6 (4) of the Copyright Directive (for an overview see http://www.euro-copyrights.org/index/14/49). What is interesting to notice for the given context, is that, generally, a tendency can be observed to pass on the difficult decision further to courts and/or specialized arbitration bodies. In other words, if a consumer cannot benefit from a national personal copying exception, he is often expected to seek agreement first. If negotiations fail, the next step would be to initiate proceedings and let a third party, a specialized arbitration body or court, decide.

How will the concept work out in practice? A first hurdle is the decision with whom to negotiate. The shop assistant? David Lynch? Studio Canal? Universal Pictures? Note that the rightholder is not always identical to the user of the DRM (for example, DRMs can be used by the production company, even against the will of the rightsholder). Provided that the consumer found somebody to negotiate with and negotiations failed, will the consumer initiate proceedings? Cases such as the case of Stéphane P. are not very encouraging. Who else would be willing to risk paying almost 10,000 Euro because of one film? And in some countries consumer organizations do not even have a right of action. Will the consumer know that he can complain, or where? And as if the "happy end" was not unlikely enough, provided a consumer managed to take all the previous obstacles: was that not exactly what Stephan P. and Michel M. did, with so little success?

Bottom line

A property order is not static but develops together with societal, economic and technological developments. With the introduction of Article 6 of the Copyright Directive (protection of technological measures), copyright law has taken a step into a new direction. Before, it was up to the rightsholders to initiate proceedings against consumers who did not respect the rightsholder's rights. Since the implementation of Article 6 Copyright Directive into national law, it is up to consumers to start proceedings against rightsholders who do not respect copyright exceptions. But, unlike rightsholders, consumers, so far, have no legal standing. Unless there is a provision such as in the German Copyright law, saying that the beneficiary of an exception can compel the DRM controller to make available the means to benefit from that exception (Article 95b (2) German Copyright Act). In all other countries consumers risk a similar answer as Stéphane P. or Michel M.: It's not a right, silly!

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