

Vom Copyright zum Intellectual Property Right

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From copyright/droit d'auteur to Intellectual Property Right/IPR

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean - neither more nor less."

*"The question is," said Alice, "whether you **can** make words mean different things."*

"The question is," said Humpty Dumpty, "which is to be the master - that's all."

Lewis Carroll: Through the looking glass & what Alice found there.

This interesting dialogue on language and power, was first published in 1872. A few years later, in June 1878, Victor Hugo held an opening speech on an international literature congress in Paris, using at least two words/concepts which meanings are still disputed, namely: droit d'auteur/copyright and domaine public/public domain.

1710 the English Parliament passed the Statute of Anne, the first known law that defined copyright not only as a printer's privilege or right, but also as an authors' right, a droit d'auteur.

Statute of Anne was a "A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof", and the law ruled that authors, and those who had purchased a manuscript from an author, would have an exclusive right to publish the work for fourteen years.

The term of fourteen years had previously been established for patents on mechanical inventions; the copyright might be renewed for another fourteen years, but after a maximum of twenty-eight years, the work would become a part of the public domain, and anyone was free to publish it.

1790 the United States of America got its copyright-and-patent-law in order to: promote the progress of science and useful arts, by securing for limited times to the authors and inventors the exclusive right to their respective writings and discoveries.

An exclusive right is a monopoly, and a monopoly is an evil, sometimes a necessary evil, but still an evil that should be strictly limited in time and extent. A necessary evil is never there for its own sake, but always for a higher purpose, so as: to promote the progress of science and useful arts. And if intellectual property rights, like patent- and copyrights, no longer promote the progress of science and useful arts, they have lost their *raison d'être*.

1793, and with the french revolution, France too got a copyright-law intended to strike a balance between the droit d'auteur and the public domaine: Respecting the authors' rights and protecting the public interest.

But already 1777 the king of France had conceded the authors a *privilège d'auteur*, and this new privilege was to be inheritable, and thus essentially perpetual.

The french revolution limited perpetuity to the lifetime of the author plus ten years, but since then the plus-years have extended, and have now reached 70 years, and in case the IPR owner is a corporation, 95 years.

In US, in the 1990s, the Disney Company led the lobbying campaign for a prolonged copyright, favouring corporations. It did so in order save Mickey Mouse from the public domain, but then Disney Company also has invested itself as the legitimate heir of quite a lot of folk tales, as well as literary classics.

The french copyright-law, passed 1793, was called a "Declaration of the Rights of Genius" thus giving homage to the romantic conception of the author.

This romantic idea has been carefully cherished, and, I would argue: It is still alive and kicking, making an impact even on today's IPR-discussions, although the bonds between the (genius) author/creator, and the copyright are loosened and almost disappearing, as the IPR is turned into a commodity, to be sold and bought at the market.

At the time France, US and UK got their copyright-laws, Germany was not one but many states, and at the beginning of the 1800s some of them, like Prussia, Baden, and Bavaria, passed laws granting real copyright (Urheberrecht) to the authors.

At the same time, various bilateral copyright agreements were established, mostly between countries with (partly) the same language, like France-Belgium, Denmark-Norway. But a regulation of the copyright as an international or universal right, was still to come. It came 1886, when the Berne Convention for the Protection of Literary and Artistic Work was signed by ten countries: Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, UK.

Victor Hugo's speech in 1878 can be seen as a grandiose prelude to the Berne Convention. Hugo emphasized the importance of the public domain, as well as the universal rights of the authors. He dwelt with the universality of the (great) authors, who represent the human spirit, as well as the spirit of their nations: Shakespeare incarnates the spirit of England, Cervantes the spirit of Spain ...

Hugo put the author's copyright in a context where it was important, not only for the author, but for the nation, and for humanity as a whole, and where there seemed to be no conflict between universally claimed IP rights, and the public domain and public interest.

Just a few days after Hugo had delivered his speech, Association Litteraire et Artistique International, was founded, with Hugo as a honorary president, and with members as Disraeli, Dostoyevsky, and Tolstoy; and eight years later, 1886, the Berne Convention was a reality.

1886 US was still a net importer of literary and scientific creation, and consequently refused to sign the Berne Convention.

1988 US was, since long, a net exporter of all kinds of intellectual property (science, literature, film, music ..) and has consequently signed the Berne Convention, and also become a bold champion of strengthening the property rights of IPR-owners, at the expense of public access and interest.

Today we still have the Berne Convention, and since 1967 the World Intellectual Property Organisation (WIPO). Since the mid 1990s we also got the World Trade Organization (WTO), General Agreement on Trade in Services (GATS), and Trade-Related Aspects of Intellectual Property Rights (TRIPS), and with TRIPS we got a new IPR-regime.

Intellectual property rights are no longer considered a tool, and a tool among others, to promote arts and science, but an end in itself. Consequently, there is no need to limit the IPRs in time and extent. Almost anything, including mere compilations of facts, can be copyrighted and locked up by proprietary rights, for ever-extensible time.

The more the better, has become the buzzword, or credo, of the new IPR-regime under TRIPS.

The main beneficiaries of the new IPR-regime are commercial interests, like pharmaceutical companies, powerful publishers, and the transnational media corporations, while most of the authors/creators pay the price, just as the public in general. The public as individual buyers and users of "intellectual property" and the public as public institutions like schools, universities and libraries.

Lending rights and property rights

All the above mentioned acronyms, WIPO, WTO, GATS, TRIPS, have an impact on libraries, but there is also one acronym directed explicitly against public libraries, namely: PLR.

PLR spells out Public Lending Right, and naive people, like myself, are apt to interpret this as the right, say, of public libraries to lend their books to the public, but: It is all about the IPR-holders'/owners' right to deny the libraries their lending right, and thus also denying the libraries their property right.

PLR is one of these words that in an exemplary way demonstrates the truth of Humpty Dumpty's statement: The meaning of a word depends on which is to be the master. And in the PLR-case, the IPR-owners are the masters.

A library buys, say, five exemplars, five copies, of a book, and thereby becomes the owner of these five exemplars/copies. They are the library's property. Not intellectual property, but real, tangibel material property, and along with this concrete property come some property rights, like the right to lend the book, or give it away. Important property rights for the library are the rights to catalogue and classify the books, making them visible and accessible to the public. The public, the citizens who through their taxes pay for the books as well as for the library work put into them, are now free to look at the books, browse them or read them thoroughly, at the library or elsewhere.

But now the IPR-owners turn up and tell the library: Yes, we have sold you these five exemplars, but you did not really buy them, you just rented them, and we are going to collect the rent, according to how much the public borrows and uses these five copies/exemplars.

The justification of this rather flagrant violation of public lending right and public property right, is the supposition that the library causes the IPR holders economic damage: If it had not been for the libraries, much more book-copies would have been sold.

As there is hardly any evidence to prove this supposition, the justification is not very convincing.

Moving from printed books to the digital sphere, not only public property rights but also private property rights are under attack - by means of DRM, Digital Rights Management. DRM is a technology that locks up the content of digital works, making it accessible only via certain hard- and software devices, or only during a limited time, or only in some geographical-national zones

DRM is a control-and-rule technology that needs juridical and political support in order to function. The DRM-locks are not at all unbreakable, and thus the DRM-advocates want anticircumvention-laws, laws that make it a crime to break the locks.

So, what happens if the DRM technology gets legal protection?

James Boyle gives the example of an e-book turned into a personal digital object, surrounded by state-sanctioned digital locks and fences. The e-book can be tied to particular users and particular computers, "so that reading my e-book on your machine is either technically impossible, a crime or a tort - or possible all three."

And Richard Stallman has written a dystopian vision of how it might look like in the year 2047, when the Software Protection Authority (SPA) rules:

Dan and Lissa are both students, and when Lissa asks Dan to lend her his computer, he is first shocked, because he knows that sharing books and computers is nasty and wrong, as well as a punishable crime; it is something that only pirates will do. But because Dan loves Lissa, he ends up sharing books and computer with her, and the two also begin to read about the history of copyright. When they learn that there was a time when anyone could go to the library and read journal articles and books without having to pay, they decide to go to Luna.

And here the story gets an utopian turn, because on Luna "they found others who had likewise gravitated away from the long arm of SPA. When the Tycho Uprising began in 2062, the universal right to read soon became one of its central aims."

Since 1998 US has got the Digital Millennium Copyright Act, that, among other things, establishes the legal basis to restrict the reading and lending of computerized books.

In Europe it is mainly the European Union (EU) and particularly the European Commission (EC) that are establishing the necessary juridical framework for the new IPR-regime, and here it is done by directives and by the European Court of Justice; recalcitrant countries, not complying, or not complying quickly enough, to the directives, are summoned to the Court.

Since the beginnings of the 1990s EU/EC have passed several directives strengthening the IPR-owners rights and interests. The Public Lending Right (PLR) came to us via the a directive from 1992, "on rental right and lending right and on certain rights related to copyright in the field of intellectual property", and Digital Rights Management (DRM) by the Copyright Directive from 2001.

In a pressrelease, from the 21 of March 2005, the EC explains why the implementation of the Copyright Directive is so important:

"It provides a secure environment for crossborder trade in copyright protected goods and services, and will facilitate the development of electronic commerce in new and multimedia products and services."

According to EU/EC, as according to TRIPS, copyright does not belong to authors/creators but to commercial actors.

The pressrelease goes on:

"Moreover, it is the means by which the European Union and its Member States implement the two 1996 World Intellectual Property Organisation (WIPO) "Internet Treaties" which have adapted copyright protection to digital technology. This makes implementation all the more urgent."

It is of course absolutely true that what EU/EC is doing in Europe is integrated in a global neoliberal movement, where not only TRIPS, but also WIPO, play an important role. I will come back to WIPO, and WIPO's position on copy- and other IP-rights, because WIPO's position today, 2005, is not identical with the 1996-position. But first a short history of how TRIPS came into being.

TRIPS, NGOs and WIPO

From the 1980s to the mid 1990s a business campaign was put forward in order to get a new regime for IPR-protection. Key actors were the industries of agriculture chemicals, pharmaceuticals, software, music and entertainment. Their political aims were to highlight the economic importance of intellectual property rights, and put IPR on the international trade agenda, all by means of stricter and stronger IPR-protection. Around 1995 they got what they wanted: An ever-expanding IPR, protected by TRIPS.

But at the mid 1990s the resistance against the new IPR-regime also began to organize. The key actors here were the Non Governmental Organisations (NGOs) and their aim was to highlight the price sick people (HIV/AIDS) have to pay for IPR-protection. The Access Campaign, led by the NGOs, put public health implications of IPRs on the international agenda, and it was no longer possible to sanction Brazil and South Africa for their trespassing the IPRs of the drug companies.

Later NGOs and WIPO followed up, widening the critic to include implications of IPRs on science and public education.

On WIPO's General Assembly in Geneva, september/october 2004, the representative of India, wanting to start on a positive note, said: With all the damage TRIPS has brought upon us, it might still have a silver lining, for TRIPS has raised our consciousness of the dangers of an unrestrained and unrestricted IPR.

The dangers and consequences of the now-ruling IPR system are disasterous: It is hampering the free flow of information, raising the cost of computer software, and thus also hampering scientists from advancing research, and reducing the public's access to information, as well as making educational material inaccessible to the poor.

Not only TRIPS but also the former policy of WIPO was criticized: For a long time WIPO has responded primarily to the narrow interests of IPR-holders, argues the Geneva Declaration, signed by about 500 scientists and activists: Recently, WIPO has become more open to civil society and public interest groups, and this is welcome, but not enough. WIPO also have to practise a new policy, and a first step is integrating the development dimension into the WIPO agenda, as proposed by fifteen member-countries.

A lot of member-countries agreed, but not all: EU as well as US argued that the aim of WIPO still is to strengthen the IPR-system.

The Geneva Agenda argued that the aim of WIPO should not be to promote the protection of intellectual property, but to promote intellectual activity and development.

IPR is not an end in itself, but one of many tools to promote art and science, and there must be a balance between the realm of property and the public domain and interest.

So, we are back to the Statute of Anne, the encouragement of learning, and the good and balanced equity of copyright/droit d'auteur and the public domain.

Male genius, women and indigenous people

Arne Ruth writes (2004) referring to the *droit d'auteur*, which (contrary to TRIPS) includes not only the economic but also the moral rights of the author: Just on this point, the bourgeois laws on property rights verge upon the marxist utopia. The artist is granted the freedom Marx once upon a time claimed for everyone: Those who perform the work shall also be in control and disposal of the work.

Now, Marx is supposed to have asked this right for all workers, but the *droit d'auteur* was never intended to be (an example) for all workers; *droit d'auteur* was intended for the chosen few, for the geniuses.

1759 the English poet Edward Young (with a little help from the English novelist Samuel Richardson) wrote and published "Conjuncture on Original Composition", where he argued that the labor of an author was of a higher order than the labor of an inventor, never mind the labor of a farmer or factory-worker, because: The author not only worked upon nature, but produced something from himself, and thus gave his work a stamp of his own unique personality.

It was fair enough to put a limit on the patents for mechanical inventions, but literary works ought to belong perpetually to their creator.

Young applied Locke's theory of knowledge, and constructed the author as a genius, self-contained and inspired by a divine creative force.

In the 1770s Condorcet, french mathematician and philosopher, argued that ideas were not the creation of a single mind, nor a gift from God. Ideas, and knowledge, are the fruit of a collective process of experience, and thus belong to us all.

But Diderot, like Condorcet one of the French encyclopedists, embraced and developed the ideas of Locke, Richardson, and Young, asking: What form of wealth could belong to a man, if not the work of his mind?

The German author Lessing (1729-1781) did likewise, and from Lessing forward, German writers claimed for recognitions of their writings as a form of unique, perpetual, and inviolable property.

1791 the German philosopher Fichte published his essay: Proof of the Illegality of Reprinting, where he asked and answered some questions pertaining to the creations of the mind, like: What is intellectual/immaterial property, and is it really possible to own ideas. No, said Fichte, it is not possible to own ideas. Obviously a great many people are able to share the same ideas, and should all be free to express them, but: It is possible to own the expression, or the form of an idea, if the expression/form is unique enough.

And on this division a new theory of copyright was established, based in the unique expressions of ideas, rather than in the ideas themselves.

Some of us are not really convinced. We find it difficult to distinguish the content of ideas from the form/expression of ideas, and we think that the copyright/*droit d'auteur* still rests on a rather shaky theory of knowledge.

And then there is this gender question.

Quite a lot of the new, moderns authors, who did not depend on patrons but made a living with their pen, were women. But those women had a rather complicated relationship to their *droit d'auteur* and intellectual property right. On one hand they were writers who could claim

authorship, and thus a form of ownership; on the other hand they could be denied the right to own individual property.

In 1853, when Harriet Beecher Stowe wanted to stop an unauthorized German translation of Uncle Tom's cabin, she could only go to the courts via her husband, as she herself was not a legal person.

One of the protagonists in Stowe's book is the runaway slave George. He has been working in a factory, and the factory-owner praises him, saying:

"He worked for me some half dozen years in my bagging factory, and he was my best hand, sir. He is an ingenious fellow too; he invented a machine for cleaning of hemp - a really valuable affaire; it's gone into use in several factories. His master holds the patent of it."

Neither George, nor his author Harriet, are free men, and thus they are not allowed to own the work and labor of their minds and hands.

The relation slave-slaveowner is still reproduced in the IPR-relations between developing and developed countries, as demonstrated in the WIPO-discussions, and so acutely described by James Boyle:

"Curare, batik, myths, and the dance "lambada" flow out of the developing countries, unprotected by intellectual property rights, while Prozac, Levis, Grisham, and the movie Lambada! flow in - protected by a suite of intellectual property laws, which in turn are backed by the threat of trade sanctions."

Commons and enclosures

On the IFLA meeting in Buenos Aires, August 2004, some european IFLA-members, supported by some latinamericans, asked IFLA to defend libraries in a very concrete case: European libraries are now threatened by EC and IPR-interests wanting to impose their definition of public lending right on the libraries.

The IFLA-meeting was unable to side with the libraries, but it was decided that IFLA should look into the matter, and since April 2005, IFLA has a Position on Public Lending Right:

"IFLA does not favour the principles of 'lending right', which can jeopardize free access to the services of publicly accessible libraries, which is the citizen's human right."

The elaborated IFLA-Position is not a consistent and throughout refusal of PLR; it is partly a collection of advices: How to make the consequences of a PLR-regime less disasterous. But it is still some kind of defence, of the intellectual commons against the ongoing enclosure.

The first enclosure, the enclosure of land, took place in England from around 1500 and well into the 1800s. It was about landed gentry seizing unfenced commons of land, of meadows, orchards, and forests, fencing them off and making them their private property. Stealing the commons, the rich claimed property rights, but denied and violated the collective property rights and the property rights of the poor.

Today, with the second enclosure, the enclosure of the 'commons of the mind', the rich and mighty steals the commons claiming intellectual property rights and fencing off the (ex)commons with digitally barbed wire.

The first enclosure movement had a couple of peaks; one around 1760 and another 1793-1815, and from 1750 until the end of the first enclosure, approximately 4000 new laws defending and protecting the enclosures, were passed.

That's a lot of new laws; just as today. And just as today, those who suffer the consequences of the new laws, have no influence on the making of the laws.

The first enclosure took place in a genuinely pre-democratic society. Today we do have some democratic rights, but they are mostly limited to the national state, and the decisions about enclosing the commons are mostly taken on a global level to which common people have no access. The laws come to us by force and directives, and are often offensive to the common sense of justice. As seen in the case of Jon Lech Johansen, who was charged with unlawful trespassing upon his own computer. Or Brazil and South Africa, being threatened by sanctions for giving sick people better access to life-sustaining medicine. Or European countries, being sued for not complying to EU/EC-directives on Digital Rights Management and Public Lending Right.

Jon Lech Johansen won his case; Brazil and South Africa have not been sanctioned. There is hope, and resistance is meaningful.

An integrated part of a meaningful resistance might be mastering languages; having words and concepts that make it possible to visualize and talk about the values of the commons. And the dangers of enclosure.

The story told by the dominating market-discourse denies the possibility of values created outside the market, and even denies the very existence of the commons.

As David Bollier has expressed it: "According to this mainstream story, "value" is created by enclosing it in an envelope of private property rights"

David Bollier and James Boyle are two, of many, who see parallels between the first and the second enclosure, and they also point out the importance of language. The importance of having a coherent vocabulary for talking about vital interests that are otherwise ignored, like our common interest in having a free circulation of ideas and facts.

Boyle and Bollier take the environmental movement, and what the environmental activists did in the 1950s and 1960s, in order to visualize the environment, as a good example, worth following. The air, water and soil, had always been there, but they were not conceptualized in a coherent way until the activists gave us 'the environment' and an 'environmental' language.

There are various kinds of commons; physical commons like fresh water supply, and socially constructed commons like libraries.

Today both the commons of fresh water supplies and the commons of libraries are threatened by enclosure.

They are both worth defending.

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