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IViR

Borderline exploitation of copyrighted works

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Welfare economic analysis of copyright I

Normative economic stance towards IP:

- Utilitarian perspective: IP aims to provide *incentives* for investment in and exploitation of works

- Optimum defined by maximum welfare (consumer + producer surplus): no preferred status for producer (author) or consumer

- Broad concept of social welfare, incorporating other norms except distribution
  - → In practice: amend outcome of more narrow-minded economic analysis
  - → Distribution – fairness?! – separate from standard welfare economic analysis

- *Without market failure*, unrestricted market forces create maximum total welfare
  - → Legislative/policy intervention justified my market failure, distributional concerns or paternalism

Welfare economic analysis of copyright II

Economic rights as an incentive system for authors:

- Without intervention, the rents of creation and exploitation are insufficiently *excludable*
- Such rents would be *positive externalities:* Anyone can copy and distribute the work without permission once the costs of creation are made [misappropriation: in itself no problem]
- This reduces revenues for the creators and publishers, damages incentives and leads to a loss of welfare in the long run [impairment: here's the problem!]
- From a welfare economic perspective, copyright should be ***aimed at and limited to <u>optimally</u> resolving*** this ~~public good~~ market failure

Welfare economic analysis of copyright III

- However, there are also social costs of copyright:
  - Transaction costs
  - Dead weight losses (unserved demand)
  - Dynamic losses (chilling effects)

- In practice, the need for copyright also depends on:
  - Substitutability of originals by copies
  - Cost advantage for creator to make copies
  - Opportunities for private ordering (enforceability, transaction costs)

    → Digitisation affected all three factors significantly

→ Defining optimum scope of copyright often an empirical question
Optimal copyright ≠ maximum copyright
≠ copyright which maximized creative output

Welfare economic analysis of copyright IV

- Exclusive rights justified to control acts that – *as a result of market failure* – negatively and significantly affect current or future exploitation opportunities (i.e. interfere with incentives to create or to exploit) → impairment 2.0
  - Broad concept of exploitation (including advertising, reputation building, cross-selling, even data harvesting)
  - Balancing with welfare costs of protection

- Copyright should not generate new market failures by generating more (or less) rights than one would have in an ordinary market
  - → No automatic control over downstream markets or claim to value generated in such markets: no ‘jealousy tax’ (unless market failure re-emerges in downstream market)
  - → Neither a ban on nor protection of price discrimination

Hyperlinking & embedding

- Economic scale (and presumed benefits) of linking & embedding enormous

- Linking to authorized sources does not affect right holder's control over availability and exploitation environment of a work → copyright irrelevant
- Embedding is different, there is still control over availability, but the work is cut loose from its exploitation environment and embedding can be a substitute to visiting the linked page
  - Most embedding probably okay → transaction costs of licensing prohibitive
  - Opt-out or technical solution?

- Linking to unauthorized sources
  - Likely to have negative effect on exploitation opportunities for right holder
  - But – except in cases of *obvious* illegality – liability without prior warning would generate large transaction costs or chilling effects, also for profit seeking parties!
    → Notice & take down, levy system?

Digital resale

- Economic scale limited but not negligible

- Market failure with respect to sold copies has been resolved
  - → no downstream protection needed or justified, any more than for other private goods
  - → as long as some monitoring is possible to ensure resale ≠ reproduction

- Digital content different because no degradation? NO:
  - □ Value from resale can be appropriated in initial sale
  - □ Commercial depreciation is enormous (+ windowing, versioning)
  - □ Information asymmetries & transaction costs hamper secondary market
- Private ordering may override general argument, but subject to general rules w.r.t. fair business practices and antitrust: no privilege for copyrighted works

Private copying

- Economic scale declining because of streaming, but still highly significant.
- Levies in EU at all time high of € 731 in 2014

- The value of most copies can largely be *appropriated indirectly* in first sale
  - no negative & significant effect on exploitation opportunities
  - most private copying is copyright irrelevant
  - Less so for systematic time shifting combined with skipping ads

- Private copying that leads to market extension can be different, in particular sharing such copies ad infinitum over the Internet will negatively affect exploitation opportunities

Retransmission

- Retransmission of free-to-air broadcast within reception area (or in hotel!) has strong resemblance with hyperlinking
  - Live retransmission without breaking access restriction does not affect control over availability nor the exploitation environment (ads, public funding)
  - Different if combined with systematic time shifting & skipping ads
- Abolishing retransmission fees will affect the financial agreements upstream
- In case of direct injection, downstream value can be part of initial contract (private ordering)

Text & Data mining

- Rapidly gaining scientific and economic relevance

- Chilling effects of licensing/uncertainty substantial
- No retrospective negative effect on incentive to create: originally, benefits of TDM were never incentive for authors (but perhaps to some extent for publishers?)
- No market failure to be resolved if access to mined content is acquired legally, value derived from TDM can be priced into the purchase

  → Only windfall profit / jealousy tax

Thank you for your attention

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