Political economies of copyright, droit dauteur and the Internet: convergence or clash?
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“Political economies of copyright, droit d’auteur and the Internet: convergence or clash?”

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Abstract

This paper contributes to academic literature on copyright and the Internet by theoretically (a) examining the political economies underlying copyright, droit d’auteur and copyright, (b) studying copyright policy from an Internet governance perspective and empirically (c) illustrating the theoretical findings with the French graduated response policy. It concludes that although policies on copyright and the Internet are converging, their underlying rationales for encouraging communication and creativity continue to clash. Moreover, differences between rationales and interests within the political economies of copyright and the Internet can also be observed. In particular, there are significant tensions between social and economic rationales and uses of copyright and the Internet. Much of the democratic and societal use of the Internet depends on its open, cooperative, flexible and decentralized nature. However, these very same characteristics are contested for economic or political reasons such as fighting piracy. This paper argues that copyright is used as leverage to advocate more control in Internet governance. Copyright extends much further than the cultural industry, it can serve to control human actions on the Internet. Copyright and the Internet shape how we communicate and create knowledge in society. They facilitate a certain type of communication and creativity. In graduated response, strong copyright wins: closed, controlled protection is chosen over open, widespread distribution of communication and creativity. Graduated response encourages global copyright maximalism and an enclosure of the Internet.

Keywords

Copyright, droit d’auteur, Internet, France, graduated response, Internet governance, rationale analysis
1. Introduction

Copyright and the Internet seem to be in a continuous heads-on clash. Indeed, while copyright seeks to encourage communication and creativity through closed, controlled protection, the Internet attempts to do the same through open, widespread distribution. There are significant differences between the main rationales underlying the two communication tools. This paper highlights the observable clash between the political economies of copyright and the Internet, but also argues that there is more to this story of copyright and the Internet.

Within copyright and the Internet, there are conflicting motives and interests as well. Take copyright and droit d’auteur (author’s rights) for example: they approach the protection of cultural works from quite different perspectives, either as an economic incentive to create and a just reward for labor or as a personality and property right. Moreover, there is an inherent tension built into copyright between the protection and exploitation of the works it governs. The protection offered by copyright stimulates creativity, but at the same time too much copyright hinders its consumption (Netanel, 2008). For the Internet, conflicts arise between its technical, social and economic uses. The Internet is both a watchdog in society and a key pivot in the information economy. The democratic potential of the Internet can be undermined by the capitalist logic of domination and profit maximization (Foster & McChesney, 2011; Mosco, 1996). This paper then, examines not only various tensions between, but within the political economies of copyright, (droit d’auteur) and the Internet.

Furthermore, many papers have been written to analyze how the Internet has instigated reforms in copyright and how the Internet has made copyright enforcement much more difficult. Less papers analyze how these reforms in copyright, in particular online copyright enforcement strategies and policies, are changing the Internet. Today’s Internet need not necessarily be tomorrow’s Internet. Much of the democratic and societal use of the Internet (take the example of free speech writing or community building) depends on its open, cooperative, flexible and decentralized nature. However, these very same characteristics are contested for economic or political reasons such as fighting piracy (Zittrain, 2008). Increasingly, there are calls for more and tighter regulation of the Internet. This paper contends that copyright is used as a leverage in the Internet governance debate for more control.

Graduated response is a copyright enforcement initiative where regulation of copyright and the Internet converges, yet their underlying rationales continue to clash. In France, it is also an example of the employment of copyright policy to achieve a higher aim of centralized, national Internet control. Graduated response is a mechanism for deterring online piracy through the surveillance of Internet use. When Internet users are caught infringing copyright, they are repeatedly warned and ultimately sanctioned through a fine, imprisonment or suspension of Internet access. This paper presents the French case study of graduated response, with a particular focus on the stakeholder views of copyright and the Internet. In the debate prior to the French graduated response policy, copyright was mainly perceived from an economic point of view and the Internet was considered a dangerous jungle. Through graduated response, the French government has advocated a “civilization of the Internet” (Presidency of the French Republic, 2009).

The structure of this paper is to theoretically (a) examine the political economies underlying copyright, droit d’auteur and the Internet, (b) study copyright policy from an Internet governance perspective and empirically (c) illustrate the theoretical findings with the French graduated response policy. This paper adds value to the current academic literature on copyright and the Internet by approaching the topic from a socio-communications viewpoint: it studies the influence of copyright on the Internet through policies aimed at protecting copyright on the Internet, rather than the more conventional reverse approach of changes to copyright due to the Internet. Further, this paper offers a comparison between copyright and author’s rights and expounds on the European developments in graduated response. The clash between copyright and the Internet in graduated response raises important questions about open communication, democratic participation, the balance between public and private interests, and ultimately the future of the Internet and society.

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1 This paper builds on two previous conference papers written by Trisha Meyer & Leo Van Audenhove (2011a, 2011b) presented at Cyber-Surveillance in Everyday Life: An International Workshop and International Association for Media & Communication Research: Cities, Creativity, Connectivity.
2. Copyright, droit d’auteur and the Internet: converging policies with clashing rationales

This first, theoretical part of the paper explores aspects of the political economies underlying copyright, droit d’auteur and the Internet. In particular, I focus on (a) the rationales for copyright and for the Internet, expand on (b) some of the frictions within and between these two communication tools and seek to show how (c) copyright policies are used to govern the Internet and beyond.

Although copyright and the Internet are quite distinct (one is a set of laws, the other an IT network), I refer to them both as communication tools. Thinking of them as tools helps us realize that copyright and the Internet shape how we communicate and create knowledge in society. They facilitate a certain type of communication and creativity: closed and centralized or open and distributed. At the same time, the fact that they are tools means that they were produced with a certain purpose in mind, but can be used for another. Copyright and the Internet (law and technology) are not neutral artifacts; there are rationales and values embedded in them which change throughout their use (Green, 2002; Lessig, 2006).

Copyright: finding the balance between protection and exploitation

Rationales

Copyright gives creators temporary monopoly rights (so-called economic rights) to reproduce, adapt and make a work of their mind available to the public. It also grants creators certain moral, personality rights, such as the right of attribution and to integrity of a work (Gotzen & Janssens, 2009). Copyright has been around for quite some time (over 300 years!), has evolved with each new technology and has taken different forms in various countries. I use the term copyright generically, as a legal means of protecting cultural works.

The following four rationales for copyright (Davies, 2002) certainly are not the only way of formulating copyright's underlying principles, but are mentioned in this paper, because they demonstrate diverging ways of thinking about copyright, the emphasis on protection but the inherent tension between protection and exploitation of copyrighted works as well:

i. Natural law

A cultural work is the fruit of a creator’s mind. According to this first reasoning, the fruit of a person’s mind should be considered property, because a person has a similar natural right of property to the fruit of his hands. A cultural work is also viewed as being the expression of a creator’s personality and thus intrinsically linked to that person. This reasoning provides the basis for moral rights.

ii. Just reward for labor

If something is worth creating, then it is worth protecting and a creator deserves remuneration for his work. This rationale gives copyright a firm economic foundation. It reasons that a creator should be rewarded for his effort. Similarly, the cultural industry needs to be able to expect a reasonable profit and return on investment to endeavor in the risky business of cultural production and distribution.

iii. Stimulus to creativity

Remuneration provides a stimulus to create, a reason to contribute to science and culture. This reasoning presupposes that creators and the cultural industry need the assurance of protection and remuneration to create. Culture would be less diverse without financial encouragements.

iv. Social requirements

Finally, a creator should be rewarded not only for his own personal benefit, but also for the benefit of society. Through his creation, he enriches the national cultural patrimony. The fourth rationale lays a responsibility on creators and the cultural industry to spread their works widely. Copyright is granted in the wider interest of society.

Clearly, the four rationales (especially the second through the fourth) described are interdependent. They provide moral, economic and social reasons for copyright. They also show how a balance needs to be found between protection and exploitation of copyrighted works. Copyright includes a social responsibility. For this reason, copyright legislation also includes limitations and exceptions to the exclusive rights, such as the right to private copy and use for commentary or research (Gotzen & Janssens, 2009).
Traditionally, national copyright laws can be divided into two models: copyright and droit d'auteur. The difference between both models lies primarily in the importance given to the underlying rationales. In the copyright model, economic principles of just reward for labor and stimulus to creativity dominate. Copyright is viewed as a positive law, rights that are not natural but rather granted by law. The aim of copyright is to incentivize creation economically with the public's interest for culture and creativity in mind. The droit d'auteur model emphasizes the close relationship between the author and his/her work. Droit d'auteur is viewed as a natural law, rights that flow from the creation of the work. The work is considered the property of the author, but limitations are set in place on this property right to ensure the public's interest is also served (Davies, 2002; Gotzen & Janssens, 2009).

While this distinction between the predominant underlying rationales for copyright and droit d'auteur models is useful to gain a better understanding of how governments in respective countries approach copyright and its enforcement, it is important to note that the differences between these two models are not clearcut. So, although copyright models tend to approach the protection of cultural works from an economic point of view and droit d'auteur models from a personal and moral point of view, the four rationales described above are interdependent and simultaneously used (Davies, 2002). In France for example, early decrees dating from the French revolution employed the rationales of just reward for labor and stimulus to creativity rather than the natural law rationale to justify copyright (Burkitt, 2001; Davies, 2002). Furthermore, global and European copyright harmonization efforts, such as the Berne Convention, the WIPO Treaties and the EU Copyright Directive, have significantly converged copyright and droit d'auteur models (Davies, 2002).

Technology

The current copyright crisis is not a new phenomenon. It was another technological revolution, the invention of the printing press, that brought about copyright in the 18th century. Licenses were given to publishers to produce and distribute literary works in an attempt to bring a halt to commercial piracy (Davies, 2002). The coming of each new technology has meant re-thinking and re-balancing copyright law. Rights are expanded and additional means of enforcement are offered, while needing to leave space for new forms of production, distribution and exploitation of copyrighted works. Neil Netanel (2008), critical of current copyright developments, speaks of "copyright's paradox": copyright is granted to spur on free speech, yet imposes unacceptable burdens on speech when private and public interests are not well-balanced. Where this balance between interests lies will be defined quite differently by holders and users of copyright. Netanel is one among many scholars (eg. Benkler, 2006; Lessig, 2004; Vaidhyanathan, 2001) advocating that copyright has evolved into being too long and too strong, restraining the Internet's potential for sharing and common knowledge production.

These various points about copyright rationales, droit d'auteur and technology are relevant for the French graduated response case study: copyright, a tool for stimulating communication and creativity was developed with various rationales in mind. These rationales show an inherent tension between the protection and exploitation of copyright (between public and private interest considerations). France operates under a droit d'auteur model, but its history shows that economic justifications for copyright have been equally been used to advocate copyright (Burkitt, 2001; Davies, 2002). Tensions in copyright tend to come to a head when discussing how to tackle the threats and opportunities that a new technology brings for creative production, distribution and consumption of cultural works. The Internet is not the first technology to challenge copyright, nor is the contestation of the strength and length of copyright new either. However, each new response formulated to retain and reinforce copyright continues to shape how we can communicate and create in society - directly through the copyright laws or indirectly through the changes it seeks to bring about in the technology to which it is responding.

Internet: promoting distributed control

Rationales

The Internet's original purpose was to facilitate communication within the academic and military spheres. In "The Internet Galaxy: Reflections on the Internet, Business and Society", Manuel Castells (2001) explains how the Internet is used for different reasons by four distinct user groups who together build up a distinct Internet culture. They can be interpreted as four rationales for the Internet:
i. Pursuit of science

The early Internet was the product of shared pursuit of technological advancement among computer scientists in the US. The academics sought to build a decentralized communication network through building on each others’ research and allowing peer-review of one’s own research. This first layer of the culture of the Internet is techno-meritocratic: merit is based on the contribution to technological discovery and on recognition and respect by other scientists.

ii. Technological sharing

The second group of users, hackers, give the shared pursuit of technological advancement a countercultural twist. Hackers also work on technical aspects of the Internet, but are part of loosely organized networks grounded in society. They are autonomous of corporate or institutional assignments. They have a distinct (at times anti-capitalist) worldview of open access and freedom to create & share knowledge. Similar to the academic setting, important values are again cooperation and free communication.

iii. Social interaction and symbolic belonging

The Internet is also a tool to bring likeminded users together to work, discuss and play on common topics. The hackers form a community focused on computer programming, but non-technical groups have also adopted the Internet as their means of networking. In this context, it is important to mention that the Internet is widely appreciated as being a potential tool for democratization. Users can easily gather and share information with others. The Internet facilitates bottom-up and horizontal communication and can also be a medium of self expression.

iv. Entrepreneurship

Finally, the Internet would not have boomed without its take-up by entrepreneurs and the Internet commerce. The Internet is essential as a collaboration and distribution medium in our information economy, but is also a commercial space of its own. In this last layer of Internet culture, the capitalist values of domination (control) and profit maximization are supreme. This entrepreneurship transformed the Internet into a mass-medium. The nature of a network is that the more users and uses there are, the more valuable a network becomes - economically, but also socially.

These four uses of the Internet build on each other. Some important characteristics underlying the development of the early Internet culture have been openness (free communication, interoperability), cooperation (requests for comments, consensus), flexibility (best effort, end-to-end approach) and decentralization (maximum autonomy of each node, distributed control) (Castells, 2001; Lessig, 2006; Shapiro, 1999). They are not rationales, but rather values embedded in the working of the network.

The fourth rationale of entrepreneurship and capitalism can sit ill at ease with the other three technically or socially oriented purposes of the Internet. The Internet has been lauded for its potential to contribute to democracy through the facilitation of free speech, deliberation between citizens and community building. At the same time, the Internet is an important tool for innovation in managing businesses as well as an increasing business sector of its own (Castells, 2009; Foster & McChesney, 2011). Comparable to traditional media, the Internet take on a watchdog role (the fourth/fifth estate2) in our society, to expose political processes and malfunctions. Wikileaks is an extreme example of the use of the Internet as a watchdog. However, tensions arise between the social and economic use of the Internet, in particular when it may not be economically efficient or profitable to maintain an open, cooperative, flexible and decentralized space (Lessig, 2003; McChesney, 2008; Shapiro, 1999). Just as with copyright, the public interest of the Internet will be defined quite differently by industry actors than by individual users.

Control on the Internet

In this context of tensions between Internet interests, it is important to mention that just as there is not one copyright, there is not one Internet either. The choice for particular characteristics in the early Internet was deliberate, driven by a belief in cooperation and openness of information (Castells, 2001). This was not the

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2 In early communication studies, the print media was referred to as the fourth estate, distinct and politically and economically free from the (British) Lords, Church and Commons. As the fourth estate, the media plays a key democratic role in keeping powers honest through monitoring and informing. However, as it selects news and shapes opinions, it is also a social and political power in itself (McQuail, 2005). Bill Dutton (2007) builds further on this theory of media as the fourth estate and refers to citizen media and the blogosphere as a potential fifth estate.
only way the Internet could have been shaped and these values were and continue to be challenged. In the
1970s, France introduced an alternative communication network technology called Minitel. The infrastructure
supporting this videotex technology was centralized and restricted to France; content on the Minitel network
was strongly regulated by the French government (Mailland, 2001). Additionally, research projects such as
the OpenNet Initiative reveal current Internet filtering, blocking and surveillance practices across the globe.
Access to Internet content is restricted at different levels of the Internet (Internet backbones, Internet service
providers, institutions and individual computers) for a multiplicity of reasons (copyright infringement, child
pornography and national security to name just a few). Studies of the OpenNet Initiative show that filtering on
the Internet is increasing and certainly is not restricted to authoritarian states only (OpenNet Initiative,
2011a).

Considering the French approach to content regulation on the Minitel network, perhaps it should be not
surprising that online surveillance is endorsed and filtering techniques are proposed in its graduated
response policy. Similar to the section on copyright, I have pointed here to some frictions that can arise
between social and economic uses of the Internet. Much of the democratic and societal use of this
communication tool depends on its open, cooperative, flexible and decentralized nature. However, these
very same characteristics are contested for economic or political reasons such as fighting piracy. Many
debates have been held about the open or closed, free or proprietary approaches to the Internet. My concern
in this paper is less about what the right business model is for innovation and creativity, and more about who
is gaining control on the Internet for which interest and whether in this process the social rationale of the
Internet to engage users is considered.

Copyright enforcement: governing the Internet and beyond

In "Networks and States: The Global Politics of Internet Governance", Milton Mueller (2010) identifies four
drivers of change in Internet governance today: contentions over intellectual property rights, cyber security,
content regulation and critical Internet resources. He contends that "to govern copyright or trademark in the
digital world is to govern the Internet" (Mueller, 2010, p. 131).

Converging policies

Copyright holders have actively sought to control their content on the Internet since the mid 1990s. Locally
and globally, legislative endeavors have extended the length and breadth of copyright, made the use of
circumvention technologies illegal and provided right holders with more enforcement means to fight digital
piracy. Lawsuits against Internet users and content providers, as well as measures to technologically protect
cultural works, have also been pursued. So far the involvement of Internet service providers (ISPs) has
mainly been retroactive through notice and takedown procedures. However, as piracy levels remain high,
legislators of late have been more receptive to the calls for proactive involvement - despite the fact that
Internet intermediaries have been granted limited liability for activity on their networks. Filtering techniques,
such as deep packet inspection of online content, are advocated as a viable means of detecting and
removing illegally distributed works (McIntyre & Scott, 2008; Mueller, 2010).

Copyright infringement and the efforts to curtail it have been the topics of many heated debates.
Stakeholders tend to hold very different opinions on the definition of the problem at hand and consequently
suggest diverging solutions for the regulation of these two communication tools. At one end of the spectrum,
"copyright maximalists" (Mueller, 2010, p. 137) equate online piracy to physical theft of property and a loss of
creativity, advocating stronger protection and enforcement measures. At the other end of the spectrum,
copyright abolitionists believe that protection of online content is contrary to the nature of the Internet and
copyright no longer has a function in the digital age. Both extremes try to force the rationales of one
communication tool on the other, are flawed in their reasonings, but surprisingly still have a fair amount of
supporters: copying a cultural work on the Internet is not the same as stealing a CD or DVD from a store.

3 The OpenNet Initiative is a collaborative research project between the Citizen Law (University of Toronto), the Berkman
Center for Internet & Society (Harvard University) and the SecDev Group (Ottawa), aiming expose and evaluate Internet
filtering and surveillance practices to help better inform public policy and advocacy work in Internet regulation (OpenNet

4 Examples of legislative endeavors are the US Digital Millennium Copyright Act, EU Copyright in the Information Society
Directive, the WIPO Copyright and Performance & Phonograms Treaties, the WTO Agreement on Trade Related Aspects
of Intellectual Property Rights and more.

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nor does piracy necessarily equate a loss of creativity (Yu, 2003). The Internet and digital information technology allow for much more sampling, sharing and amateur content production. Copyright needs to accommodate for these new types of creativity, but is nonetheless relevant in the digital era. Indeed, the Internet does not question the underlying rationales for copyright, but rather demands a re-balancing between the protection and exploitation of cultural works. The ease of consuming cultural works illegally on the Internet is not an excuse to stop supporting these types of protected cultural production, as the Internet and digital technology reduces, but certainly does not eliminate the cost of creativity.

**Clashing rationales**

In essence, the clash between copyright and the Internet is a significant dissimilarity between the rationales of the communication tools. Three out of the four copyright rationales identified in this paper favor protection, while the Internet rationales opt for the distribution of content. In our information society, copyright has steadily increased in importance, as information is a valuable economic asset (Castells, 2009; Green, 2002). In “Intellectual Property and European Economic Constitutional Law : The Trouble with Private Informational Power”, Tuomas Mylly (2008) explains how intellectual property rights can be a tool for structural and relational power. Access to information is valuable for participation in democracy and society, but at the same time control over information is necessary to succeed in today’s economy. Mylly (2008) contends that copyright regulates much more than just the cultural industry, copyright extends to core informational resources, to non-market interactions and the Internet:

“[W]hereas in the industrial society intellectual property rights regulated the relations of authors and publishers and some industrial firms, in the networked information society they increasingly extend to and regulate the core cultural and informational resources, cultural non-market production, and the communication structures necessary for open and pluralistic public spheres, enabling individual autonomy and the existence of a civil society discernible from the capitalist economy. In the networked society technology itself functions as an important regulator of individual and institutional behavior. Intellectual property, in turn, may define who has the power over individual uses and future trajectories of technologies: a single entity, several entities or no individual entity at all.”
(Mylly, 2008, p. 13)

Copyright enforcement on the Internet can thus be used to control human actions, and conflicts in online copyright can be interpreted as a collision between liberal democratic and neoliberal globalist values, a choice between democratic participation and centralized control (Mylly, 2008). Copyright is bundled with other online issues such as security, privacy and child pornography to advocate for more control on the Internet. Mueller (2010, p. 157) argues that “[t]here is a distinct possibility of a ‘regulatory alliance’ between content regulators, intellectual property interests, and security advocates, which attempts to reassert and strengthen hierarchical, nation-state based control over the Internet”. In the 2011 G8 meetings, the French president Nicolas Sarkozy suggested the French graduated response approach as an appropriate means to regulate (in his terms "civilize", Presidency of the French Republic, 2009) the Internet.

Copyright and the Internet shape how we communicate and create knowledge in society. They facilitate a certain type of communication and creativity: closed and centralized or open and distributed. Additionally, as communication tools, copyright and the Internet are not neutral artifacts; they reflect the power of different social groups and are shaped by its uses and users, especially by those in powerful positions (Green, 2002; Mansell, 2004). Graduated response is a success story for those advocating copyright maximalism and an enclosure of the Internet. It promotes private, closed, controlled communication and creation and regulates much more than the cultural sector alone. As will be explored in the following section, graduated response not only illustrates clashes within and between the political economies of copyright and the Internet, but is also used as a leverage for governing the Internet and society.

3. Graduated response in France: “civilizing the Internet”

The second, empirical part of this paper will (a) sketch the policy making process leading up to the adoption of graduated response in France to (b) then expand on how copyright and the Internet were perceived by the various stakeholders, and (c) explain how these findings correspond with the theoretical arguments of this paper on the convergence of policies but clash of rationales and Internet governance.

For this case study, I used Jagdish Bhagwati’s (1989) concept of 3Is (ideas, interests and institutions) in policy to structure the analysis of the political economics of the French graduated response policy. It
provides insight into the rationales and theories, the positions of various stakeholders and the legal and political context of the communication tools. As might have been noticed from my analysis in the first, theoretical section of this paper, the theories of political economy of media and social construction of technology also underlie the research. Copyright and the Internet are tools shaping and shaped by society - many times in service of the controlling and powerful stakeholders (Green, 2002; McChesney, 2008).

Policy making : protecting French culture

Upheaval

France was the first European country to pass legislation in 2009 introducing a graduated response mechanism to deter online copyright infringement: LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (Hadopi 1) and LOI n° 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet (Hadopi 2).

Forerunners to the legally enforced graduated response mechanism in France are the DADVSI law and Olivennes agreement. In 2006, the French transposition of the European Union copyright directive (DADVSI) introduced an obligation for Internet account holders to monitor their network against copyright infringements. Then, in 2007, the government brokered a multi-stakeholder agreement (Olivennes, 2007) which further laid the basis for graduated response. This agreement was made legally enforceable with Hadopi 1 and 2 in 2009. The graduated response mechanism has been operational in France since Autumn 2010. Arguably, the recently adopted French LOPPSI 2 law which deals with homeland security, has been the next step in the development of a French surveillance regime and its endeavor to regulate the Internet. LOPPSI 2 permits an administrative authority to order the blocking of Internet addresses containing pornographic depictions of minors.

Both Hadopi laws were heavily opposed by many stakeholders, with the French socialist party (PS) and digital rights group La Quadrature du Net leading the way. In April 2009, the socialist party successfully voted down Hadopi 1 in the House of Representatives, a cause of much upheaval among the proponents of graduated response (the French Ministry of Culture and Communication, President and cultural industry). La Quadrature du Net used the Internet as their primary tool for protest and awareness raising, a good example of the third, social rationale of the Internet.

Opposition to graduated response certainly was not restricted to France. At the level of the European Union, graduated response (in particular the suspension of Internet access) became a hot topic in the discussions on a telecoms reform. The adoption of the telecoms reform, a package of regulatory changes to telecommunications infrastructure (which initially did not relate to copyright infringement), was held up for several months over a provision on the need for a “prior fair and impartial procedure” with “the right to an effective and timely judicial review” to take measures limiting Internet access or use. This nicely illustrates the convergence in policies related to copyright and the Internet. Interestingly, although concern about graduated response continues to be raised (notably also by the EU Data Protection Supervisor Peter Hustinx (2010) and UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Frank La Rue (2011), similar copyright enforcement agreements are being reached across the globe in countries such as South Korea, Ireland, the United Kingdom and most recently the United States. Graduated response fits the latest strategy of the cultural industry to involve ISPs more actively in the enforcement of copyright online, a development which seems to be jetting ahead.

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My analysis of the graduated response policy in France is conducted in the framework of my doctoral research and consists of three parts. In 2009 a first analysis was made of the policy debate, comparing it with developments in the EU and the UK (Meyer & Van Audenhove, 2010; Van Audenhove, Morganti, & Meyer, 2009). Then in 2011 a second analysis was made, focusing specifically on the rationales of the stakeholders towards copyright, Internet, surveillance and technological protection measures (Meyer & Van Audenhove, 2011a, 2011b). A third and final analysis will follow in 2012 to conduct interviews with stakeholders in France and study the implementation of the graduated response policy.

LOI n° 2006-961 du 1 Août 2006 relative au Droit d'Auteur et aux Droits Voisins dans la Société de l'Information.


Objectives of Hadopi

Christine Albanel was the Minister of Culture and Communication when the first Hadopi law proposal was introduced. She described the objective of the law “to stop the hemorrhage of cultural works on the Internet and to create the indispensable legal framework for the development of the legal offer of music, films, audiovisual works and programs, even literary works on the new communication networks” (French Ministry of Culture and Communication, 2008, p. 3). The first French law creates Hadopi (Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet), a public authority. The second law deals with the expedited judicial procedure for suspending Internet access. Hadopi has three missions: to encourage the development of legal offers, to prevent online copyright infringement and to regulate and monitor technical protection measures.9

Concerning legal offers, the first Hadopi law includes provisions to shorten the release windows for audiovisual works and to offer music catalogues free of technical protection measures. Further, Hadopi has developed a labelling scheme to make it easier for Internet users to identify legal offers. The French government has also launched a music card for young people, doubling the amount of credits on a card purchased as an incentive to obtain music legally.

Concerning technical protection measures, the first Hadopi law includes provisions for Hadopi to evaluate experimentations in the field of content recognition and filtering. It also stipulates that, at the request of right holders, a judge can order "all measures to prevent or put an end to an infringement of an author's right or related right against any person likely to contribute to remedy it".10 Further, Hadopi needs to ensure that digital rights management (DRM) on works is not used for anti-competitive purposes and does not deprive consumers of the benefit of certain legal exceptions, such as the right to a private copy. Thus, while there is a recognition that certain technical protection measures such as DRM can constitute an inconvenient or even illegal barrier to the consumption of cultural works, there is still an openness to regulate copyright through filtering and blocking on the Internet network.

Three steps

The graduated response mechanism in France consists of monitoring, warning and sanctions. Right holders monitor the activities of Internet users. When they detect illegal file-sharing of copyrighted works, they can notify Hadopi. Based on the IP address provided by the right holders, Hadopi can then decide to send an email to the holders of the account where illegal activity was detected, reminding them of the obligation to secure their Internet access against copyright breaches and stressing the dangers of copyright infringement for the renewal of creativity and the economy of the cultural sector. The notification also points them to legal alternatives to obtain copyrighted works and ways to secure their Internet access. In case of renewed detection of illegal file-sharing within six months, account holders can be sent a second email and a registered letter. In case of a third detection within one year, Hadopi can notify account holders that their file will be transferred to the judicial authorities. Through an expedited criminal procedure, taking into account the gravity of the breach and the situation of the account holder, a judge can decide to suspend the Internet access for a period up to one year, in addition to a fine and prison sentence. Account holders who are not found guilty of illegal file-sharing but who repeatedly neglected to secure their Internet access risk losing their Internet access for a period up to one month, in addition to a fine and prison sentence. A visualization of the procedure can be found in figure 1.

9 LOI n° 2009-669 du 12 Juin 2009 Favorisant la Diffusion et la Protection de la Création sur Internet, art. 5.
10 Idem, art. 10.
Stakeholder views: cultural diversity and the Internet jungle

Copyright

The most recurrent reasoning for copyright in French graduated response policy was economic in nature: copyright as a just reward for labor. There was a strong concern about the losses of revenue for the cultural industry and artists due to piracy. The economic reasoning was intrinsically linked with cultural diversity and creativity. A just reward for labor was viewed as a prerequisite, a stimulus for creativity and legal offers. The French government and cultural industry frequently mentioned cultural diversity as a reason for graduated response (French Ministry of Justice and Liberties, 2009; Le Monde.fr, 2009). They argued that the French cultural patrimony was endangered by lack of copyright protection. The civil society, however, argued that culture was being used as a pretext in the debate to defend the status quo of the cultural industry (UFC Que Choisir, 2007).

Further, references were also made to the property and moral rights of authors in a few documents of the French Ministry of Culture and Communication and cultural industry (Le Monde.fr, 2009). In the droit d’auteur tradition, moral rights are the prime example of copyright as a natural law, a cultural work is the expression of its author’s personality. Considering the strong droit d’auteur tradition in France, I had expected more reasoning based on the natural right of an author to property. The use of the terminology “stealing” and “plundering” to describe copyright infringement indirectly refers to cultural works as intellectual property.

Internet

All stakeholders perceived the Internet as a communication and distribution medium, for legal and illegal purposes, although this was not always explicitly mentioned (Films7.com, 2009; SACD, 2009). Technical aspects of the Internet were not often referred to, except when discussing technical protection measures. The civil society and telecommunications and IT industry pointed to characteristics of the Internet (decentralized, international, open and neutral) which they believe were endangered by graduated response and the EU telecoms reform (ASIC, 2008, 2009; La Quadrature du Net, 2009).

11 The references to stakeholder documents in this section are selective, yet representative. Please feel free to contact me at trisha.meyer@vub.ac.be if you would like a more extensive list of references for specific statements.
Further, the Internet was presented by stakeholders as a tool for entrepreneurship and commerce on the one hand, and as a tool for social interaction and belonging, a tool for freedom of expression and access to information on the other hand (French Ministry of Culture and Communication, 2008). The European Commission (2008) has regularly stressed the importance of the Internet for employment and innovation. The telecommunications and IT industry agreed and emphasized the Internet as a vector for economic growth, an environment with new profit opportunities (ASIC, 2008). Some antagonism between the functions of the Internet as a tool for industry and for society could be observed. Importantly, the French Constitutional Council in its decision on Hadopi 1 considered that “in the current state of communication means and in view of the general development of online public communication services as well as the importance of these services for the participation in democratic life and the expression of ideas and opinions, this right [free communication of thoughts and opinions] implies the freedom to access these [Internet] services”.12 It ruled that considering the importance of the Internet for the exercise of human rights, Internet access could only be suspended by a judge. The European Parliament (2008) and civil society further stressed the role of the Internet for new non-commercial content creation and discovery, indicating the potential of the Internet for the democratization of information production, distribution and consumption.

Finally and interestingly, most stakeholders perceived the information society and the Internet as revolutionary and unstoppable. The Hadopi 1 law proposal compared the current developments in cultural distribution and diffusion to the invention of the printing press (French Ministry of Culture and Communication, 2008). This was, however, often accompanied with a discourse on the dangers of the Internet. The French Ministry of Culture and Communication, the President and the cultural industry described the Internet as a jungle, an uncivilized environment where only the fittest survive (Le Monde.fr, 2009; Presidency of the French Republic, 2009). They strongly urged for regulation of the Internet. The European Commission (2008) and civil society interpreted the reactions of the cultural industry (and government) to the Internet as one driven by loss of control (Capital.fr, 2009). The discourse of the French government and cultural industry on the need to civilize the Internet seeks to justify control over the medium through surveillance and technical regulation. It is another step in the direction of an enclosed Internet, of a restricted mass-medium comparable to the radio and television - a change which several artists indeed advocated in a letter to the socialist parliamentarians (Le Monde.fr, 2009).

Analysis : faux droit d’auteur, Minitel and the G8

The policy discourse of graduated response in France illustrates the clash between and within the political economies of copyright, droit d’auteur and the Internet well:

Copyright was mainly perceived from an economic point of view, as a just reward for labor and necessary stimulus to creativity. Although France is often considered as a bastion for droit d’auteur (personality and moral rights of an author), its history shows that economic justifications were readily used in the early days of French copyright. Here again, it was economic dangers of piracy for authors and the cultural industry that were brought forward as a reason to fight piracy through graduated response (French Ministry of Justice and Liberties, 2009; Le Monde.fr, 2009). The interpretation of the French culture and creativity needing protection was also quite restrictive. New types of creativity enabled by the Internet were not considered, the graduated response policy protects the status quo in cultural production. Social aspects of copyright in the distribution of cultural works are present in Hadopi’s commitment to shorten the release windows for audiovisual works and to offer music catalogues free of technical protection measures.13 Graduated response in France thus shows the inherent tension between the protection and exploitation of copyright (between private and public interest considerations).

When reasoning about the Internet, the French stakeholders acknowledged the importance of the societal role that the Internet plays (French Ministry of Culture and Communication, 2008). The digital rights groups, La Quadrature du Net made use of the Internet for their awareness and protest campaigns, showing the potential for the Internet for contestation and democratization. Importantly, however, the Hadopi laws and its defenders also portrayed the Internet as a dangerous jungle, a survival of the fittest (Le Monde.fr, 2009; Presidency of the French Republic, 2009). A precedent of seeking to centrally control a communication network can be found in the French approach to Minitel (Mailand, 2001). There is also a willingness to intervene in the architecture of the Internet to filter and block for copyright reasons.14 Early values embedded in the Internet to encourage widespread distribution of communication such as openness, cooperation,

13 LOI n° 2009-669 du 12 Juin 2009 Favorisant la Diffusion et la Protection de la Création sur Internet, art. 5.
14 Ibidem.
flexibility and decentralization are set aside in the endeavor to make the Internet a safer, more culture-friendly space. Technically or socially-oriented rationales for the Internet are also overruled in favor of a market-oriented Internet.

The policies of copyright and the Internet converge in graduated response, because it regulates both communication tools. Both theoretically and empirically though, it is clear that their approaches to encourage communication and creativity clash significantly. In graduated response, strong copyright wins: closed, controlled protection is chosen over open, widespread distribution of communication and creativity. Graduated response encourages copyright maximalism and an enclosure of the Internet.

Indeed, the French approach to copyright online fits within a wider framework to regulate the Internet:

Regulatory alliances have been made between copyright infringement and child pornography to govern the Internet more closely. The new French LOPPSI 2 law permits an administrative authority to order the blocking of Internet addresses containing pornographic depictions of minors. Further, President Nicolas Sarkozy has employed the discourse of the need for a “civilization of the Internet” (Presidency of the French Republic, 2009) not only in the context of copyright protection but more generally at the level of Internet regulation as well. The latest venue for this discourse has been the G8, over which France is presiding this year. President Sarkozy has successfully placed Internet governance on the agenda of a meeting between the eight largest global economies, moving the debate away from its traditional international multi-stakeholder venue, the UN Internet Governance Forum, and towards a closed, government forum. International support for Internet control is thus also sought.

4. Conclusion

Copyright and the Internet both shape in part how we communicate and create knowledge in society. They facilitate a certain type of communication and creativity: closed and controlled or open and distributed. At the same time, the fact that they are tools means that they were produced with a certain purpose in mind, but can be used for another. Copyright and the Internet are not neutral artifacts; there are rationales and values embedded in them which change throughout their use and regulation (Green, 2002; Lessig, 2006). There are also tensions within copyright and the Internet themselves. There is not one approach, argument or use for these communication tools. In particular, there are significant tensions between social and economic rationales and uses of copyright and the Internet.

The Internet has not changed the underlying rationales of copyright. Nor is the Internet the first technology to challenge copyright. The coming of each new technology has meant re-thinking and re-balancing copyright law. But each new response formulated to retain and reinforce copyright does continue to shape how we can communicate and create in society—directly through the copyright laws or indirectly through the changes it seeks to bring about in the technology to which it is responding. The Internet does not question the protection of cultural works, but rather the balance and inherent tension in copyright between the protection and exploitation of cultural works to further communication and creativity in society.

Copyright has resisted and pushed back against this new technology remarkably well. Defenders of strong copyright have used copyright enforcement policy to advocate for changes in the regulation of the Internet. In seeking to protect copyright through intervention in the network (think of filtering and blocking), they step away from early Internet values of openness, cooperation, flexibility and decentralization (Lessig, 2006; Zittrain, 2008). However, much of the democratic and societal use of the Internet depends precisely on this adherence to open and widespread distribution of communication and creativity (Benkler, 2006; Jørgensen, 2006; Shapiro, 1999). Copyright maximalists seek to force the protection rationales of copyright on the Internet. The attempt to cipher away these Internet values is not unique to copyright. Regulatory alliances can be formed between content regulators, intellectual property interests and security advocates, to argue for more Internet control (Mueller, 2010).

Furthermore, I have argued in this paper that copyright enforcement can also be an attempt to regulate individual actions and uses of technology. In our information society, copyright deals with much more than the cultural industry and can be used as a tool for structural and relational control (Mylly, 2008). In other papers (Meyer & Van Audenhove, 2011a, 2011b) I address the important issue of surveillance and how this serves to regulate society. Copyright enforcement initiatives such as graduated response in France endorse widespread surveillance of Internet users for copyright protection purposes by private actors. Surveillance

allows some select groups to monitor the actions of others, endorsing the practices of some, while restraining those of others (Lyon, 2001). This paper has based its empirical findings on discourses surrounding the graduated response policy in France. It is too early (and probably also too difficult) to assess if and how graduated response changes regulation of the Internet and society, but it is possible to make claims about the type of society and Internet governance being promoted.

Graduated response paints the complex picture of the tensions and struggles in and between copyright and the Internet well and shows that there is not one approach to copyright, nor to the Internet. For example, although France grants strong moral and personality rights to its authors, economic rationales for copyright played a far greater role in advocating for graduated response. Similarly, although proponents of graduated response acknowledged the Internet as a tool for freedom of expression and access to information, their main discourse emphasized the dangers of the Internet. Graduated response advocates a heavily regulated and centrally controlled Internet that discourages new forms of communication and creativity. In graduated response, strong copyright wins: closed, controlled protection is chosen over open, widespread distribution of communication and creativity.

In response to President Sarkozy's advocacy for more Internet control (Presidency of the French Republic, 2009), I would contend that graduated response leans much more towards a colonization than a civilization of the Internet. The clash between copyright and the Internet raises important questions about open communication, democratic participation, the balance between public and private interests, and ultimately the future of the Internet and society.
References


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