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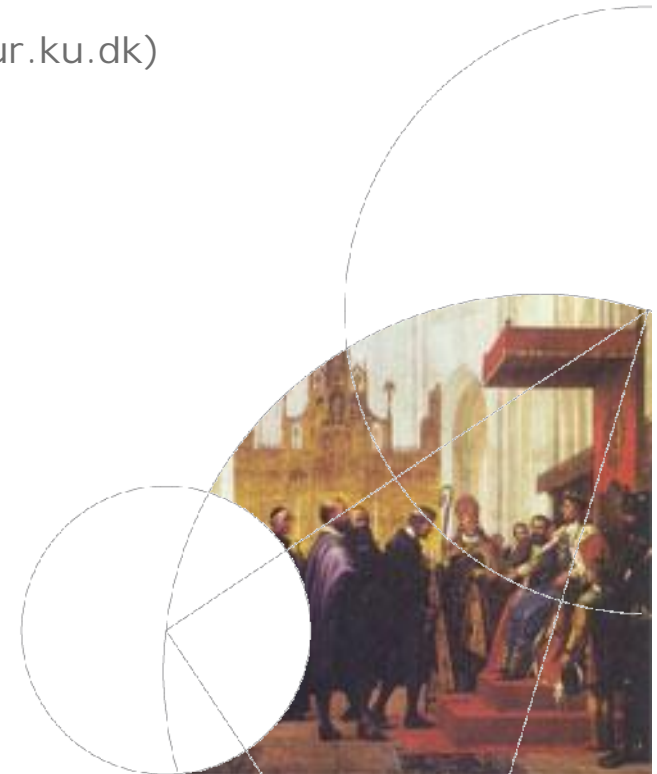


Global IP & New Interfaces

Collectivization of Rights: The Way Forward or The Road to Hell?

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Sted og dato (Indsæt --> Diasnummer)
Dias 1



Why Collectivization?

- The economic (“hard”) argument:
 - A response to a market failure caused by the property rules which give right holders the ability to individually prevent third parties from using their works, inventions etc.
 - “Thousands of users, thousands of copyright holders and millions of compositions” (*Broadcast Music Inc. v CBS Inc.* 441 US 1 (1979) 20)
 - Overcoming transactions costs
 - Turning useless rights into “useable bundles”
- The copyright (“droit d’auteur”) argument: Protecting authors
 - Collecting societies as “Authors Guilds/Unions”



“Collectivization”

- The creation of Institutions
 - “collecting societies”, “pools”, “joint ventures”, “clearing houses” etc.
 - “Bulk sale of rights”
 - “One stop shop”, blanket licenses (“bundles”)
 - Fixed prices and conditions (licensing schemes set by the institution)
 - External control (government agency, Copyright Tribunal, competition authorities etc.)
- Effects
 - Structural level
 - Changing the entitlement model from a property rule to a liability rule
 - Value level
 - Eroding author’s protection: From individual (authors’) right to collecting societies



Legal drivers of collectivization

- Voluntary models (“contracting into liability rules ...”)
- Compulsory models
 - Rights only through collective means (EU Satellite and Cable Directive)
- Hybrid models
 - Extended collective licenses (ECL)
 - Maybe also: Licenses of Right (LoR)
- Maybe one should include also
 - Competition law (misuse)
 - “E-bay-”style decisions
 - because they also imply the use of liability models



Structural level: From exclusivity to liability/copyright law

- To copyright collective administration is not just a “handy” way of administering rights: It’s the prerequisite for the existence of central aspects of copyright
- The Faustian Pact:
 - Collectivization has made it possible for copyright exclusivity to expand to cover secondary uses
 - The price has been a shift from exclusivity to liability
- HOWEVER: The base line protection rule in Berne and TRIPS etc. is still the property right and exclusivity - liability systems are perceived as SECOND BEST-solutions only



From exclusivity to liability/patents

- Winds of change?
 - *eBay v. Mercexchange* (to "patent trolls" "legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest")
 - License of Rights rules in the Proposal for a Council Regulation on the Community patent
 - Competition law
 - Indispensability test in EU-law
 - Swiss patent rules on research tools
 - TRIPS article 31 (Access to Medicine)



Dangers

- Innovation losses
 - General: The loss on the incentive's side from going to a liability system exceed the gains from the reduction of the transaction costs
 - When collecting societies etc. are involved also: Risk of losses from lock-ins to certain technologies or to collective rights administration models, lock-out effects (new-comers) or from monopolization (misuse)
- Value losses
 - Ideologically and culturally copyright (and patents: "The Fuel of Interest to the Fire of Genius!") is based on liberalistic and individualistic grounds (exclusivity, originality, and moral rights)
 - According to the traditional European view the protection of these interests by copyright is of value in itself
 - Collectivization implies a risk of loss of authors' protection



Copyright: The Collecting Societies – friend or foe?

- The *Janus*-quality of authors' organisation:
 - "Guilds"/"trade unions" for authors
 - Monopolies for business transactions
- Like all stake holders Societies (institutions) have vested interests in keeping the system as it is and in promoting their institutional self-interests by avoiding change:
 - Lock in to collective administration models – delay/prevent the development of DRM models based on individual licensing
 - Misuse of dominance vis-à-vis users and *authors*



Organizations vs. Users

C-52/07, STIM: “it is conceivable that, in certain circumstances, the application of such a remuneration model may amount to an abuse, in particular when another method exists which enables the use of those works and the audience to be identified and quantified more precisely and that method is capable of achieving the same legitimate aim, which is the protection of the interests of composers and music editors, without however leading to a disproportionate increase in the costs incurred for the management of the contracts and the supervision of the use of musical works protected by copyright (para 40).

SO: Also to competition law the individual rights model is the base line and the transaction cost argument only goes so far

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Organizations vs. Members

- From the *CISAC*-decision: The interest of authors include at the least
 - (i) the cost elements (commission related deductions, membership fees and associated costs such as pension or cultural deductions);
 - (ii) the quality of service (transparency, accountability, royalty payment terms, information, legal protection and enforcement);
 - (iii) the benefits derived from the membership (such as pension or illness schemes); and
 - (iv) the ability to collect the highest proportion of rights due to the authors (point 134)
- Should these rights be secured via competition law or via copyright law?
 - “Membership rights” as part of authors’ rights? ”



Summing up: Dangers of collectivization

- Dangers of going too far
 - Lose innovation benefits from the property model
 - Incentives
 - Misuse problems
 - Lock in problems
 - Lose author's protection
- Dangers from not going far enough:
 - Access to existing works/inventions becomes too costly and this hampers innovation/creativity
 - Individual authors loose protection from the "Guild"



Perspectives

- As seen from a societal perspective one cannot prefer property rules to liability rules. Nor can one prefer liability rules to property rules
 - Maximizing societal benefits out to be the goal
- The present IPR system is geared towards property rules and individual exclusivity
- The law should be changed to recognize collective models and liability rules as normal parts of the IPR system
- Therefore: The Way forward Goes through Hell!
 - IPR should push for collectivization if this is expected to lead to societal gains. An otherwise not.
 - At the same time, however, IPR should
 - Regulate institutions: Enter Competition Law?
 - Protect authors as "members"





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