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How to balance copyright and social interests in the new information age

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ABSTRACT

This essay is prepared to examine and find out the proper answers to these questions. To set the stage, it is necessary to: firstly assess the existing forms of limits and exceptions to copyright; secondly explore the characteristics of new information age; finally examine the problems brought by two new important digital products--electronic contracts and technical measures--to the copyright system and find out the legislative solution to these two problems.

KEYWORDS

Copyright; Information age; TRIPS agreement; WIPO; Electronic contracts.



INTRODUCTION

Over the centuries, copyright has been proved not only as an effective vehicle to encourage the geniuses to create more works, but as an engine of the change and development of modern human society because “it (copyright) has evolved into a finely tuned system that fosters fundamental human values and promotes vital social goals” In respect of the whole copyright system, the exclusive rights available to copyright owner are undoubtedly in the central position and act as the direct incentive for authors to continue their works. “Copyright could not have played this role had it not developed into a system of robust exclusive rights.” Besides these rights, exceptions and limitations to these exclusive rights incorporated in the current copyright system is another extremely important aspect requiring adequate attention. While these limitations and exceptions are not allowed to be in the way of the legal enforcement of exclusive rights by copyright owner, they really strike an appropriate balance between the rights of copyright owner and social interest, restricting the exclusive rights granted by copyright in cases where it is felt they go too far^[1]. It is reasonably to say that such balance constitutes a certain kind of cornerstone of the whole copyright regime and directs the improvement of the system and achieving vital social goals.

However, it is argued that the exceptions are likely to be affected than the rights on the basis that rights are often worded in an open way which can easily apply to new technology, while exceptions are often more specific^[2]. As a result of that, even if the existing legislation has provided for exceptions and limitations to copyright and these provisions would still remain in the future, the emergence of the new information age and the subsequent changes brought to the exclusive rights of copyright owner are likely to break the balance. This will definitely give rise to two significant questions: what are the new changes and impact generated by new information age greatly affecting the balance and in respect of these new problems, how to solve them and restore the balance?

THE CURRENT COPYRIGHT BALANCE: THE EXISTING LIMITS AND EXCEPTIONS TO COPYRIGHT

The importance of limits and exceptions to copyright in protecting social interests

Although it has been addressed for a long time and can be found in every period of copyright, the question of what are social interests should be emphasized and clarified again. There is no doubt that the protection of the rights of copyright holders can encourage them to create more works, which is also the main aim of the copyright system. More works the right holders create, more human intellectual fruits and contribution the society can benefit. However, it must be mentioned that no intellectual work can be made by genius without the help from society. It is absurdly to say that Karl Marx finished his works, the Capital, Chapter One, merely by isolating himself in an island and using only the intellectual sparkle of his creative brain, without getting the knowledge of the economic theories from others and the social experience from the society. Actually, nowadays civilization is mainly relying on the consecutive and chronological transmission of knowledge and the fact that we all stand on the shoulders of giants. The social interests, in general words, are unquestionably the paramount concern all the time.

Furthermore, the exclusive rights of copyright holders, if not controlled, are likely to limit the exchange of information in society to a extremely stringent extent, which is not the genuine purpose of the copyright system. Such circumstance will definitely stop the development of the intellectual creation with respect to the whole society and conversely reduce the chance for other right holders of accessing more constructive resources to continue their creations. The ultimate terrible result of such instance is that the interests of both sides will be harmed and the devolvement of society will gradually slow down. Thus, Authors, like creators and innovators, can't do their creation work without standing on the shoulders of their predecessors and competitors, and every copyright law must set the limits between the exclusive rights of one author and the opportunity of the next to build on the existing cultural and creative heritage^[3]. It is clearly, therefore, the relative free use of copyrighted works and flow of information are the core of social interests, playing a role to establish the reasonable way for authors to create their works as well as restricting the unreasonable growth of exclusive rights through copyright. Through this balance, copyright and social interests can benefit from each other and develop interactively,

Hence, when considering the function and aim of the copyright system, it is not difficult to draw a conclusion that on the one hand, the granted exclusive rights are the foundation and the incentive for more creation work, while on the other hand social interests are to some extent on the contrary to the rights of copyright owner's and need extremely emphasis. Copyright, as codified, with respect to this, are not conflict but consistent and already reflects a inherent balance between free speech and property rights. In other words, copyright and exceptions has been internalized to some extent on the basis that various copyright laws has incorporated a series of forms of exceptions to be discussed below. That's the exact direction followed by the development of copyright law in the past years and there is no reason why such an inner well-tuned mechanism should not be kept in the future information environment.

The forms of existing limits and exceptions

The procedure of examining “certain special cases”, “not conflict with a normal exploitation” and “not unreasonably prejudice the legitimate interests of the author” constitute the so-called three-step test. The member states could stipulate the exceptions or adopt its philosophy subject to the three-step test when it seems necessary to do so. This three-step test principle was subsequently transplanted into WTO/TRIPS Agreement (Art 13), and was emphasized unequivocally by the WIPO Copyright Treaty by stating that there is a “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”.

Recently, with the worldwide spread of use of computer, the emphasis on computer programs, especially on computer software, was gradually increased. It was argued that copyright exceptions are becoming to reflect the new role of copyright as a form of “near-industrial” property protection^[4]. Software developers concerns that where copyright was extended to cover computer programs, some common methods (including decompilation), which was regularly and legally employed by them before to analyze their competitors’ computer programs and extract interface information, would be precluded due to an unyielding application of the reproduction right. Such concern was quickly responded by the recognition of copyright exceptions as to reverse engineering. The most prominent examples of this type of exception are the exceptions for reverse engineering in the E.C. Computer Programs Directive^[5], which will be discussed later.

Now the rising tide of digital revolution has immersed into every corner of the world, the traditional limits and exceptions are inevitably facing the huge impact brought out by this revolution. The E.C. Computer Programs Directive just mentioned is one of the few responses to this trend. However, the main impact, which would touch the cornerstone of limits and exceptions to copyright, is still insufficiently recognized and far more complicated than what we have known before as it has still been moving along with the process of digital revolution at a high speed. The following part will turn to this sharp-edged area to explore the features of the new information age and more importantly, the changes and challenge standing in front of the copyright balance.

WHAT’S THE NEW INFORMATION AGE?

In order to clarify the features of the new information age, its essence must be clarified. It should be borne in mind that information highways do not constitute a new and different means or procedure of communication but a new way of organization and exploitation of means and procedures. New information age means exactly no more than a world with incredible increments of the participation of information in the human daily’s life, and such participation is orchestrated in new computer-generated way and reasonably to be called source-communicating process. What the new information will provide for us is the new way connected to sources so that people can use digital means to access them, not the new way of producing sources and products. Hence, in this article, the meaning of the word “information” extends from the traditional understanding connected with news and journalism to a new concept “equivalent to data able to be processed by a computerized system”. Such data/information is not a new increment of the amount of the knowledge, but another form of presentation of it, a form related to computerized and digitalized process. The meaning of “information age”, which is the key point to be grasped, therefore, is not concerned with how much knowledge we have possessed and will possess, but how these knowledge can be distributed.

THE NEW IMPACT AND PROBLEMS IMPOSED ON COPYRIGHT BALANCE IN THE NEW INFORMATION AGE

The copyright owners’ perspective of the issue of copyright exceptions: The concerns as to copyright piracy and counterfeiting in the digital environment

Before exploring the problems relating to copyright exceptions under the new information age circumstance, it may be helpful to put attention firstly on the contrary concerns held by copyright owners because it can illustrate the issue of why copyright owners are going to expand their rights beyond the traditional copyright granted extent from another perspective. The main concern hold by them is that their rights are confronting huge risk to be more easily infringed in respect of digital environment. The potential for unlicensed use is increasingly exacerbated by new technologies enabling domestic or low cost copyright and distribution: a combination of digitization, the internet and a global market place has given huge impetus to copying without reference to the designated licensor^[6]. For example, the download of music and video files via peer-to-peer networks and tools, such as Kazaa and Edonky, has been increasing tremendously in the past few years and become a perfect procedure for users to access to what they want directly and unlimitedly. The right owners claimed that under such circumstance, if there are no relevant provisions to restrict the unauthorized acts, they really have little hope in relying on anything other than trust that their works will be respected. Some statistic Figures of copyright piracy and counterfeiting was used by them for such argument: the European Commission estimated that copyright infringement doubled between 1999 and 2000; and, furthermore, that counterfeiting and piracy, as a whole, accounts for between 5 to 39 percent of legitimate trade in particular sectors in the single market. In this context, it is quite reasonable for the copyright owners to demand more protection for their rights of copyrighted works and the response to such demand can also be found in the recent legislations.

However, if we take another perspective to consider this issue, it would be found that this is also the reason why nowadays legislators are inclined to limit the scope of copyright exceptions and the legal use of copyrighted works by the third party while permit the exclusive rights of copyright holders to grow to a much broader area than ever before. From the E.C Copyright Directive to the U.S. Digital Millennium Copyright Act, which will be discussed below, the traditional exceptions to copyright are greatly restricted and compassed. Therefore, “in recent years, an increasing number of prominent European scholars and judges^[7] have expressed their anxiety over the seemingly unstoppable growth of copyrights, neighboring rights, sui generis rights, trademarks, and other rights of intellectual or industrial property^[8].”

Electronic contracts

As mentioned above, the technology developments are more likely to affect exceptions than the rights on the basis that rights are usually worded in an open way while and can adapt to new changes easily while the exceptions are too specific

to respond to the changes immediately. Thus, the direct impact on copyright system seems to take place in the area of the rights of copyright holders and then the relationship between exceptions and rights will inevitably be affected.

The idea/expression dichotomy makes clear that the aim of protection provided by copyright is the expression of idea, not idea itself. This doctrine undoubtedly applies to the new digital environment. As discussed above, the new information age is operating a way capable of digitalizing every kind of expression, touching the cornerstone of the copyright system. This process mainly relies on the extensive and intensive use of computer and Internet and produces lots of new communication techniques. On the other hand, creators are endowed with means to perform a micro engineering of expression, and of the possibility of expressing themselves using means that did not exist before. Such power bestowed by cyber improvement to authors could broaden the limit of the private domain over expressive forms and make authors more original and feel more independent than others to handle their own creation^[9]. Besides this, the spread of the use of the same program and the same files of data also limits the freedom of expression and extends the circle of the commonplace and, therefore, of the public domain.

It is quite clear that this issue is extremely important with regard to the copyright exceptions because the extra-copyright restrictions affect directly on the traditional limits and exceptions so that some previous legal and normal use falling with exceptions cannot be employed. If this kind of electronic contracts develop further without any constraint, the existence of copyright exceptions will seem meaningless.

CONCLUSION

In the light of new information age, copyright owners will face much more rapidly transmission and communication of information than any era before and it is no wonder that when facing the possible problem that more and more infringement to the rights of copyright owners may take place under the new situation, copyright owners will naturally rely more on controlling exploitation and use of their works through high-tech means including electronic contracts and technical measures than on enforcing copyright, trying to protect their works individually and directly. The expansion of extra-copyright rights, therefore, seems to be unstoppable and the copyright balance is inevitably under a new threat. The development of electronic contracts and technical measures are still on the way, and its direction and progress will largely control the extent to which the threat would be and new exceptions might be stipulated.

Legislators now face the challenge of determining the extent to which private parties may rely on contract law to achieve protection they may not achieve by copyright as well as the extent to which the law will prevent citizens from defeating technical measures that prevent them from engaging in acts permitted by copyright system. Decisions on these issues will tremendously affect the direction of copyright balance. While recently adopted legislations have taken into account of these issues, the answers for them are still far from certain and exact.

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