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Information Technology and the Law - Copyright in Cyberspace

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Information Technology and Copyright in Cyberspace

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Lezioni su

“INFORMATION TECHNOLOGY AND LAW”

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Visiting Scholar presso l’Università di Macerata / Dipartimento di Giurisprudenza

mercoledì 25 febbraio / ore 16.00 - 18.00
Information Technology and the Law – an Overview of Issues

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Private International Law and the Internet

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The Future of Information Technology – Multiplication or Simplification

25 FEBBRAIO - 28 APRILE 2015
AULA VIOLA 2 / POLO DIDATTICO DIOMEDE PANTALEONI
VIA PESCHERIA VECCHIA / MACERATA
Copyright Law

Patent Law

Intellectual Property Law

Design Law

Trademark Law
Introduction and background

Copyright law in Practice

Copyrights in Cyberspace

Copyright law in a Nutshell

Copyright and Information Technology
Introductory remarks – Copyright and technology developments

– Not only the Internet…
– It begins with the art of printing in 1440
– Copyright is used to adopt to new technology…
– The Swedish Copyright Act as one example:
  • A case regarding import of phonograph records (1961)
  • A case regarding Internet-links and MP-3 files (2000)
  • Bothe cases were decided under tha same principles (more or less)
– Similar examples is likely to exists in relation to the Italian Copyright Act
What is Copyright?
Copyright law in a Nutshell

• Legal Background
• Subject matter
• Ownership and Duration
• Prerequisites for protection
• Rights conferred
Legal Background

– **UN declaration of human rights, art 27.2.**
  
  "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"

– **WIPO (World Intellectual Property Organization)**
  
  • Berne Convention (1886)
  • *The Digital Agenda*
  • WCT (1996)

– **WTO**
  
  • TRIPS
Legal background

• EU-law
  – Rental and Lending Directive (1992/100)
  – Resale Rights Directive (Droit de suite) (2001/84)
  – Enforcement directive (2004/48)
  – Computer program directive (2009/24)

• Harmonization piece by piece
Legal Background

• Lack of full harmonization -> room for national discretion

• National Law...
  – Italy: Law No 633 on the protection of copyright and other rights relating to its exercise
  – Sweden: Act on Copyright in Literary and Artistic Works (SFS 1960:729)
In what can copyright subsist?

• Subject matter
  – Literary, scientific, or artistic expression
  – Representation in writing or speech (the legal protection for the author
  – Computer programs, Musical or dramatic work, Cinematographic work, Photographic work, Architecture or applied arts and Works expressed in some other manner…

• Everything is protected…
  ..but Ideas, discoveries or inventions
Ownership …

• Individual right for the creator
  – Anyone (human) who has created a work of literature or art has copyright in the work.
  – A fictional or descriptive presentation in writing or speech.
• A right that is protected on the creation of a work - No need for formalities
• A right that can be transferred (by sale, gift, inheritance) and defended against infringements
• Special rules for employees are common
... and Duration

• EU – 70 years after the death of the author/creator
• Berne Convention article 7
  – 50 years after the death of the author/creator
• Term of protection varies between different works and different countries (see BC article 7(6))
Prerequisites for protection

• Creation – the work shall come from the copyright holder himself, be the result of his/hers personal creative effort.

• Originality – certain level of originality – the unique expression
Economic rights

• The exclusive (economic) right to control the work by reproducing it and:
  – Making it available to the public
    • Public performance – Offered for sale
    • Spread to the public – Show in public
  – Right to communicate to the public by wire or wireless means
The moral right

– May differ between countries – not harmonized

– In principle:
  - *The name of the author shall be stated to the extent and in the manner required by proper usage.*
  - *Respect the author’s literary or artistic reputation and his individuality*
    - As regards changes of the work
    - As regards under which circumstances the work is made available
What is Copyright?

• A monopoly right with limitations and exceptions - Private use...
• Software and Database protection
• DRM and technical measures
• More and more commercial
Questions related to new technology

• The challenge of communication in open networks
  – Information gets global – in a world of national rights.
  – What is reproduction for private purposes in a Peer to Peer world?

• The challenge of digitalization
  – What is original and what is copied – digital files can not easily be separated from each other.
  – Everything is copied everywhere all the time - the problem of servers, routers and temporary files.
Introduction and background

Copyright law in practice

Copyrights in Cyberspace

Copyright law in a Nutshell

Copyright and Information Technology
Copyright law in Practice

• Use and re-use of copyright
  – C 173/11 (Dataco)

• Internet related use
  – C-466/12 (Svensson)

• DRM and effective technological measures
  C-355/12 (Nintendo)
Copyright and fundamental rights

– ECJ Case C-275/06 (Promusicae), 29 January 2008;
– ECJ Case C-70/10 (Scarlet Extended v SABAM), 24 November 2011;
– ECJ Case C-461/10 (Bonnier Audio), 19 April 2012.
Use and re-use of copyright
Use of copyright

- C-275/06 (Promusicae)
- C-5/08 (Infopaq)
- Joined cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)
- C 173/11 (Dataco)
Adopting to new circumstances

‘[i]n accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other’

Joined cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)
C 173/11 (Dataco)
Legal Context

• Database Directive (1996/9), article 7
• Regulation 44/2001 (Brussels I Regulation) – Jurisdiction, enforcement and recognition
Background

• Football Dataco Ltd manages the creation and exploitation of the data and intellectual property rights relating to football competitions in England and Scotland = a *sui generis* right in the ‘Football Live’ database.

• A national right protecting an investment

• Sportradar GmbH is a German company which provides the service ‘Sport Live Data’, betradar.com. Bet365 among the costumers.
Background

• On 23 April 2010 Football Dataco brought proceedings against Sportradar (compensation for damage).
• Jurisdiction was challenged
• High Court of Justice:
  – Jurisdiction to hear the action in so far as it concerned use in the United Kingdom
  – Declined jurisdiction over the action in so far as it concerned the use in Germany.
• Where takes the (infringing) act place, where is it “located”?
• Transmission, communication and/or emission theory –
• Where the receiver is located or where the sender is located
The questions

‘Where a party uploads data from a database protected by the 
sui generis right under Directive 96/9/EC onto that party’s web 
server located in Member State A and in response to requests 
from a user in another Member State B the web server sends 
such data to the user’s computer so that the data is stored in the 
memory of that computer and displayed on its screen: 
(a) is the act of sending the data an act of “extraction” or “re-
utilisation” by that party? 
(b) does any act of extraction and/or re-utilisation by that party 
occur 
(i) in A only, 
(ii) in B only; or 
(iii) in both A and B?’
The judgement

Article 7 of Directive 96/9/EC must be interpreted as meaning that the sending by one person, by means of a web server located in Member State A, of data previously uploaded by that person from a database protected by the sui generis right under that directive to the computer of another person located in Member State B, at that person’s request, for the purpose of storage in that computer’s memory and display on its screen, constitutes an act of ‘re-utilisation’ of the data by the person sending it. = Infringing use

That act takes place, at least, in Member State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess. = in What Country/Territory
Database protection
– recent developments

  – ECJ Case C-355/12 (Nintendo), 23 January 2014.
  – ECJ Case C-202/12 (Innoweb), 19 December 2013.
  – ECJ Case C-173/11 (Football Dataco v Sportradar GmbH), 18 October 2012.
  – ECJ Case C-604/10 (Football Dataco Ltd v Yahoo! UK Ltd), 1 March 2012;
Internet related use
Copyright and hypertext links
Legal Context

• The WIPO Copyright Treaty (WCT)
• The Berne Convention
• Directive 2001/29 (INFOSOC)
Background

• Swedish newspaper (Göteborgs-Posten, GP), Journalists – production of text – copyright

• Retriever operates a website that provides its clients with lists of clickable Internet links (among other things to news that has been first published at the website of GP)

• GP brought action against Retriever, Stockholm District Court (compensation) – the action was rejected

• GP brought an appeal against that judgment before Svea Court of Appeal.

• What is “copyright relevant” use? – Scope of protection – new public
The questions

‘(1) If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive [2001/29]? (2) Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way? (3) When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website? (4) Is it possible for a Member State to give wider protection to authors’ exclusive right by enabling communication to the public to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29?’
The judgement

1. Article 3(1) of Directive 2001/29, must be interpreted as meaning that the act of providing clickable links on one website to works freely available on another website does not constitute an ‘act of communication to the public’, as referred to in article 3(1).

2. Article 3(1) must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.
Copyright and hypertext links

In Case C-466/12, the Court of Justice gave its answer to the question of whether links should be considered a communication to the public: in the Court’s view, that is not the case if the works are freely available on another website since the public is not new. Member States may not give ‘wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision’

Case C-466/12 (Svensson), 13 February 2014, para. 32, 41.
Copyright and hypertext links

• As long as the link is not communicating to a “new public” it will not be infringing...
DRM and effective technological measures
C-355/12 (Nintendo)
Legal Context

• InfoSoc Directive (2001/29), article 6
• Berne Convention (1886), article 2(1)
• Computer program directive (2009/24)
Background

• Nintendo creates and produces videogames and market two types of products for those games, namely portable systems, ‘DS’ consoles and fixed console videogame systems, ‘Wii’ consoles.

• Nintendo have adopted technological measures, namely a recognition system installed in the consoles.

• PC Box markets original Nintendo consoles together with additional software consisting of certain applications from independent manufacturers, ‘homebrews’ created specifically to be used in such consoles and the use of which requires the prior installation of PC Box equipment which deactivates the installed device which constitutes the technological protection measure.

• Considering that the principal purpose of the PC Box equipment was to circumvent and to avoid the technological protection measures of Nintendo games, Nintendo brought proceedings against PC Box (and 9Net) before the Tribunale di Milano.
The questions

(1) Must Article 6 of [Directive 2001/29] be interpreted as meaning that the protection of technological protection measures attaching to copyright-protected works may also extend to a system, produced and marketed by the same undertaking (e.g. consoles – Wii and DS3).

(2) Should it be necessary to consider whether or not the use of a product or component whose purpose is to circumvent a technological protection measure predominates over other commercially important purposes or uses and must the national court adopt certain criteria's in assessing that question.
The judgement

• Directive 2001/29/EC must be interpreted as meaning that the concept of an ‘effective technological measure’, for the purposes of Article 6(3) of that directive, is capable of covering technological measures comprising, also portable equipment or consoles intended to ensure access to games and their use.

• It is for the national court to determine whether other measures or measures which are not installed in consoles could cause less interference with the activities of third parties or limitations to those activities, while still providing comparable protection of the rightholder’s rights.
The judgement

• It is relevant to take account of the relative costs of different types of technological measures, of technological and practical aspects of their implementation, and of a comparison of the effectiveness of those different types of technological measures.

• As regards the protection of the rightholder’s rights, that effectiveness however not having to be absolute.

• That court must also examine the purpose of devices, products or components, which are capable of circumventing those technological measures.

• In that regard, the evidence of use which third parties actually make of them will be particularly relevant.
References

• World Intellectual Property Organisation; [www.wipo.org](http://www.wipo.org)
  – Bern Convention (1886)
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