

HOW SHOULD SOCIETY ADDRESS THE COPYRIGHT PIRACY PROBLEM?

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ABSTRACT. Chon attempts to map the challenges raised by recent encounters between intellectual property and development, proposing a normative principle of global intellectual property. Gervaise notes that the economic purpose of copyright law is instrumentalist in nature, ensuring the orderly production and distribution of, and access to, work of art and intellect. Janis and Smith present a case study about the potential for new technology paradigms to drive intellectual property regimes towards obsolescence. According to CDT, the same technology that has led to communications revolution makes infringement easy and has opened the door to widespread piracy.

Chon attempts to map the challenges raised by recent encounters between intellectual property and development, proposing a normative principle of global intellectual property; intellectual property should include a substantive equality principle, measuring the welfare – generating outcomes by economic growth and by distributional effects; a decision maker would accord much less deference and exercise much more skepticism towards the proposed government action when a knowledge good that affects basic human development capabilities is implicated. Chon claims that a new principle of substantive equality is a necessary corollary to the formal equality principles of national treatment and minimum standards that are now imposed on virtually all countries regardless of their level of development; this proposed substantive equality principle would match intellectual property's innovation mandate to the actual local conditions and concerns of developing countries seeking to join the global knowledge economy (it is the core of a human development – driven concept of development, a term lately used by many developing countries to express an equality concern with various global intellectual property regimes such as the WTO and WIPO); certain foundational capacities should guide application and creation of intellectual property norms.ⁱ Gervais notes that the economic purpose of copyright law is instrumentalist in nature, ensuring the orderly production and distribution of, and access to, work of art and intellect. Gervais proposes two concrete ways to align copyright law with its underlying purpose (especially on the internet): (i) to make existing rights easier to manage by facilitating collective management using the Extended Repertoire, and (ii) a recasting of the copyright rights based on the effect of the use made of the work (not its technical nature).ⁱⁱ

Janis and Smith present a case study about the potential for new technology paradigms to drive intellectual property regimes towards obsolescence. Using historical, legal and technical sources, Janis and Smith analyze how a major conceptual shift in the plant sciences threatens to undermine the intellectual framework – work around which plant variety protection was structured, and propose an alternative design for a plant variety protection regime based on unfair competition principles,

recommending that the future course of plant variety protection.ⁱⁱⁱ Dinwoodie remarks that international intellectual property norms are now being developed by a wide range of institutions – some nations, some international and some that do not fit neatly into either category; by bodies designed to address intellectual property; by trade and other bodies; and by actors public, private and indeterminate.^{iv}

Birnhack holds that copyright is no longer a matter of promoting and progress of science in the words of the U.S. Constitution (it is now more than ever before a matter of trade); the globalization of copyright law destabilized previous balances; local culture, access to information, research and free speech in general; will be left unattended, in the face of expanding copyright. Birnhack examines the intersection of copyright law and free speech on the global level; the answers given to the alleged copyright / speech conflict in some developed countries that copyright is the engine of free speech, do not necessarily fit other places; the copyright / speech conflict is a legal and political site where global norms of trade collide with local culture, resulting in a GloCalization.^v According to CDT, the same technology that has led to the communications revolution makes infringement easy and has opened the door to widespread piracy; targeted enforcement (consistent with due process, and coupled with legal alternatives) can have a substantial deterrent effect on piracy; a well – functioning DRM marketplace requires informed consumers who understand the benefits, limitations and tradeoffs associated with different DRM – enabled products. „CDT believes there is a path towards a set of solutions to the piracy issue. These solutions will not eliminate piracy completely – likely an impossible task. Rather, the goal should be to make participation in widespread infringement unattractive, risky and rare. The solutions CDT envisions are based on a carrot – and – stick approach: distributing digital content in ways that will attract paying consumers, while making infringement unenticing and it clear that bad activity will be punished.”^{vi} CDT aims to outline a general framework for protecting copyright in a manner that is consistent with the open architecture of the Internet and with the interests of creators, consumers and technology innovators; there is a path towards a policy convergence to match the coming technology convergence (the combination of legal protections to make infringement unattractive and technical protections for online content offers the possibility of vibrant new markets for content delivery, consistent with the open architecture of the Internet); there may be opportunities to use the threat of enforcement to change the behavior of small – scale infringers (without resorting to a full – fledged lawsuits). „Consumers need trusted sources of information in order to understand their rights and responsibilities regarding copyright law and the use of copyrighted works. Copyright law can be a technical area, and consumers’ initial assumptions about what is and not permitted and often not fully accurate. Public education is needed to help shape the consumer expectations and norms concerning the use of copyrighted works in a digital world – because without effective public education, new technologies capabilities relating to (for example) peer - to – peer networks and DRM may create their own ‘facts on the ground’ with little regard for law or policy.”^{vii}

Hainge links the concept of high – fidelity reproduction to histories of representation, suggesting that the former contradicts widely held beliefs about the nature of representation throughout the 20th century; digital technology appears to surpass all previous standards of high – fidelity reproduction (it displaces a human perceptive faculty into the technological apparatus itself); the digital technology that is supposedly super – clean and noise free is merely better and disguising its noise and errors that still, always and necessarily form a part of its message. Our media technologies are precisely means to mediate reality, which is to say to represent under a different name. Yet, although the content of many cultural products and texts created in the disseminated by our media technologies may indeed problematize the possibility of representing as coherent a world of unprecedented and exponential complexity, it would not appear that the ontologies of these media technologies themselves are touched by this recognition of immanent failure.”^{viii}

REFERENCES

ⁱ Chon, M. „Intellectual Property an the Development Divide” in *Cardozo Law Review*, 27, 2006, pp 2821 -2921.

ⁱⁱ Gervaise, D.J., „The Purpose of Copyright Law in Canada”, in *University of Ottawa Law & Technology Journal*, 2 (2), 2005, pp. 315 – 356.

ⁱⁱⁱ Janis, M.D. * Smith, S., „Obsolescence in Intellectual Property Regimes”, in *University of Iowa, Legal Studies Research Paper No. 05 – 48*, April 2006.

^{iv} Dinwoodie, G.B., „The International Intellectual Property Law System: New Institutions, New Sources”, in *Marquette Intellectual Property Law Review*, 2006.

^v Birnhack, M., „Global Copyright, Local Speech”, in *Cardozo Arts & Entertainment Law Journal*, 24, 2006, p.491.

^{vi} CDT, „Protecting Copyright and Internet Values”, RWP, Spring 2005, p. 5.

^{vii} *Ibid.*, p. 9.

^{viii} Hainge, G., „Of Glitch and Men: The Place of the Human in the Successful Integration of Failure and Noise in the Digital Realm”, in *Communication Theory*, 17, 2007, pp. 26 – 27.