

Chapter 67

Between Scylla and Charybdis: The Balance between Copyright, Digital Rights Management and Freedom of Expression

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ABSTRACT

As a reaction to the challenges of digitization, recent developments of international copyright law are characterized not only by its strengthening and proliferation but also by the protection of technological protection measures against circumvention acts. Consequently, in the digital context, copyright is being deconstructed and converted into a mere access right to legally and technologically protected information. Considering that copyright must represent a compromise between holders and users interests, the desired balance has been lost to the disadvantage of the users, potentially harming fundamental and human rights such as freedom of expression and freedom of access to information. In the present chapter, the author describes the conflict between copyright and freedom of expression, how the classic compromise achieved by the conflict's internalization within copyright law and the provision of copyright exemptions may no longer exist and how the users tend to find legal protection externally, outside copyright law.

INTRODUCTION

Until recently, it would cause wonder to say that copyright law could conflict with freedom of expression, since historically they had coexisted peaceably. Nevertheless, today, with the emergence of the knowledge economy based on creative digital contents, the tension between both rights is becoming increasingly clear.

Freedom of expression is a fundamental human right that currently is not regarded only as a shield against government censorship (Birnhack, 2006, p. 64). Its scope of protection has been expanding since some private entities have gained the power to restrict others' speech and access to information.

That is precisely what has been happening in the field of digital copyright. In fact, recent developments of copyright law reveal a tendency to its global strengthening and to the recognition of self-help systems based on technological pro-

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tection measures (TPM). As digital content and, in general, immaterial goods can easily be used or appropriated by others, to protect the creative economy the rights' holders needed to go beyond copyright's traditional field by expanding its object of protection and the powers granted to holders to control unauthorized utilizations. Since, traditionally, the enforcement of copyright was merely reactive, the infringements committed in the digital world seemed to remain unpunished, which caused substantial damages to copyright holders. In the digital environment, freedom of access to information and rights over informational and copyrighted contents have become realities in tension, and technology was seen as the adequate response to guarantee the holders' rights by promoting digital rights management (DRM) systems. In fact, DRM systems based on TPM allow the author or the rights' holders to digitally control access to copyright protected works (or even to unprotected works); to restrict unauthorized reproduction and other usages of works or to identify the users. Copyright law combined with self-help technological systems has adapted to become the adequate instrument to legally create scarcity and to restore the lost balance between holders and users' interests.

However, reality showed how the self-help systems can negatively affect the public domain and users' fundamental rights or freedoms like privacy or freedom of expression. In the latter case, by transforming the users' rights or freedoms into a mere access right to digitally private-controlled works, the use of TPM and DRM and the may have serious implications in usages that in traditional copyright law were admitted. Accessing digital information for educational, scientific, artistic or other creative purposes, amongst other usages, may today rely more on the will of the rights' holder, expressed by the terms of a contract celebrated with the end user, rather than on public interest oriented legal provisions.

Consequently, this privatization of the control of the access to digital information may lead to

a context where freedom of information and expression can be undermined since creative speech based on (or influenced by) a restricted access work no longer relies only on the will of its creator, but depends on a contractual relation established with the rights' holders.

In the present chapter, I discuss the relationship between digital copyright and freedom of expression. I will start by describing the traditional balance between copyright and freedom of expression that was achieved inside copyright law itself and how digital technology has been challenging it. I will then explain how recent developments of copyright law may jeopardize freedom of expression and freedom of access to information and how the traditional internalized balance is being lost, leaving space to a model where freedom of expression tends to be considered an external limitation on copyright.

BACKGROUND

Traditionally, both in the common law copyright system and in the *droit d'auteur* system, despite their different bases and principles, copyright has been idealized as an engine for (or a means of) freedom of expression by granting the holder the exclusive right to use and to explore his original work, therefore providing him a reward for his labour.

That normative construction never meant that there was no inherent conflict between copyright and freedom of expression. In fact, to assign the holder the exclusive right to explore or to determine the terms by which a third person can exploit the former's work means that the copyrighted creative expression cannot be freely used by others without adequate authorization. The legal mechanisms that were created to protect copyrighted works can then be characterized as a restriction to freedom of expression functionally planned as an instrument to promote cultural, artistic and scientific creation, or, in other words, freedom of creative expression.

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