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Copyright

Linking the world of ideas
to the world of commerce

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Technological revolutions are massive surges of technical change that occasion the re-organization of industry and cause major modifications in the organizational and institutional spheres of societies. Such revolutions, as defined by Schumpeter and Kuhn, and later by Freeman, Perez, Dosi and others, are not seen as an engineering phenomenon but as a complex social process involving technical, economic, social and institutional factors that establish and become part of a techno-economic paradigm that eventually causes a fundamental change in the socio-institutional sphere (Kristín Atladóttir, 2009). The source of technological revolution is the introduction of a new, cheap input into production. An input that slowly renders older production methods obsolete and becomes the basis for new industries.

The new industries call for the development of new organizational principles and externalities of infrastructure and knowledge that enable the modernisation of existing industries (Perez, 2010). The transformational instrument is a new techno-economic paradigm that embodies new and wide-ranging common sense criteria for the most efficient, effective and profitable products, processes, business organisations and market behaviour. Perez describes the 5 technological revolutions as:

- 1st – Industrial Revolution
- 2nd – Age of Steam and Railways
- 3rd – Age of steel, Electricity and Heavy Engineering
- 4th – Age of Oil, the Automobile and Mass Production
- 5th – Age of Information and Tele-communications

She delineates the transformational techno-economic paradigms and the new ‘common-‘sense’ innovation principles that come to diffuse into the socio-economic substructure and the institutional logics of society. The fifth technological revolution, or the Age of Information and Tele-communication and its new paradigm bears the following features:

- Information-intensity (microelectronics-based ICT)
- Decentralized integration / network structures
- Knowledge as capital / intangible value added
- Heterogeneity, diversity, adaptability
- Segmentation of markets / proliferation of niches
- Economics of scope and specialization combined with scale
- Globalization / interaction between the global and the local
- Inward and outward cooperation / clusters
- Instant contact and action / instant global communications.

Sundara Rajan (2002) has pointed out that the role of copyright in globalization reflects three factors. Firstly, as the primary legal mechanism for protecting new technologies that are central to the global economy and the continued growth in

industrialized economies that have a comparative advantage in technology. Secondly, a growing economic importance of outputs of the creative industries and a global marketplace for such products. Thirdly, works of the mind (information, knowledge, intangible goods) is recognized as “raw material” for productive activity in a digitized society and by linking those with an industrial framework a context for international commercialisation of knowledge and culture has been contrived (Sundara Rajan, 2002). Indeed, as will be discussed later, the TRIPs agreement introduced intellectual property law into the international trading system and created a framework within which trade in copyrightable goods could be fostered.

The new common sense criteria applies to the institutional sphere as well and although it has been demonstrated that both institutional inertia and institutional resistance cause the dissemination into the institutional sphere to lag and be slow in adaption, changes in the legal framework of intellectual property rights in the last few decades demonstrate not only the importance of IP rights in international commerce but also how effective “lobbying” can be in driving institutional reform when the market and the industrial sector realize the potential of new technologies.

In outlining a cultural industries paradigm and what she perceives as a shift therein, Towse has described its constituent features as its conformity to a concept of creative economy with emphasis on knowledge and human capital assets as the source of post-industrial economic growth. It also emphasizes the importance of innovation and creativity and highlights intellectual property as a mainstay of growth policy in both developed and developing economies. Additionally the shift includes the integration of the cultural industries with the arts under the collective term creative industries and seeing this sector as *the* (italics RT) driver of the twenty-first century economy that relies on copyright in particular to deliver growth. With production and consumption closely entwined and large number of people both using and creating due to digitization policy-makers are having to rethink the role of copyright (Towse, 2010).

I

The last two decades of the 20th century saw a marked increase in amendments, revisions and additions to Intellectual Property Rights. The technical nature of copying and the cost of duplication changed due to the new digital and telecommunication technologies. Changes of a similar nature had occasioned changes in copyright in earlier times but scale and scope were greatly inferior to changes heralded by the invention of the silicon chip. The new technologies soon displayed the potential for large-scale transformation of commerce and introduced the prospect of globalization and the importance of Intellectual Property Rights in this development soon became apparent. Statements such as “Intellectual Property is a critical component of our present and future success in the global economy.” that preambled the 2005 UK Gower review became commonplace from around the turn of the century. The US Copyright Act of 1976, the implementation of the UK Copyright, Designs and Patents Act in 1988, the adoption of the WIPO copyright treaty in 1996 and the TRIPs agreement annexed to the General Agreement on Trade and Tariffs (GATT) in 1996 have all instigated frequent changes to the Intellectual Property laws in their respective jurisdiction. A marked expansion of US legal texts in the applicable domain was, in their own words, crudely examined by Landes and Posner (Landes & Posner, 2004). The description crude refers to the primitive methods used for the examination and the fact that there has not necessarily to be a link between the increase in words and pages and the increase in legal protection provided by the law as can be seen in Figure 1. However, the figure demonstrates a number of findings that are highly suggestive.

These are the correlation between the increase in words and pages and major statutory changes. Also that the number of pages in the U.S. Code compared to the words of the intellectual property statutes indicated growth in the intellectual property statutes despite the fact that the U.S. Code include laws that reduce rather than increase the protection of property rights. It is noteworthy that the expansion of copyright is more rapid than of other IP rights and particularly during the period of 1994-2000.

INTELLECTUAL PROPERTY STATUTES AND U.S. CODE

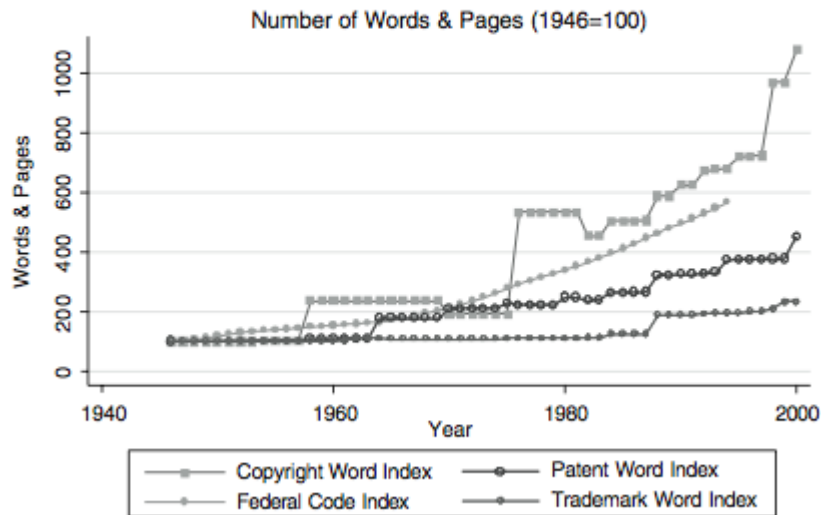


Figure 1. Intellectual Property Statutes and U.S. Code Source: William Landes & Richard Posner, 2004

This, Landes and Posner contribute to a number of factors. Political and ideological currents encouraging investment in innovation and technological development, pressure from interest groups representing those in favour and possession of intellectual property rights and the growth in the market for intellectual property. This marked growth has become prominent in the most recent decades and has increased the potential economic rents from IP rights (thus increasing the pressure from interest groups even further). Further to this Landes and Posner have suggested that a mercantilist “cause”, supported by the large positive balance of US trade in intellectual property rights, may have imparted political-economic considerations on legislators since “...a nation that, like the United States, has a comparative advantage in producing intellectual property is more likely to favour intellectual property rights than one that does not” (Landes & Posner, 2004, p. 19).

Although no comparative study of legal texts in either national or on a supra-national level in Europe has been conducted it is safe to maintain that amendments and ongoing revisions are taking place in many countries of the continent and act, pacts and directives issued by bodies operating on various levels of governance in the European Union no little but increase in occurrence.

A developing body of international rules describing and governing the movement of things, people and ideas across borders reflects the reality of globalization. Intellectual Property law finds itself in the hub of international regulation, a situation that emphasises it's role in the new environment of intense global exchange (Sundara Rajan, 2002).

II

North describes the function of organizations as that of purposive entities designed by their creators to maximize wealth, income or other objectives defined by the opportunities afforded by the institutional structure of society. He further explains that in the course of pursuing those objectives organizations incrementally alter the institutional structure and that the organizations are created as a function not simply of institutional constraints but also of other constraints (e.g. technology, income and preference) and that the interaction of these constraints shapes the potential wealth-maximizing opportunities of entrepreneurs (North, 1990).

Marginal adjustments to the complex of rules, norms and enforcement that constitutes the institutional framework is the essence of change (North, 1990). Landes and Posner (Landes & Posner, 2004) point out the material and social changes that increase the value of intellectual property rights. They maintain that intellectual property rights tend to be costly to define and enforce and that such costs are particularly high in an unsophisticated legal system. However, when the system becomes better at resolving disputes, as the cost of copying falls and technological advances accelerate its speed, as technological progress, as well as originality in general, becomes more highly valued, the costs of intellectual property rights fall and the benefits rise. This leads us to presume that intellectual property rights will expand. In line with this reasoning Landes and Posner, by referring to Demsetz (in his theory of property rights, 1967) and other sources, draw parallels to rise of rights over property and the concomitant decline of common property and further presuppose that an anticipated effect of the implementation of the TRIPs agreement will increase the willingness of developed countries to transfer technology to developing countries in order to encourage the production of intellectual property in the respective countries.

Many are, however, more sceptical about the paths that the changes to IP law are going down (see Lessig(2004), Boyle(2008), Zittrain(2008), Benkler(2006) and others). P. A. David sees the development as a self-reinforcing and potentially destructive dynamic that may result in the complete commodification of all information (David, 2004).

He sees unprecedented and underestimated threats being posed to the public domain as 'the repository of a collectively held cultural heritage' as well as the 'foundations of the "open science" mode of cumulatively generating novelty be the recombination of readily accessible information and knowledge' and goes on to state that:

“The threats posed to the public domain as the repository of a collectively held cultural heritage, and hence to the foundation of the "open Science" mode of cumulatively generating novelty by the recombination of readily accessible information and knowledge, are unprecedented and more serious than is readily acknowledged in many government policy-making circles - and by some leaders and administrators of academic institutions. Three processes that are distinct but interconnected currently are driving events towards the demise of the copyright system.”

III

As we have seen Perez details the 5 technological revolutions and how their paradigmatic effect diffuses into society. David describes three "technological disruptions" that have taken place within the technological and institutional structures that govern the printing and publishing industries of modern economics. These

disruptions and their effect in forming' the business organization and the political and legal regulation of publishing' are:

- The movable type revolution (mid 15th century)
- The stereotype and lithographic revolution (early 18th century)
- The digital information technology revolution (late 20th century)

David suggests that “after two centuries of elaboration and extension, the very principles upon which modern copyright law appeared to rest are being severely distorted by the forces unleashed by a new clustering of disruptive technological innovations”(David, 2004, p. 7). In addition the ensuing efforts of harmonization and standardisation of international copyright has spawned international policy and enforcement reforms that sees seismic shifts in the operational and cognitive perception of the core purpose of copyright.

The popular economic rationale for copyright goes something like this: Copyright is a body of law constructed and enforced to ensure an economic incentive for authors for the creation and divulging of artistic works and knowledge.

There exist many versions of this dictum, most more elegantly phrased than the one given here. This conception is founded on premises provided in the constitutional body of all of the early legal texts and statutes of copyright.

The preamble to the Statute of Anne, the first copyright law proper passed in England in 1710 states the purpose of the legislature as being: *An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.*

The United States passed statutory copyright laws in 1790 and based them on a provision made in article 1, section 8, clause 8 of the 1787 United States Constitution, also known as the Copyright Clause. This body of law was purported to: *“To Promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.”*

The Berne Convention came into being in 1886 and most national states have become signatories to the convention or the union as it is termed. The Berne Convention is overseen by WIPO, a specialized agency of the United Nations, and has, until recently, been the international legal authority on copyright. The first article of the Berne Convention reads as follows: *“The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.”*

The principal statements of these three landmark legal bodies are closely related and reflect a purpose that complies with the opening statement of this section. In 1996, as an annexe to the GATT agreement, a new international agreement on Trade-Related Aspects of Intellectual Property (TRIPs) was enforced. As the name suggest the agreement provides guidelines and re-enforcement to trade-related aspects of copyright. The entire legal doctrine of copyright enunciated in the Berne Convention and all amendments and additions thereto, were imported into the new agreement apart from article 6bis which sets out stipulations for moral rights of authors. TRIP's, which is governed by WTO, has already been demonstrated to have a stronger judicial power than the Berne Convention (see Sundara Rajan, 2002) and has, according to some reduced the function of WIPO into an advisory and research body. As with the other statutes mentioned above the purpose of TRIPs is clearly stated and the opening text reads:

Trade-Related Aspects of Intellectual Property - Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to

ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

The change in policy and the underlying purpose of the institution could hardly be more jarring. Sundara Rajan states: “Copyright harmonization in the EU, and standardization in TRIPs, are primarily commercial undertakings, whose main purpose is to facilitate the free flow of information, knowledge and culture across borders for economic purposes. They are based on the principle of reducing the costs and inconveniences arising out of inconsistent standards of protection in different jurisdictions” (Sundara Rajan, 2002).

Following the spread of the digital environment where electronic communication and electronic commerce, linked with the rise of the Internet and globalization, it became pressing that the institutions needed to change to facilitate the tremendous growth of international trade.

The reasons for change to copyright (not in the nature of the law but rather in its applicability and functionality) can be said to be a great need for harmonization and a stronger enforcement mechanism.

IV

What is the function of an institution, how does the current state hinder or enhance this function and how do we adapt the institution to the current needs? Such are the questions posed and answered in institutional design. However, the growth of intellectual property rights and copyright in particular are not part of institutional design, rather they are like most institutional change, incremental changes that brought on by organizations that operate within the institutional framework and apply pressure to the institutional structure in order to maximize their own growth. The TRIPs agreement, on the other hand, heralds something different, something larger than the non-continuous industry driven changes that have taken place in national and state statute.

The economic perspective on copyright so strongly upheld by the UK and US and demonstrated by their initial reluctance to include moral rights (Article 6*bis* of the Berne Convention that provides the foundational rationale of the perception of authors rights) in their national legislature and later, upon enacting moral rights to a varying degree, an insistence on those rights to be waivable appears to have permeated the new institutional logic.

P.A.David does not recognize that different institutional logics may have underpinned the territorial and traditional perceptions of copyright and authors rights respectively. He maintains that the economic function has been the primary function of the institution from its 1710 beginning and he states that the protection for intangible property rights and their codification in law “..has been shaped more by the economics of “publishing” than by the economics of “authorship” (see David, 2004; Rose, 2003). Thus the institution of copyright may be perceived as resulting from industrial policy rather than an enlightened and socially rational institutional design. In his own words:

“Protection for intangible property rights and their codification in copyright law ...has been shaped more by the economics of “publishing” than by the economics of “authorship”. The legal institutions of copyright as we know them are properly seen as consequences of “industrial policy” actions that responded mainly to the changing interests of printers and publishers, rather than as the resultants of enlightened and socially rational institutional design. In historical terms it is as misleading as it is incorrect in terms of economic analysis to

present the modern system of copyright protections as a necessary social innovation that has been devised to protect the creators of information -goods from plagiarists, "free-riders" and "pirates". Economic incentives and material rewards for authorial efforts were not and are not central in this story, however much those aspects of the subject continue to fascinate economists and serve to rationalize the obtrusive conflict between legalized (intellectual property) monopolies and the reigning ideology of market competition.”(David, 2004, p. 1)

Copyright is a temporary property right or a state sanctioned monopoly granted to a creator who is thus enabled to recover the cost of creation by charging users a price above the marginal price of producing a copy. These rights are commonly contracted to an agent or an organization through a contract that either provides an upfront lump payment or royalties at a later date. There is little doubt that copyright offers some measure of incentives to creators but as Towse has pointed out, it is mediated through market and thus may offer stronger incentive to enterprises that use creative content. Little is known about the responsiveness of the production of creative goods and services to the strength of copyright protection. In fact economists know very little about economic aspects of creativity or how copyright influences it.

Moral rights, where they are in effect, cannot be waived or contracted and have, according to Towse, incentive effects for artistic production because it encourages a highly valued recognition of the artist's status and professionalism.(2010). However, it can be asserted that moral rights are hardly in existence any longer except in a national capacity. The TRIPs agreement supersedes the Berne Convention where it is applicable. And since near all, if not all, members of the Union that the Berne Convention constituted are signatories to the TRIPs agreement, the function of WIPO (the UNESCO organization governing the Berne Convention) seems ambiguous at least. TRIPs is the new supranational enforcement agency in trade with intellectual property rights and it's articles stipulate the baseline protection that has to be provided for in national legislature in the countries assigned to the agreement. Moral rights provisions on a national level thus only apply within each state but are invalid as soon as trade in copyright involves the crossing of borders.

In view of this it is difficult to see how the justification of a state granted monopoly that copyright is can, in future be justified as it has been since 1710, that is as an incentive for the creation of artistic works and knowledge. The incentive for creation rhetoric is certainly undermined by the strong economic emphasis in the shifting institutional logics of international copyright regime or does the justification for a temporary monopoly given for the encouragement of further creation justify a temporary monopoly granted for international trade? Samuelson (2007) asserts that due to amendments US copyright law has become an amalgam of inter- and intra-industry negotiated compromises or a hodgepodge law. There is reason to consider whether Samuelson's assertion may in part be applicable to the development of copyright in Europe. The changes in logics and in particular the upsurge of moral rights in international intellectual property agreements, suggest that such considerations are due and proper.

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