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 optimally resolving* this public-good market failure.
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)
  \[ \rightarrow \text{Digitisation affected all three factors significantly} \]

\[ \rightarrow \text{Defining optimum scope of copyright often an empirical question} \]
Optimal copyright \( \neq \) maximum copyright
\( \neq \) 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) \( \rightarrow \) 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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