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Intellectual Property and Digital Information: Law, Politics, and Culture

Lecture Notes for Course ABMA18. Department of Arts and Cultural Sciences

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About the Course

Intellectual property (IP) is an area of increasing relevance and it is undergoing continuous changes, frequently being subject to highly visible controversies. Alongside these controversies the literature on IP's various facets continues to grow and is increasingly multi-disciplinary. At the same time, the decisions that information professionals, R&D personnel and artists have to face in their working lives are increasingly tied to legal concerns.

The course is intended to deal with these issues from a number of different perspectives, specifically considering cultural, political, legal, but also economical aspects, including those relevant outside a Western context. It will provide an overview of the legal situation in a national, European, and international setting. Participants will gain an understanding of the various forms of IP (copyright, patent, trademark, etc.) and expanding or antagonistic concepts including the creative commons, open access, open source, and piracy.

Acknowledgements

These lecture notes have their origin in the course “Intellectual Property – Law, Politics and Culture”, developed and first taught by Jutta Haider at Lund University in 2011. Over the years, other teachers adopted this material: Karolina Lindh and Arwid Lund. When Nora Schmidt became the course responsible in 2017, the lecture notes received a substantial overhaul, and have been updated annually since. The co-teacher of 2017, Andrea Mervik, and the co-teacher since, Charlotte Högberg, both contributed with comments and corrections. This version is the first to be published as Open Educational Resource.

The cover image, stating that "all reproduction, deformation, modification, derivation, and transformation of the Situationist Times is permitted", is taken from the back cover of the The Situationist Times (1962-1965), no. 3, international British edition, edited by Jacqueline de Jong. The journal largely is a collage of found imagery, that might be protected under IP law. After the Dadaist movement, the Situationists established another wave of remixing culture, not bothering to breach any IP law. As far as we know, none of them was ever persecuted for that.

License

Contents

Session 1: The Emergence of Intellectual Property

Mandatory reading for this course session

Hesse, Carla. 'The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance'. *Daedalus* 131, no. 2 (2002): 26–45, http://www.jstor.org.ludwig.lub.lu.se/stable/20027756.

Mellot, Jean-Dominique. 'Counterfeit Printing as an Agent of Diffusion and Change: The French Book-Privilege System and Its Contradictions (1489-1790)'. *Agent of Change: Print Culture Studies after Elizabeth L. Eisenstein*, edited by Sabrina Alcorn Baron et al., University of Massachusetts Press, 2007, pp. 42–66, https://books.google.com/books?hl=en&lr=&id=gBmYsCKwz24C&pg=PA42#v=onepage.

El Said, Mohammed. 'Rethinking the Foundations of Intellectual Property: Applying Islamic Principles on Selected Contemporary IP Challenges'. *Kritika: Essays on Intellectual Property*, edited by Hanns Ullrich et al., vol. 3, Cheltenham: Edward Elgar, 2018, pp. 94–131, LUBSearch.

1 Definitions

1.1 Intellectual Property

Purely technical answers to the question "What is Intellectual Property" usually evoke the concept of rights that pertain to so-called creations of the mind.

> In general terms, intellectual property is any product of the human intellect that the law protects from unauthorized use by others. The ownership of intellectual property inherently creates a limited monopoly in the protected property.[1]

At the most basic level, intellectual property (IP) – in Swedish *immateriella rättigheter* or *immateriell egendom* – is a legal concept denoting a bundle of rights that allows a legal person (*juridisk person*) – i.e. either a natural person or a group of natural persons acting as one legal entity – to claim and solely exploit certain exclusive rights in creative works, inventions, marks and symbols, and designs, typically during a certain period of time. These rights vary depending on the type of IP, and – to a certain degree – also on the country in which the rights are awarded.

Article 27 of the Universal Declaration of Human Rights from 1948 is often used as justification of the need for IP laws similar to those currently in place. It reads as follows:

> (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

1 Legal Information Institute, Cornell Law School. 'Intellectual Property', https://www.law.cornell.edu/wex/intellectual_property, visited on 2019-08-27.

> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[2]

However, it could also be interpreted to the opposite effect: creativity cannot be exploited without any (material) reward, but in order for everyone to enjoy the arts and scientific advancement, they must be accessible. Reward systems can take different forms, and the one in place, that we will learn about in detail in the following, is not the only option.[3]

IP is a legal construct and it is easiest to pin down and investigate by describing the laws that apply to it. IP law forms part of private law (*civilrätt*)[4]. In the Swedish legal system, within private law, IP law belongs to property law (*förmögenhetsrätt*). As Peuckert states, IP is an adaptation from property theories that were created for material property, and therefore is no original construction.[5]

There is a clear difference between ownership of a physical object and ownership of rights pertaining to an immaterial entity. The term used to describe the most important consequence of this is “non-rivalrous”. IP pertains to intangible “goods” that are non-rivalrous, i.e. they can be used by more than one person without depletion. The simplest way to imagine the following: If I have an apple and I give it to you then I do not have it any more. If I know a story and I tell you the story then I will still have it afterwards. This is even more obvious with digital files. If I have a CD and you take it then I won't have it, yet if I have a mp3 (or similar file) and you take it, then I will still have it, unless you delete it on my hard drive.

A difference between the two forms of property also becomes clear when IP is unlawfully appropriated in opposition to material property. While the latter is called theft, the former is described by the term of infringement (*intrång i ensamrätten*). The major difference is that the original owner in one instance loses the object; while in the case of IP the original owner in principle still has what he/she had before. Furthermore, if you buy for example a book, then you acquire a certain property right in one copy of the book, the material object, while the copyright and thus the right to the expression contained in the book remains with the author, or whoever the owner of the copyright is.

At the same time, IP rights, immaterial as they may be, do not pertain to mere ideas. It is only expressions of ideas that can be protected, hence creations of the mind, not

2 United Nations. ‘The Universal Declaration of Human Rights’, 1948, https://www.un.org/en/universal-declaration-human-rights/, visited on 2019-08-27.
3 One can think of an entirely open culture and science, combined, e.g., with a tax-financed budget of creativity awards for each citizen, to allocate to preferred projects, or, alternatively, to a public fund that is managed by a diverse board of elected experts. The accumulation at single projects could be capped at reasonable points, depending on the type of project. Excess awards would go to the expert-managed fund for reallocation.
4 In opposition to public law (*offentlig rätt*).
5 Peukert, Alexander. ‘Intellectual Property: The Global Spread of a Legal Concept’. *Kritika: Essays on Intellectual Property*, edited by Peter Drahos et al., vol. 1, Cheltenham: Edward Elgar, 2015, pp. 114–33.

merely thoughts. For example, if you have the idea to paint a picture of a green mouse in front of a red sky and you do it, then you will have the copyright to the one painting and the specific way in which you painted it. You will not have copyright for all pictures of green mice in front of red skies.

Further Reading

For a discussion of the issue of property see Himma, Kenneth Einar. 'The Justification of Intellectual Property: Contemporary Philosophical Disputes'. *Journal of the American Society for Information Science & Technology* 59, no. 7 (May 2008): 1143–61, http://www.escholarship.org/uc/item/20h4p5sj.

In Swedish: For a discussion of the difference between property in physical and immaterial entities and the difference between physical form (*exemplaret*) and expression (*verket*), see Marianne Levin. Lärobok I Immaterialrätt Upphovsrätt, Patenträtt, Mönsterrätt, Kännetecknensrätt – I Sverige, EU och Internationellt. 11th ed. Alphen aan den Rijn: Wolters Kluwer, 2017, p. 42-44. For a discussion of copyright infringement (*intrång i upphovsrätt*) see p. 174 et sq. For a discussion of patent infringement (*patent intrång*) see, p. 314 et seq.

1.2 Types of Intellectual Property

We distinguish between two groups of IP rights: (a) Copyright (*upphovsrätt*) on the one hand and (b) industrial property rights (*industriella rättsskyddet*), on the other.

(a) Copyright applies to artistic and literary works, whereby the scope of what counts as artistic or literary is very wide. "Artistic works" refers to pieces of art, i.e. sculptures, paintings, prints, artistic photographs etc., but also includes, for example, films of different kinds, or theatre plays. Alongside those creations we would normally recognise as "literary", like poetry, novels, stories, lyrics etc., this category also includes descriptive accounts, for example non-fiction literature, maps, teaching materials, reports, reference works, interviews, even instructions, as well as computer programs. Please note: These are only examples and the list is in no way exhaustive.

Copyright arises automatically and does not need to be applied for. Since 1996, it lasts for 70 years after the death of the creator, or, in the case of works without an identifiable creator, for 70 years after the creation or first publication of the work. There are a number of related rights, for instance to protect performing artists, producers of sounds recordings, or radio and TV programmes, and also certain types of photographs. These are protected for 50 years from the time of a performance, recording, broadcasting, or publication.

In Swedish: For a more detailed account see Levin, loc. cit., chapter II.

(b) Industrial property rights encompass patent (*patent*), trademark (*varumärke, kännetecken, firmarätt*), and design right (*designskydd, mönsterrätt*).

As a general rule, industrial property rights have to be applied for and be registered, and do not arise automatically.

- **Patents** denote exclusive rights in inventions. Patent protection is granted for 20 years and cannot be renewed.
- **Trademarks** are distinctive signs used to identify goods and services. A registration is valid for 10 years, but can be renewed innumerable times, thus making it essentially a perpetual right.
- **Geographical indications** are supposed to indicate exclusive geographical origin and quality. Sometimes, these provisions are subordinated under trademark law.
- **Design rights** protect the aesthetic qualities of goods. They last for 5 years, and can be renewed twice, which makes for a maximum protection time of 15 years.

In Swedish: Those who want to get more detail, especially on the Swedish system: see Levin, loc. cit., chapters III, IV and V

2 The Balance of Rights

IP rights are different from other property rights since they are are usually restricted in a number of ways, most importantly with regard to time. Society grants the holders of IP rights a monopoly to exploit a so-called “creation of the mind”. Yet since these creations are seen to be in the larger interest of society, i.e. the advancement of knowledge, these exclusive rights are awarded only for a limited amount of time (see above). After this time the work falls into what is called, in US-American and British law, the “public domain”, and which could probably be translated with “*allmän egendom*” in Swedish. In fact, Continental European law does not recognise the concept of the public domain, since certain moral rights cannot be passed on (we will consider these in the next course session). However, after the expiration of the time for which the monopoly is granted, the public is in principle free to use and exploit the formerly protected creation, also outside the Anglo-American law tradition.

Not only exclusive rights are granted under IP law, but also exceptions and limitations. In the case of copyright, this means for example the right to quote, the right to copy for private use etc.[6] In the UK, the principle of exceptions and limitations is called “fair dealing”, in the US, it is “fair use”. The latter became widely used, also in countries in which the law does not introduce this term.

A limitation under IP law for patents is, for instance, compulsory licensing (*tvångslicens*) for someone seeking to use another's IP without the rights holder's explicit consent. We will return to that in Session 3.

However, especially when it comes to copyright, the rights holders' position has been increasingly strengthened and the time limit has seen several extensions over the course of the past century alone, thus posing a challenge to this balance. Exceptions and limitations are constantly threatened, and strong diverging societal interests are involved. This will be a returning subject during this course.

6 We will discuss exceptions and limitations repeatedly during this course. For a full list in Swedish see Levin, loc. cit., pp. 192 et sq.

As will become clear from the literature on the emergence of IP, the laws have been introduced to serve certain social functions, and as society develops, law has to be evaluated constantly, in order to determine if 1) the social problems that they are supposed to tackle are still around, and, if yes, 2) if the laws actually tackle the problem any longer, in the best possible way, and, eventually, 3) if they do any harm. Vivant[7] argues that the general essentialist and mechanical view on law, and the fact that this view served *some* interests very well in the case of IP, lead to a continuous decoupling of social function and legal construction.

Further Reading

An overview and analysis of different positions regarding the balance of rights can found at Himma, 2008, loc. cit.

If you want to get back to the philosophical and sociological discussion of IP after you learned more about its basic definitions, maybe after Session 5, Vivant, 2017, loc. cit., is highly recommended.

For another philosophical discussion that includes more recent contributions and developments, see Spinello, Richard A., and Herman T. Tavani. 'Intellectual Property Rights: From Theory to Practical Implications'. In *Intellectual Property Rights in a Networked World : Theory and Practice*, 1–65. Hershey, Pa. : Information Science Publishing, 2005, https://ebookcentral.proquest.com/lib/lund/detail.action?docID=197409. (**Note**: The authors write specifically about the US American system and its law. While their theoretical discussion is relevant, also for the Swedish system, Swedish laws and those of other European countries are different from those in the US. Most notably there exist no software patents in the EU.)

3 History

I mentioned above that copyright underwent a number of changes during the past century. However, its origin and that of other IP rights go back a good while longer than that. In its development, copyright shows a clear connection with technical development (hence such profound changes in recent decades). The advent of the printing press in Europe is closely related with the emerging idea of the author as an original creator: "copyright is not a transcendent moral idea, but a specifically modern formation produced by printing technology, marketplace economic, and the classical liberal culture of possessive individualism".[8]

The idea of moral rights in the creation of one's mind is a rather old concept. Moore describes a number of cases in ancient Greece and Rome that evoke some form of moral rights in ones intellectual creations, in one instance recipes (from 500 BC), in another, public speeches.[9] However, he also points out that these are atypical, and that neither Roman law nor ancient Greece knew any formal protection for these

7 Vivant, Michel. 'Intellectual Property Rights and Their Functions: Determining Their Legitimate "Enclosure"'. *Kritika: Essays on Intellectual Property*, edited by Gustavo Ghidini et al., vol. 2, Cheltenham: Edward Elgar, 2017, pp. 41–69.
8 Rose, Mark. *Authors and owners: The invention of copyright*. Cambridge, Mass: Harvard University Press, 1993, p. 142.

forms of rights. Especially Roman law very much disapproved of monopolies of any kind. For the European Middle Ages, Putnam reports that monasteries frequently charged a fee when one of the manuscripts they owned was copied, so ownership seems to have justified economic exploitation.[10]

It is important to note that copyright only became a legal problem when copying was possible with less effort, and, with the distribution of many copies over time, only then, it became economically profitable: with the establishment of the movable type printing press in Europe from the mid-15th century.[11] Copyright followed the technical development and tended to become more and more restrictive.

One of the key dates and places for the history of IP is 15th century Venice, the other 17th century England. While the first (5-year) printing privilege was granted to Venice's first printer in 1469,[12] in 1474 the Venetian Republic introduced a patent statute that, according to Moore, "was remarkably mature and sophisticated. The rights of inventors were recognised, an incentive mechanism was included, compensation for infringement was established, and a term limit on inventor's rights imposed".[13]

In how far early regulations of printing can be understood as tools for censorship, strongly depends on the specific place and time studied. As Johns summarises in his in-depth study of the Stationers' Company, England's printing guild in the 16th century: "The early modern state had neither the ideology, nor the finances, nor the mechanisms, nor the police and personnel to construct a regime of censorship recognizable as such to late twentieth-century eyes."[14] It rather is likely that economic interests drove the development from an increasingly unmanageable number of printing privileges to state-wide regulations. Privileges were administrated entirely by the community of printers who understood themselves as a respected professional group tightly bond together, being in service of society. Contrary to that, from the 17th century onwards, the "ideology of possessive individualism" emerged, breaking those bonds loose.[15] This is also when the "author" eventually came into play.

The statutes usually referred to as precursors of *modern* IP law stem from 17th and early 18th century England, namely the Statute of Monopolies (1624) for patents and the Statute of Anne for copyright (1709). The latter, for the first time, allowed authors

9 Moore, A. D. *Intellectual Property and Information Control*. Philosophic Foundations and Contemporary Issues. New Brunswick NJ: Transaction Publishing/Rutgers University, 2004, pp. 10 et sq.
10 Putnam, George Haven. *Books and Their Makers during the Middle Ages*. Vol. 2 (1500-1709), New York and London: G.P. Putnams Sons, 1897, http://archive.org/details/b29003544_0002, p. 482.
11 A classic about this development is Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change*. Cambridge University Press, 1980, especially see pp. 229-241 and 556-563.
12 Rose, loc. cit., p. 10.
13 Ibid., p. 11.
14 Johns, Adrian. '"The Advancement of Wholesome Knowledge": The Politics of Print and the Practices of Propriety'. *The Nature of the Book: Print and Knowledge in the Making*, Chicago and London: University of Chicago Press, 1998, pp. 187–265. But cf. Rose, loc. cit., p. 13.
15 Rose, loc. cit., p. 15.

to acquire the copyright in their works. Most importantly, however, as Patterson points out, the radical change was "that it gave that right to all persons", rather than as previously only to representatives of a certain trade: publishers.[16]

By the end of the 19th century, most European countries had some form of IP law, and it was also by then, with industrialisation, that internationalisation increased,[17] attempting a cross-border standardisation of IP laws. The British, i.e., introduced IP law in all their colonies and mandates from the early 19th century, so "at the time of independence, most of the then developing countries already formed part of the global IP system. It was not necessary to persuade them to accede to the international IP unions in the first place. … They only had to be prevented from leaving."[18] This was successful. Until the first discussions about the protection of traditional knowledge of the people of formerly colonised countries started quite recently (see Session 6), formal IP law was a pure "legal transplant"[19] from Europe and the US. Increasingly, it seems more correct to talk about adaptions than transplants.

The so-called Paris Convention for the Protection of Industrial Property[20] was developed in 1883, the Berne Convention for the Protection of Literary and Artistic Rights[21] in 1886. For the administration of those two conventions, seven years later, the United International Bureaux for the Protection of Intellectual Property (best known by its French acronym, BIRPI) was established. In 1970, BIRPI changed its name to World Intellectual Property Organization (WIPO), and became a UN agency three years later. Nevertheless the USA hosted an ever increasing number of creators of IP, the country only joined the Berne Convention in 1989, over a hundred years after its establishment. The reasons for that will become clear in the next session.

In Swedish: For a brief overview of key dates and names see Levin, loc. cit., pp. 27 et seq.

Further Reading

The best summary of the early history of IP is Rose, 1993, loc. cit.

For detailed historical insights into the debate about literary copyright in the early 20th century in the USA, transatlantic relations, and its influence on literary production, featuring James Joyce's *Ulysses* at its centre, see Spoo, Robert E.

16 Patterson, L.R. *Copyright in a historical perspective*. Nashville: Vanderbildt University Press, 1968, p. 145.
17 Levin, loc. cit., pp. 29 et seq.
18 Peukert, Alexander. 'Intellectual Property: The Global Spread of a Legal Concept'. *Kritika: Essays on Intellectual Property*, edited by Peter Drahos et al., vol. 1, Cheltenham: Edward Elgar, 2015, pp. 114–33.
19 Ibid.
20 World Intellectual Property Organisation. 'Paris Convention for the Protection of Industrial Property', 1979, http://www.wipo.int/treaties/en/ip/paris/, visited on 2019-08-27.
21 World Intellectual Property Organisation. 'Berne Convention for the Protection of Literary and Artistic Works', http://www.wipo.int/treaties/en/ip/berne/, visited on 2019-08-27.

Without Copyrights: Piracy, Publishing, and the Public Domain. Oxford University Press, 2013.

The 1911 UK Copyright Act established a one-size-fits-all approach for literature, performing arts, and visual art, abolishing the right to copy e.g. paintings for private use, and the right of the artist to repeat a piece of visual art, which was very much in interest of collectors, but actually cutting artistic freedom, see Cooper, Elena. *Art and Modern Copyright: The Contested Image*. Cambridge University Press, 2018.

Session 2: Copyright

Mandatory reading for this course session

Vaidhyanathan, Siva. Chapter 2: Copyright, Commerce, and Culture. In *Intellectual Property. A Very Short Introduction*. Very Short Introductions: 508. New York: Oxford University Press, 2017, pp. 16-39.

Story, Alan. ' Berne: Why the Leading International Copyright Convention Must Be Repealed'. *Houston Law Review* 40, no. 3 (2003): 763–803, https://houstonlawreview.org/api/v1/articles/4815-burn-berne-why-the-leading-international-copyright-convention-must-be-repealed.pdf.

1 Copyright Symbols

Copyright (upphovsrätt) clearly is the part of intellect property law which has seen most attention in recent years, due to the increasing relevance of digital media and the possibilities for copying and sharing. In the everyday language of many, "copyright" is used synonymously with "intellectual property", applying the English term in the context of other languages as well. The copyright sign ©, introduced by US copyright law in 1909, initially for works of art only, is omnipresent. It was used to mark works which were registered to be protected by copyright legislation in the USA. Without registration, there was no copyright protection. However, for all signatories of the Berne Convention, which introduced unconditional copyright protection for all works, it is unnecessary and never had a legal meaning.[22] Even in the USA, the symbol is obsolete now.

There was another event in the history of international copyright treaties that gave relevance to the copyright symbol: the Universal Copyright Convention (UCC)[23] which was signed 1952 in Geneva. It was developed by the UNESCO as an alternative to the Berne Convention, and leaves a lot of power to define conditions and means of protection to the member states. Under Article III.1, foreign works required to be marked with the copyright symbol to denote its protected status, nothing more. As we will learn later in this session, the UCC did not have a lot of legal nor political impact, and can be regarded as relict of a movement, on government level, for a weaker copyright, all in vain (we will return to the UCC later).

For sound recordings, under the Geneva Phonograms Convention,[24] effective since 1973, copies of the recording should carry a copyright notice which consists of the phonogram copyright symbol, ℗, the year of publication, and the copyright owner's name. The recording will be protected under terms similar to those of the Berne

22 World Intellectual Property Organisation. 'Berne Convention for the Protection of Literary and Artistic Works', 1979, http://www.wipo.int/treaties/en/ip/berne/, visited on 2019-08-27.
23 See UNESCO. 'Universal Copyright Convention (UCC)', http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html, visited on 2019-08-27.
24 World Intellectual Property Organisation. 'Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms', 1971, http://www.wipo.int/treaties/en/ip/phonograms/, visited on 2019-08-27.

Convention. However, since the copyright notice is defined as a maximum level of formality, all 79 member states define on their own which formality to apply.

New symbols are emerging that are based on the copyright sign, symbols that accentuate the conflicting interests which are meeting in the disputes around copyright. Copyleft and Creative Commons are licensing systems, attempting to counter the increasing restrictiveness of copyright. In media-savvy manner, their symbols were based on the very copyright symbol, eye-catching and known all over the world (see Figures 1 and 2; we will return these licensing models in Session 7).

Figure 1: Creative Commons logo

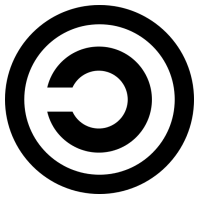

Figure 2: Copyleft logo

If we go back in time, to what is considered the first modern copyright legislation, the so-called Statute of Anne from 1710, it is important to remember that the British Parliament did not protect or privatise something which previously was public and free to use. On the contrary, ironic as it may seem from today's vantage point, copyright as framed in the Statute of Anne was in effect freeing cultural products, books mainly, by ending the perpetual monopoly of booksellers and publishers (not of the authors!). It was very much contested by these publishers, and celebrated by those who were considered “pirates” at the time.[25]

It is noteworthy that copyright, today, stands for almost the opposite of its founders' intentions. Both the time limit and the coverage of types of creations has been extended in a way that can be considered virtually perpetual for most intents and purposes. Over the centuries new types of works in new and in old media have been added and, importantly, derivative works are now also within the scope of copyright law.

25 For the whole exciting story see Lessig, Lawrence. *Free Culture. The Nature and Future of Creativity*. London: Penguin, 2004, pp. 85-94, http://www.free-culture.cc/freecontent, visited on 2019-08-27.

2 The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Rights,[26] established in 1886, was the most powerful step into the direction of a strong copyright. It requires signatory countries to adhere to three basic principles. The first one is national treatment: signatory countries agree to grant (at least) the same rights and the same protection they do to their own nationals, to the citizens of any of the other signatory countries, in the area of IP protection. This also requires that no formalities, such as for example registrations, are required for copyright to arise. Second, it requires a set of minimum standards to be fulfilled; these include:

- a minimum protection term of (the life of the author plus) 50 years;
- the requirement that protection is granted to "every production in the artistic, literary, and scientific domain, whatever may be the mode or form of its expression" (WIPO 2013, p. 38);
- and finally a set of rights, ranging from the right to translate to the right to use the work as the basis for an audiovisual work etc. must be guaranteed.

The final basic principle pertains to countries recognised as "developing countries". The right to translate and the right to make reproductions can be waived for these countries for a limited amount of time.

Article 9 of the Convention includes what came to be known as "three-step test": the member country can "permit the reproduction of […] works in certain special cases [1], provided that such reproduction does not conflict with a normal exploitation of the work [2] and does not unreasonably prejudice the legitimate interests of the author [3]." The test is applied for the types of works which are not explicitly listed in the convention.

Like the Paris Convention, the Berne Convention is administered by WIPO. It has today 168 signatory countries. Sweden signed the convention in 1904. It was last revised in 1971. However, it was expanded with two protocols which came into force in 2002:

(1) The WIPO Copyright Treaty (WCT)[27], which specifically protects databases and software to the same extent as literary works. We will return to the WCT in Session 5.

(2) The WIPO Performance and Phonograms Treaty (WPPT)[28] protects the rights of performers and producers of sound recordings.

26 Loc. cit.
27 World Intellectual Property Organisation, WIPO Copyright Treaty, 1996, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295166, visited on 2019-08-27.
28 World Intellectual Property Organisation, WIPO Performance and Phonograms Treaty, 1996, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295578, visited on 2019-08-27.

3 The Universal Copyright Convention (UCC)

First signed in 1952, the UCC, as has been mentioned already, was developed under the auspices of UNESCO, incorporating the interests of many so-called developing countries, mostly from Latin America and Africa. States which did not sign Berne, signed the UCC, but, the other way round, many "Berne states" *did* sign the UCC, so that their copyrights would be protected in "non-Berne states". However, this protection is at a lower level. Today, since almost all countries are either members or aspiring members of WTO, and are thus conforming to TRIPS (see session 5), the UCC is overridden. For a while, to still qualify for protection under the Berne Convention before it was actually a member, a lot of US publications were double published in Canada which had joined the Berne Convention 1971.[29]

Further Reading

For an introduction to the political economy of copyright and some contemporary controversies regarding the ownership of information, that we will return to throughout the course, see especially chapter 1 in Halbert, Debora J. *The state of copyright: the complex relationships of cultural creation in a globalized world.* London: Routledge, 2014.

4 Legal Definitions of Copyright

In the following, I will point out some of the key elements of copyright. Legislation is very similar in all of the EU, and quite similar also in other countries. As we will see in Session 5, everywhere, IP regimes are subject to numerous international agreements. If you understand how it works in Sweden, you have the basics to understand how it works elsewhere. Yet, of course there are always differences.

Therefore, if you are interested in the legislation of another country, it would be really great if you could read (something about) this country's copyright law, compare it with the following, and write a short posting about the differences in the "tips, thoughts and links" forum. I am sure, everyone is curious to learn about these differences!

Swedish copyright legislation stems from 1960: *Upphovsrättslagen*, URL (SFS 1960:729)[30]. It has of course seen a number of additions, updates, and changes, also bringing it in accordance with the legal requirements of the EU, which attempts to harmonise legislation in the various member states.[31] One of these so-called EU

29 See Drahos, P. and Braithwaite, J. *Information feudalism. Who owns the knowledge economy?* London: Earthscan, 2002.
30 The English version of the act with all amendments up to 2011 can be found at WIPO Lex. 'Act on Copyright in Literary and Artistic Works (1960:729)', http://www.wipo.int/wipolex/en/text.jsp?file_id=290912, the most recent Swedish version at Sveriges Riksdag. 'Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk', 2017, https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1960729-om-upphovsratt-till-litterara-och_sfs-1960-729, both visited on 2019-08-27.
31 Levin, Marianne. *Lärobok I Immaterialrätt Upphovsrätt, Patenträtt, Mönsterrätt, Känneteckensrätt - I Sverige, EU och Internationellt.* 11th ed. Alphen aan den Rijn: Wolters Kluwer, 2017, p. 70.

directives that has been implemented in national law was the EU Directive "Copyright in the Information Society" (EU 2001/29/EC). It entered Swedish law in 2005 and considered specifically the changed circumstances that the event of the Internet had caused. However, the EU copyright reform is ongoing, see Session 5.

Another notable significant modification in Sweden was the implementation of a further EU directive on IP, the highly controversial EU Directive on the enforcement of intellectual property rights (2004/48/EC4), short IPRED. It became law in April 2009 and gives holders of IP rights the right to demand information about those they suspect to have infringed their IP, and the duty to provide it, lays upon those presumed to have this information. In other words: Internet Service Providers have to identify a user of an Internet Protocol (IP) address from which copyright protected files have been downloaded. IPRED is aimed at all forms of IP, in practice, however, it is seen to be most relevant for file sharing over the Internet and thus for copyright infringement. It is a fundamental change in the way IP infringement is sought out and avenged and has been severely criticised as handing too much control to rights holders and opening the way for severe threats to privacy.

In Swedish: See the Swedish Government Official Report (SOU 2012:51) for an evaluation of the implementation of IPRED:
http://www.regeringen.se/contentassets/d7073e02e00f4e36b89e3013f39f123c/utvardering-av-ipred-lagstiftningen-sou-201251

What follows is a quick walk through of the most important points of copyright legislation (also see the Swedish Reproduction Rights Organization (RRO) Bonus Copyright Access, http://en.bonuscopyright.se/pages/Copyright).

4.1 Originality

First of all, it is important to remember that copyright protects artistic and literary expressions, it does not protect ideas. (Remember the example with the green mice in front of a red sky that we had in session 1.) Copyright arises automatically and does not have to be registered or applied for.

Works protected by copyright have to have a certain level of originality (*verkshöjd*). This should exclude shopping lists, security camera footage or doodles made while talking on the phone. However, as the latter example shows already, it is not always so clear-cut to determine when this "threshold of originality" is reached, so individual decisions are up to each jurisdiction. If the threshold is not reached, the work can possibly still be protected as industrial IP. Some orientation might be provided by thinking about intellectual effort, individual character, novelty, skills and judgement required. Opposed to that view is the "Sweat of the brow doctrine", based on Locke's theory of labour that would naturally result in property. According to this view, the investment of considerable effort is enough to reach the threshold of originality. The copyright protection of databases under the WTC is based on it, and high-tech reproductions of artworks were also granted copyright occasionally, but other than that, the doctrine lost impact during the process of the international harmonisation of IP law.

In many cases, the notion of “artistic and literary works” (*litterär eller konstnärlig verk*) is remote from what we consider artistic or literary in the common sense of the word. What is protected by copyright in Sweden is established in § 1 URL (SFS 1960:729):

(1) fictional or descriptive representation in writing or speech

(2) computer programme

(3) musical or dramatic work

(4) cinematographic work

(5) photographic work or another work of fine arts

(6) work of architecture or applied art

(7) work expressed in some other manner

The law also explicitly excludes certain works from copyright:

(1) laws and other regulations

(2) decisions by public authorities

(3) reports by Swedish public authorities

(4) translations made of the works named in 1-3.

In Swedish: For a detailed descriptions of what counts as artistic and literary works read Levin, loc. cit., pp. 90-116, see especially: Datorprogram (pp. 91-94); Fotografiska verk och bilder (pp. 95-100).

4.2 Economic Rights, Moral Right and Plagiarism

We distinguish between two kinds of rights that are united in copyright: economic rights and moral rights. Only the economic right can be transferred, for example sold or assigned to a publisher etc. An author can refrain from his/her moral rights, however, in Sweden, they cannot be transferred.

The economic right is the exclusive right to exploit the work by controlling its reproduction, i.e. making copies of the work or prohibiting it (*rätten att framställa exemplar av verket*) or making it available to the public (*rätten att göra verket tillgängligt för allmänheten*). This also applies to adaptations of a work, including for example translations and other derivative works. The definition of a derivative work can be quite wide, however, there is one important exception, and that is parody. In copyright law, parody does not count as derivate, but as a work in its own right.

The moral right is the right to be named as the author of the work in context of any use (*rätten att bli namngiven vid utnyttjandet av verket / namnangivelserätt*), to oppose changes and adaptations of the work, and to prevent it from being made available to the public if the author's reputation or individuality would be at risk (*rätten att motsäga sig kränkande ändringar / respekträtt*). The US only introduced

the moral right when it signed the Berne Convention in 1989. In many countries, the moral right is perpetual and cannot be waived.

Copyright infringement is often confused with plagiarism. Plagiarism is "the wrongful act of taking the product of another person's mind, and presenting it as one's own."[32] The etymology of the term is interesting: *plagiarius* is latin for "slave trader": the first century Roman poet Martial described his creations as released slaves which are then incarcerated by his colleague Fidentinus whom he accused of copying his stories.

Plagiarism *could* also be copyright infringement, depending on if the work is protected under copyright at all (remember: ideas are not, and ideas can be plagiarised), and also depending on the respective country's legislation on moral right. In any case, a process of appropriation occurs, but in the case of plagiarism, this is not always illegal. In the academic context, it could be categorised as fraud, and fraud can be legally prosecuted. In other cases – and we cannot cover all cases here, plagiarism rather is a moral offence. To make it short: there is no explicit law against plagiarism in itself, but oftentimes, in the context in which it appears, it leads to or is the consequence of an actual delinquency.

In Swedish: Levin, loc. cit., pp. 136-143, on derivative works, and p. 175 on parody.

4.3 Protection Periods

Copyright protection consists of certain exclusive rights awarded for a limited period of time. This (usually) is the lifetime of the creator plus a further 70 years after his/her death. For example, under current legislation, if an author dies sometime during the year 2010, then the work will be free from copyright protection on the 1st of January 2081. If a work is published, or made available to the public, without the name of the author or without a generally known pseudonym, the copyright length is calculated from the year the work was made public. There are also specific regulations for films and for works which have not been made available to the public, and which don't have known authors.

For works protected not directly by copyright, but by related rights (*närstående rättigheter*), the length is 50 years. This concerns, i.e. performing artists, producers of sound or film recordings, or TV and radio broadcasters.

In Swedish: see Levin, loc. cit., pp. 109-116, and 'PRV. Film om upphovsrätt. Markus Dahlberg berättar om upphovsrätt i PRV-skolan', http://www.prv.se/sv/upphovsratt/film-om-upphovsratt/, visited on 2019-08-27.

32 Lindey, Alexander. *Plagiarism and Originality*. New York: Harper, 1952. 2 p.

4.4 Limits of Copyright and Digital Media

The scope of copyright has been widened over the years and the time limit for which it is granted has similarly been expanded considerably. At the same time, there are limits to the exclusive rights of the copyright holder(s) (*inskränknignar*), and some of those are necessary pre-conditions for libraries to be able to fulfil their obligations. Only the economic rights are affected by these limitations. At the same time, increasingly, limitations themselves are also subject to limitations, especially where digital formats are concerned. This is due to the following characteristics of digital media

> that will make it difficult for existing categories of intellectual property law to adjust to the protection of works in digital form. They are: (1) the ease with which works in digital form can be replicated, (2) the ease with which they can be transmitted, (3) the ease with which they can be modified and manipulated, (4) the equivalence of works in digital form, (5) the compactness of works in digital form, and (6) the capacity they have for creating new methods of searching digital space and linking works together.[33]

Therefore limitations to copyright appear to be quite twisted:

- Copying for private use, i.e. personal use is allowed. Only a few copies may be made, and the copies may not be distributed. The copy must be made from a source that has been obtained legally, i.e. not from pirated works. It is not allowed to copy computer programs (except for backup purposes) and compilations in digital form (i.e. databases; database entries of limited scope may be copied); entire books are also excluded from the exception.
- The right to quote from works which have been made available to the public. Quotations have to be exact and need to name the source. However, the situation is really only straightforward when it comes to texts. It is complicated when it comes to music, and does not include images.
- Works of fine art, which have been made public, can be reproduced in scientific, non-commercial publications; in critical reviews, unless the review is in digital form; in a newspaper or periodical in context of current news reporting.
- "Freedom of panorama": Works of fine art and architecture, which have been made public, can be reproduced as pictures if they are permanently outdoors; for the purpose of advertising or selling it; in compilations and catalogues, but not in digital databases.[34]

33 Samuelson, Pamela. 'Digital Media and the Changing Face of Intellectual Property Law'. *Rutgers Computer & Technology Law Journal*, vol. 16, 1990, pp. 323–40.
34 See the case Bildupphovsrätt vs Wikimedia Sweden: Norderyd, Johan and Elna Jönsson. 'Swedish Supreme Court issues decision regarding the freedom of panorama'. *Kluwer Copyright Blog*, May 9, 2016, http://copyrightblog.kluweriplaw.com/2016/05/09/swedish-supreme-court-issues-decision-regarding-freedom-panorama/, visited on 2019-08-27. For panorama freedom, litigation is nationally diverse, e.g. prohibitive in France and Italy.

There are specific regulations for libraries and archives, regarding copying. They may, at times, also copy digital material, again with the exception of software. They may make copies for the purpose of preservation and completion of research, for the use in reading rooms, for their users, if it concerns single articles, extracts of works, or works that, for reasons of security or preservation, cannot be given away in original form. These are regulated in §16 URL.

It is also specified in the law to which libraries and archives this applies. These are: public libraries, research libraries operated by public authorities, the National Archive for Recorded Sound and Moving Image, and governmental and municipal archival authorities. The government can give further libraries and archives the same rights.

Copying material for educational purposes in Sweden is regulated in detail via agreement under the auspices of the Swedish collective rights management organization Bonus Copyright Access (http://en.bonuscopyright.se/). We will return to this type of institution, also called “collecting society”, in session 4.

It is very important to keep in mind that contracts increasingly overrule IP rights and its limitations, so legal certainty is only given when cases are typical and no supplementary contract is in place.

> This shift in power has significant implications because it implies an inappropriate delegation of governmental decision making to a non-governmental entity and a consequent privatization of the government's role of promotion of the arts and knowledge in the digital environment.[35]

In Swedish: On the limits of copyright, including rules for libraries and archives see: Levin, loc. cit., pp. 192-220.

Further Reading

A very technical list of library exceptions all over the world: Crews, Kenneth D. *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised*. WIPO Standing Committee on Copyright and Related Rights, SCCR/30/3, 2015, http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_3.pdf, visited on 2019-08-27.

A classic essay arguing that IP law becomes largely obsolete with the advent of digital media: Samuelson, Pamela. ‘Digital Media and the Changing Face of Intellectual Property Law’. *Rutgers Computer & Technology Law Journal*, vol. 16, 1990, pp. 323–40.

A bit dated, but still valuable introduction with focus on digital media, and contractual extensions of copyright (“paracopyright”): Lucchi, Nicola. *Digital Media & Intellectual Property: Management of Rights and Consumer Protection in a Comparative Analysis*. Berlin, Heidelberg: Springer, 2006.

35 Lucchi, Nicola. *Digital Media & Intellectual Property: Management of Rights and Consumer Protection in a Comparative Analysis*. Berlin, Heidelberg: Springer, 2006, p. 4.

For the specific context of Social Media, see Alm, Jessica Gutierrez. ‘Sharing Copyrights: The Copyright Implications of User Content in Social Media’. *Hamline Journal of Public Law & Policy*, vol. 35, 2014, pp. 103–30, https://heinonline.org/HOL/P?h=hein.journals/hplp35&i=107.

Session 3: Industrial Intellectual Property

Mandatory reading for this course session

Vaidhyanathan, Siva. Chapters 3-5. In *Intellectual Property. A Very Short Introduction*. Very Short Introductions: 508. New York: Oxford University Press, 2017, 40-96.

Hugenholtz, P. Bernt. 'Against "Data Property"'. In *Kritika: Essays on Intellectual Property*, edited by Hanns Ullrich et al., vol. 3, Cheltenham: Edward Elgar, 2018, 48-71. LUBSearch.

While the last session was dedicated to the, for most people, most visible and most debated form of IP right, copyright, this session will deal with another form, industrial IP rights (*industriella rättsskyddet*). They stem from the same tradition and equally have developed into economically very powerful tools, yet they also function on a set of different premises, at least to a degree.

Like with copyright, industrial IP right holders are granted a set of exclusive rights, this time to exploit a certain type of work or sign of recognition. Here, "work" largely refers to what we commonly understand as inventions or designs.

The three most relevant forms of industrial property rights are:

- Patents, regulated in the "patent act" / *patentlagen* (1967:837)[36]
- Trademarks, regulated in the "trademark act" / *varumärkeslagen* (1960:644)[37]
- Industrial Design Rights, regulated in the "design protection act"/*mönsterskyddslagen* (1970:485)[38]

Further laws falling in the same category of industrial property law are the "trade secrets act" / *lagen om skydd för företagshemligheter* (1990:409), the "law on plant breeders' rights"/ *växtförädlarrättslagen* (1997:306), "the companies act" / *firmalagen* (1974:156), as well as the law regulating the protection of integrated circuit design / *lagen om skydd för kretsmönster i halvledareprodukter* (1986:1425).

These legal frameworks are very complex. I will highlight the more salient points in the following. Make sure you understand the differences between the different types of industrial property, and also between copyright and industrial property rights.

36 Sveriges Riksdag, 'Patentlag (1967:837)', https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/patentlag-1967837_sfs-1967-837, visited on 2019-08-27.
37 Sveriges Riksdag. 'Varumärkeslag (1960:644)', http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Varumarkeslag-1960644_sfs-1960-644/, visited on 2019-08-27.
38 Sveriges Riksdag. 'Mönsterskyddslag (1970:485)', http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Monsterskyddslag-1970485_sfs-1970-485/, visited on 2019-08-27.

1 The Paris Convention

The Paris Convention for the Protection of Industrial Property,[39] first signed by 11 countries in 1883, was the first successful attempt to find a common international ground for the global exploitation of industrial property, since national laws have been very diverse. The convention is today administered by WIPO. Sweden signed the Paris convention in 1885, like, until today, about 170 countries also did.

As with the Berne convention (session 2), signatories agree on national treatment. Furthermore, they agree on a certain set of minimal requirements which national law has to fulfil: “common rules”. Finally, they agree on the so-called right of priority. This means that if someone has filed a patent, a trademark or an industrial design in one of the member states then this person has 6 months (for trademarks and designs) and 12 months (for patents) to file for protection in any of the other member states and will get priority. The application will be treated as if it was filed on the same day as the first one and everything that happened in between, including other applications for the same invention, will be disregarded.

The Paris Convention was last updated in Stockholm in 1967.

2 Patents

Patents are titles awarded by government that grant its holders the exclusive rights to commercially exploit an invention, that is the function, operation, and construction of an invention. It is in fact a negative right, that is the right to exclude others from commercially (*yrkesmässigt*) exploiting an invention, for a limited period of time. The time limit is usually 20 years, also in Sweden.

For a patent to be granted, an invention has to fulfil the following criteria:

- it must be new and original: It must not be known anywhere in the world and this means no publication or documentation on it must be available anywhere, this includes publications that the applicant might have written herself. (Note: This is a problem when it comes to what is commonly called “indigenous knowledge”, since it in many cases lacks documentation in writing)
- it must be non-obvious and involve an inventive step (*uppfinningsshöjd*)
- it must be suitable for industrial applications (*tillgodogöras industriellt*): that means it must be of a technical character, have a technical effect, and be reproducible.

The Swedish patent act starts out with a list of what cannot be patented. This list includes presentations of information, animals, plants, software, works of art, scientific theories, mathematical methods, procedures for therapeutic or surgical treatments on people or animals.

39 World Intellectual Property Organisation. ‘Paris Convention for the Protection of Industrial Property’, 1979, http://www.wipo.int/treaties/en/ip/paris/, visited on 2019-08-27.

Patents have to be applied for. They do not arise automatically. Patents are granted for the one country/jurisdiction in which they are applied for. For a patent to be granted the invention has to be made public and described in such a way that an expert could follow the steps to apply the invention in the way it is intended. Patent applications are complicated and lengthy matters and it can take years from the day of the application until a patent is granted.

In Sweden, patent applications are made to the Patent- och Registreringsverket (PRV), which grants national patents. There is no such thing as a world patent; however there are multilateral agreements that make it easier to apply for a patent in more than one country. Most importantly, Sweden is a member of the European Patent Organisation (EPO) and signatory of the European Patent Convention, together with 38 other states.

For a list of all member states see the EPO website: http://www.epo.org/about-us/organisation/member-states.html

For information on how to apply for a European Patent: http://www.epo.org/applying/basics.html

Furthermore, Sweden is a signatory of the Patent Cooperation Treaty (PCT), together with over a 130 countries. Administered by WIPO, this treaty offers a way to apply for patents in all the signatory countries.

Patents are limited in a number of ways. I already mentioned compulsory licensing (*tvångslicens*), which allows the state under certain conditions to withdraw the exclusive rights from the holder of the patent, if this in the interest of the greater public good. This is mostly of relevance in emergency situations or regarding health related issues, however it can also be applied in other situations. In many countries, royalties and conditions received for a copyrighted work under a compulsory licence are specified by local law, but may also be subject to negotiation.[40]

Why are patents needed? The most common argument is that patents secure a return of investment, and also give an incentive to inventors for revealing their inventions to the public. In this view, patents stimulate invention, and ultimately the advance of knowledge.

However, this perspective is not entirely uncontested. One counter-argument is targeted at the fact that patents establish, albeit for a limited amount of time, monopolies. Thus they are in conflict with the mechanisms of a free market in which free competition is meant to stimulate advances and innovation. This problem has been highlighted by leading economists and proponents of free trade for a long time, at least since the beginning of the last century.[41]

40 See Knowledge Ecology International for a list of cases of compulsory licences or threats to use such a licence: https://www.keionline.org/cl, visited on 2019-08-27.
41 Johns, A. 'Intellectual property and the nature of science'. *Cultural Studies* 20, no. 2-3 (2006): 145-164, http://dx.doi.org/10.1080/09502380500495643.

Moreover, there is evidence that the link between patents and innovation is not as direct as stipulated in the "official" argument, and that increased patent protection is, in practice, not necessarily an incentive for innovation.[42] As Frankel explains:

> When an intellectual property rule or policy is demonstratively a cost to the local economy, it is a deadweight loss. Some kind of cost–benefit analysis may determine if a cost is worth bearing in exchange for some other gain. In the intellectual property context, the supposed benefit is either some trade gain or simply being part of a trade agreement. Even if there is an overall benefit to carrying an intellectual property related deadweight loss, the reasons for having intellectual property rules in such circumstances have changed. The reasons for intellectual property rules are no longer related to innovation incentives, but to something else. Intellectual property becomes essentially the equivalent of a market-distorting subsidy, for an offshore interest, and that means it functions as a protectionist measure and its role is primarily rent-seeking.[43]

In any case, it makes sense to distinguish between different industries. As Lessig writes, "for economists [...] the theory suggests contexts in which innovation will be helped by patents as well as contexts where it will be harmed".[44] He goes on to discuss software development as one such area that might see more harm than benefit from strong patent protection, since its innovations are cumulative and sequential.[45]

In Swedish: Marianne Levin. *Lärobok I Immaterialrätt Upphovsrätt, Patenträtt, Mönsterrätt, Känneteckensrätt - I Sverige, EU och Internationellt.* 11th ed. Alphen aan den Rijn: Wolters Kluwer, 2017, pp. 229-347; on compulsory licences: pp. 329-333.

3 Trademarks

Trademarks (*varumärke*) are titles which grant certain exclusive rights to their owners. "Trade marks are signs used in trade to identify products. In the framework of IP law, trade marks are practical little items".[46] While patents concern function, operation, and constructions of inventions, trademarks serve to identify the origin of product and services, and also to distinguish products and services from different providers. They are unique in the way that they are, and, potentially at least, perpetual. They also have to be applied for, and initially last for 10 years, however, they can be renewed an unlimited number of times.

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42 Cf. e.g. Sakakibara,Mariko, and Lee Branstetter. *Do Stronger Patents Induce More Innovation? Evidence from the 1988 Japanese Patent Law Reforms*. Cambridge, MA: National Bureau of Economic Research, 1999, http://dx.doi.org/10.3386/w7066.
43 Frankel, Susy. *Test Tubes for Global Intellectual Property Issues. Small Market Economies*. Cambridge University Press, 2015, p. 77f.
44 Lessig, Lawrence. *The future of ideas. The fate of the commons in a connected world*. New York: Vintage, 2002, p. 205.
45 Also see Benkler, Y. *The wealth of networks. How social production transforms markets and freedom*. New Haven; London: Yale University Press, 2006, http://benkler.org/Benkler_Wealth_Of_Networks.pdf, visited on 2019-08-27.
46 European Union Intellectual Property Office. 'Trade Mark Definition', https://oami.europa.eu/ohimportal/en/trade-mark-definition, visited on 2019-08-27.

As with patents, in Sweden, applications for national trademarks are made to the PRV. It is also possible to apply for an EU trademark, handled by the European Union Intellectual Property Office (EUIPO). International trademarks are handled by WIPO, and it is possible to apply for trademarks which are valid in all or only some of the countries which have signed the Madrid Agreement. In certain cases, a trademark can also arise without registration, as a common law right through use (*inarbetning*).

An application is made for certain groups of goods or services only. For example, textiles is one such group, another one covers technical tools etc.[47] Hence, a trademark is only valid in the group(s) to which the good or service belongs. The owner of a trademark can prevent others from using the mark in relation to products which are similar or identical, i.e. which belong to the same group. However, in some cases, when the threat of confusion is given, the owner can also prevent its use in relation to other groups.

Conflicts arose quite early on and still arise today between trademarks and domain names. The main problem has to do with the fact that trademarks are territorial and restricted to certain classes, while domain names are global and not restricted. Conflicts arising between holders of trademarks and holders of domain names are today typically dealt with by so-called “Dispute Resolution Service Providers”. One such provider is organised by the WIPO Arbitration and Mediation centre (http://www.wipo.int/amc/en/domains).

4 Design Rights

Design rights, in contrast to patents, pertain to the appearance of a product, they do not cover the function of a product. A design has to fulfil the following criteria to qualify for protection:

- Novelty
- Distinctive character
- Not exclusively functional

Design rights have to be applied for to qualify for the full length of protection. As with patents and trademarks, in Sweden, applications are made to the PRV. It is also possible to apply for a Community Design, valid in the EU. Like trademarks, design rights are handled by EUIPO. Sweden is not connected to the international registration system, which is organised by WIPO.

Design rights are granted for 5 years and can be renewed so as to last a maximum of 25 years. There even exists protection for unregistered designs. In these cases the protection lasts for three years, and cannot be renewed.

PRV databases for patents, trademarks and designs: https://www.prv.se/en/more-services/search-databases/

47 For a list see PRV. ‘Klassa varor och tjänster’, http://www.prv.se/sv/Varumarke/Klassa-varor-och-tjanster/, visited on 2019-08-27.

Also see PRV, 'Så söker du patent', December 2016, https://www.prv.se/globalassets/dokument/patent/informationsmaterial/sa-soker-du-patent.pdf, visited on 2019-08-27.

In Swedish: Levin, loc. cit., pp. 386-432, especially "Varumärken och Internet" pp. 403-407.

Further Reading

Johns, 2006, loc. cit.; Sakakibara and Branstetter, 1999, loc. cit.

5 AI and User Data as Trade Secrets

With the increasing relevance of machine learning, databases are not any more predominately used for look-up services, but potentially become the central component of a certain technology. However, this component is not patentable, since it is a collection of data just like any other database, but typically of extensive size – and value. Machine learning, also called artificial intelligence (AI), relies on human behaviour that can be learned from, so it took off from a niche to a major business since user data are produced with every step humans make using Web technologies: where ever possible, this data, often personal (pseudo- or anonymised) data, is stored with its relations to machine-generated data, so the movements of single users are logged as a package. This makes it possible to compare the behaviour of single users to others, and to find patterns that the machine then learns as behaviour that can be expected from humans.

Even though it is questionable if the labour put into the automatised collection of this user data justifies the application of the "Sweat of the bow doctrine", the AI industry already started working on a new type of IP right for this purpose. Data collected in order to train "smart" machines, at this point, could only be protected under copyright *after* a somewhat laborious and creative annotation process for structuring the data was conducted. Even then, those annotation processes typically follow very strict manuals and therefore are rather not creative. Therefore, the industry currently relies on trade secret regulations to own and trade collected user data, which is a contested legal construct and bears insecurities.

If the users will continue to allow the industry to own and monetize their personal data as IP, is, to a large part, up to them. The infrastructure for the collection of Big Open Data could be an integral part of the Web that allows everyone to retain the definitive ownership right of their own user data (not as IP, of course). This is what the inventor of the Web, Tim Berners-Lee, recently suggested with the newly launched Solid platform:[48] personal data is stored anonymised in principally open and accessible databases ("PODs") that can – if the user allows – be used by everyone, including e.g. start up businesses, in order to challenge the market power of the giants of the Internet industry. This market power is not the least based on exclusive access to the data that users give away in exchange for the use of apps and Web services.

48 'Welcome to Solid', https://solid.inrupt.com, visited on 2019-08-27.

Further Reading

Margoni, Thomas. *Artificial Intelligence, Machine Learning and EU Copyright Law: Who Owns AI?*, University of Glasgow : Centre for Copyright and New Business Models in the Creative Economy (CREATe), 10 Nov. 2018. https://doi.org/10.5281/zenodo.2001763.

Session 4: Copyright Management at Cultural Heritage Institutions

Mandatory reading for this course session

Petri, Grischka. 'The Public Domain vs. the Museum: The Limits of Copyright and Reproductions of Two-Dimensional Works of Art'. J*ournal of Conservation and Museum Studies* 12, no. 1 (2014): 1-12, http://doi.org/10.5334/jcms.1021217.

Pantalony, Rina Elster. Chapter 4. In 'WIPO Guide on Managing Intellectual Property for Museums'. World Intellectual Property Organisation, 2013: 22-33, http://www.wipo.int/edocs/pubdocs/en/copyright/1001/wipo_pub_1001.pdf.

Davies, Philippa. 'Access v Contract. Competing Freedoms in the Context of Copyright Limitations and Exceptions for Libraries'. *Cahiers de La documentation–Bladen Voor Documentatie* 4 (2013): 13–31, https://www.abd-bvd.be/wp-content/uploads/2013-4_Davies.pdf.

Kapitzke, Cushla. 'Rethinking Copyrights for the Library through Creative Commons Licensing'. *Library Trends* 58, no. 1 (Summer 2009): 95–108. LUBSearch.

Libraries, archives, and also museums are increasingly dealing with digital material. For them, the move onto the Internet has meant an increased confrontation with IP law, and here, especially copyright. In some aspects, the different cultural heritage institutions face different issues and have different interests, while in other regards, they find themselves in similar positions. To begin with the latter, what unites them in their position in a digital, networked environment, is their role as mediators of cultural expressions. In this role, they are faced with laws regulating access to the material they host or grant access to, and to which they typically do not hold the copyright.

As we learned in session 2, libraries and archives are mentioned specifically in Swedish copyright law and provisions are made for them (§ 16 and § 42), in order to allow them to fulfil their mandates as providers of copyright protected material to their users. These exemptions enable them, for instance, to make copies for certain clearly described purposes, including preservation and research.

However, under these provisions, although some licences allow electronic files to be sent between institutions via "Secure Electronic Transmission", the end user may only receive a printed copy. Institutional licences (avtal) are contracts between the provider of the material (often publishers) and the library or archive. These licences have a tendency to be somewhat more restrictive than the regulations provided under copyright law. Some changes in Swedish copyright legislation, implemented in November 2013, facilitate licence regulations and digitizing collections in libraries and archives.

Museums have, until recently, appeared foremost in their role as (potential) buyers of copyright protected works of art (§ 26). However, museums are (like galleries), although not explicitly mentioned, also affected by § 24 which allows for works of art

to be reproduced, if the purpose is to advertise them or to sell them, as well as to be reproduced in catalogues. However, the latter exemption applies only – as so often – when it is not in digital form. For all three institutions, one of the main shifts that comes from their increased dealing with digital material lies in a heightened importance of copyright issues, often connected to issues (mainly complications) of preservation and archiving as well as to distribution to users. However, how this further manifests itself differs, often depending on the respective institution's key activities and mandate.

The most recent addition of copyright treaties administered by WIPO is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MTV) which was adopted in June 2013.[49] By allowing for some copyright exceptions, the treaty is supposed to facilitate the adoption of print text to other media in order to make works accessible to visually impaired persons.

Further Reading

Interesting discussion of recent changes in the legislation and the remaining difficulties for libraries of another EU country, Spain: Fernández-Molina, Juan-Carlos, Margarita Pérez-Pulido, and José-Luis Herrera-Morillas. 'Academic Libraries and Copyright: Unveiling Inadequacies of Current Law Through the Analysis of Processes Included in Quality Management Systems'. *Journal of Academic Librarianship* 43, no. 3 (May 2017): 184–92, http://dx.doi.org/10.1016/j.acalib.2017.03.006.

If you are especially interested in archives, the literature is quite sparse. Read: McKay, Aprille C. 'Managing Rights and Permissions'. In *Rights in the Digital Era*, edited by Menzi L. Behrnd-Klodt and Christopher J. Prom. Chicago: Society of American Archivists, 2015.

1 Clearing Copyright and the Issue of Orphan Works

Challenges, especially for archives and museums, but of course also for libraries, involve the digitisation of material in their possession to which they do not own the copyright (and for which the copyright term has not expired). In order to digitise and especially to grant access to their users, it is necessary to clear the copyright, to get the approval of the copyright holder. This can be quite simple in the case of one known copyright holder, but it proves difficult and a very lengthy process if it is a more complex work in which different layers of copyright (and related rights) exist, as for example in films, music productions and similar. Moreover, it is not uncommon that copyright owners are hard or near to impossible to find. Given the length of the copyright term and the fact that it arises automatically with no need for registration and hence no register to consult, this poses in many cases a veritable problem. Works for which no copyright owner can be made out are called "orphan works" (*herrelösa verk*). Studies have shown that in order to stay on the safe side archives tend to

49 World Intellectual Property Organisation. 'Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled', 2013, http://www.wipo.int/treaties/en/ip/marrakesh/, visited on 2019-08-27.

restrict themselves in their digitisation efforts and do not include works for which the situation is unclear or hard to solve.[50]

In October 2014, changes in Swedish copyright legislation (§ 16) came into force providing additional exemption for museums, archives and libraries, in order to facilitate digitizing. The change came about following a directive from the European parliament (2012/28/EU) that prescribed EU member states to allow for restrictions in national copyright legislations, in order to enable cultural heritage institutions to make orphan works available to the public.

Europeana (https://www.europeana.eu) is an EU-funded cooperation of numerous large European libraries, archives and museums, with the aim of creating online access to the collected treasures of European culture. It has been threatened in its progress by the legal problem orphan works pose. In cooperation with the Digital Library of America (DPLA), Europeana introduced internationally standardized rights labels in 2016: http://rightsstatements.org/en/. These 12 different labels are available as linked data and can be used by any cultural heritage institution for their digital collections.

Further Reading

Borghi, Maurizio, and Stavroula Karapapa. *Copyright and Mass Digitization*. Oxford : Oxford University Press, 2013.

2 From Owning to Licensing: Negotiating Access

A major shift that has occurred for libraries is the transition to licensing (i.e. renting) of material instead of buying and owning it. Simplified, with printed works (books, journals etc.) as well as CDs (or other media for sound recordings) a library would buy one or more copies; and in agreement with the provisions made in copyright law, these would be lent to their users. They could be exchanged between libraries, copies could be made for preservation or for research purposes, and the copies (if so required) could be archived perpetually.

In order to compensate the creators, the Swedish copyright and library infrastructure (as in many other European countries) is complemented by a system of so-called “collecting societies” or “copyright collectives” which represent the interests of copyright holders (e.g. authors, musicians, etc.).

Films and computer programmes (even on DVD or similar) are not dealt with under the same conditions. They are explicitly exempt from these provisions and cannot be loaned freely, neither are their copyright holders represented by collecting societies. Here, it is the film, distribution or software company itself which acts on behalf of the copyright holders.

The Swedish collecting society for authors (Författarfonden) receives a set amount for *each* library loan of a Swedish book (in the original language) from the state, but

50 Dryden, J. ‘Copyright issues in the selection of archival material for internet access’. *Archival Science* 8, no. 2, 2008, 123-147.

then distributes the generated income *only* to its members.[51] This settlement does, however, not encompass e-books. Formerly, Swedish public libraries paid 20 SEK each time an e-book is borrowed, half of this to the distributor, and the other half to the publisher. Then, Axiell Media (formerly Elib), the Swedish main distributor of e-books, allowed publishers to set different prices on different titles. The company was also involved in a scandal in which it allowed a fake publisher to offer some public domain classics through its platform. The publisher then "borrowed" the books themselves to receive the per book-payment. This example shows one of the problems and vulnerabilities with the current system, and new solutions are called for.[52]

During summer 2018, the US-company Overdrive, part of the multinational Rakuten group, succeeded over Axiell Media in the first public procurement process for a e-book distributor for Swedish public libraries. The call for tenders included the return to a fixed price per loan for at least a year. Overdrive's tender was the cheapest. Already the Swedish company Axiell was criticised that too many books are missing from the platform, especially those published in Sweden, or by small publishers. Overdrive, however, could not prove, so far, that it can even cover major Swedish publishers, so the company is suspected of breaching the contract, and the roll-out was stopped.[53]

There is no distributor on the market, and particularly none suitable for the use in libraries, that would cover a truly broad range of publishers. However, a combination of platforms seems unacceptable from a public library user perspective. This means that, in any case, for now, many books will not be available in electronic format to public library users, although there are single user licences on the market.

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51 For music (CDs and similar) the system works like that for print books. Two collecting societies are active here in Sweden: SAMI (Svenska Artisters och Musikers Intresseorganisation) and STIM (Sveriges Tonsättares Internationella Musikbyrå). All these represent only holders of Swedish copyright, while foreign works are not covered by this system of public lending right (biblioteksersättning). A lists of Swedish copyright and collecting societies can be found here: Kungliga Bibliotek, Viktigt att veta om upphovsrätt, http://www.kb.se/Dokument/Bibliotek/biblioteksjuridik/upphovsratt_viktigt_att_veta.pdf; also see Riksarkivet, Viktigt att veta om upphovsrätt, http://riksarkivet.se/upphovsratt, both visited in 2018-10-20.

52 Ericson, Katarina Tollbäck, Göran Schmitz, and Johan Rasmussen. 'Öppet fönster mot oskyddad e-boksvärld'. *Biblioteksbladet,* 16 Dec 2016, http://biblioteksbladet.se/redaktionellt/oppet-fonster-mot-oskyddad-e-boksvarld/, visited on 2019-08-27. For a more general take on libraries and e-books, see De Castell, Christina. 'Considering the Ebook Journey: Look at How Far We've Come.' *Computers in Libraries* 37, no. 5, June 2017: 19-22. For the Swedish context, see Maceviciute, E. et al. 'The Acquisition of E-Books in the Libraries of the Swedish Higher Education Institutions'. *Information Research*, vol. 19, no. 2, 2014.

53 SKL Kommentus. 'Ramavtalsområde: E-Litteratur', updated on 8 Oct. 2018, https://www.sklkommentus.se/upphandling-och-ramavtal/vara-ramavtal-och-upphandlingar/ramavtal-och-avtalskategorier/utbildning-och-larande/e-litteratur/; also see Houltzén, Eva. 'Axiell media: "Förlag saknar avtal med Overdrive"'. *Svensk Bokhandel*, 9 Oct. 2018, http://www.svb.se/debatt/axiell-media-forlag-saknar-avtal-med-overdrive, both visited on 2019-08-27.

In general, e-books are legally treated just as printed books, meaning that libraries are allowed to lend e-books based on a one-copy one-user model.[54] However, libraries treat formats differently, often depending on contracts with publishers or resource aggregators. Moreover, public and academic libraries, at least in Europe, often follow different licensing strategies for e-books. Public libraries tend to have a cap every month, and when that is reached, no more e-loans can be made. For research libraries, the situation is different, they tend to either purchase individual print titles and license e-journals, or they negotiate over large packages ("big deals"), often on a national level, so all libraries which participate in that so-called consortium will be included in the deal. A fee is then paid to the rights holder once or annually (or both!), but not per loan.[55]

Negotiating over licenses on whatever level gives the owner of the copyright – or their representatives – a stronger position to demand, but also to prohibit certain actions. For instance, interlibrary loans are often very restrictive when it comes to digital material, or the possibility to print out material might be severely restricted. In addition, licensed material is typically not hosted on site, but lies on a server somewhere else, and often access is granted only for a certain amount of time.

I just mentioned the groups which are formed by libraries, so-called library consortia, in order to negotiate from a stronger position. For Sweden, most relevant licences (for e-journals and databases) are negotiated through Bibsam, administered by Kungliga Biblioteket (KB). Bibsam set up a number of minimum requirements for such licences: (1) walk-in users should have access to material covered by a licence, (2) users should be able to access the material from off-site, (3) public libraries who are not part of Bibsam need to be able to get copies. However, individual libraries also negotiate contracts independently.[56]

A general information point for copyright collectives:
https://www.copyrightlink.org/issues/collective-licensing-models.html

For an international perspective of public lending right see:
http://www.plrinternational.com

Further Reading

Fischman Afori, Orit. 'The Battle Over Public E-Libraries – Taking Stock and Moving Ahead'. *IIC - International Review of Intellectual Property & Competition Law* 44, no. 4 (June 2013): 392-417.

54 The Court of Justice of the European Union. Judgement of the Court (Third Chamber) ECLI:EU:C:2016:856. InfoCuria, 10 November 2016, http://curia.europa.eu/juris/document/document.jsf;?docid=185250&doclang=EN, visited on 2019-08-27. Also see Guest Blogger. 'Libraries: A Trio of European Court Rulings', EIFL, 15 January 2018 http://www.eifl.net/blogs/libraries-trio-european-court-rulings, visited on 2019-08-27.
55 For music (and audio books), there is a service based on licensing, targeted at libraries: Naxos Music, http://www.naxosmusiclibrary.com, visited on 2019-08-27.
56 For more details see: Kungliga biblioteket, Bibsam, http://www.kb.se/bibliotek/centrala-avtal, visited on 2019-08-27.

Bergström, Annika, et al. *Books on Screens: Players in the Swedish e-Book Market*. Göteburg: Nordicom, 2017; specifically Chapter 5.

Jones, D. R. 'Locked Collections: Copyright and the Future of Research Support'. *Law Library Journal* 105, no. 4 (Fall 2013): 425–60.

3 Extended Collective Licences

Helpful for orphan works, for missing explicit fair use exceptions in the law, for masses of copyrighted content that are supposed to be used or when masses of users are involved (broadcasting, the Web), but also for cases in which the rightsholders are residing in other countries – so-called outsiders – extended collective licences (ECLs) are a way of facilitating licensing procedures. ECLs are also called "the Nordic system", because it was introduced in Denmark, in 1960, with broadcasting mass consumption, and the other Nordic countries followed soon. The advantage of the system is that license negotiations do not have to take place individually – this where the "extended" in the name comes from. ECLs cover rightsholders which have not mandated the collecting society to represent them. However, the society must have negotiated an agreement on national level, granting a defined user group certain rights collectively, for a certain defined type of work.

For instance, hypothetically, if a song by Madonna is played on the Swedish radio, Madonna's record company would receive the same amount of royalties that Swedish singers would receive, even though no bilateral agreement exists. Rightsholders can typically opt out of ECLs, and negotiate bilaterally. Another example is the Bøkhylla project by the National Library of Norway which intends to digitise all books in the national library which are written in Norwegian, and to make them available online. For the project, a deal has been made between the library and the organization Kopinor, representing authors and publishers, instead of the library having to reach an agreement with every single creator. As a third example, since there is no fair use exception for educational purposes in many Nordic legislations, ECLs enable teachers and students of educational institutions – within certain limits – to make and share copies without negotiating with the copyright holder.[57]

Recently, the Nordic ECLs became a role model for many other countries, and for the EU copyright reform (see Session 5).

Further Reading

IFLA Committee on Copyright and other Legal Matters. *IFLA Background Paper on Extended Collective Licensing*. 7 Aug. 2018, https://www.ifla.org/files/assets/clm/ecl_background_paper.pdf.

57 For Sweden, see Bonus Copyright Access. 'The Extended Collective Licence System', 2017, http://en.bonuscopyright.se/pages/ExtendedCollectiveLicenceECL, and 'Copy and Share Protected Material within Higher Education Institutions', 2017, http://en.bonuscopyright.se/pages/HigherEducationInstitutions, both visited on 2019-08-27.

4 “Archiving” Remote Content?

One of the main issues libraries and archives face, when it comes to material that is provided under conditions set out in a licensing contract, is how to enable access even after a licensing period ended. So-called archival rights (*arkivrättigheter*) are part of some licences, yet not of all. Bibsam, like other library consortia, aims at negotiating access to back issues for the licensing contracts they enter. Dictionaries and encyclopaedias are most commonly excluded. However, this access to back issues very often takes the shape of online access to a database on a remote server. Thus, even in cases in which archival rights are granted, and access to back issues is possible, the central question remains: what happens to this remote archive in case the respective company (which owns the copyright or represents the copyright holders) ceases to exist? After all, typically these are private entities and archiving is not part of their mandate.

Session 5: Intellectual Property in the Age of Neoliberalism

Mandatory resources for this course session

David, M., and D.J. Halbert. 'Intellectual Property & Global Policy'. *Global Policy* 8, no. 2 (2017): 149–58, http://doi.org/10.1111/1758-5899.12381.

Kretschmer, Martin (2019). 'European copyright reform: Is it possible?'. Re;publica19, 6-7 May 2019, Berlin, https://19.re-publica.com/en/session/european-copyright-reform-it-possible (51:45 min). Video accessible via: YouTube, https://www.youtube.com/watch?v=ZyujNlpxu9k, published 07.05.2019; the slides are available in Canvas.

Losey, James. 'The Anti-Counterfeiting Trade Agreement and European Civil Society: A Case Study on Networked Advocacy'. *Journal of Information Policy*, 2014, 205, http://doi.org/10.5325/jinfopoli.4.2014.0205.

IP has undoubtedly become a significant economical force, and its high level of regulation is an excellent example of how neoliberal markets are supported by national and international law that gain legitimacy mainly because they maximise competition, and subordinate ideals like "the common good". Dardot and Laval define neoliberalism "as the set of discourses, practices and apparatuses that determine a new mode of government of human beings in accordance with the universal principle of competition".[58]

International agreements aiming at regulating IP at a level beyond the individual nation state have proliferated in the past 130 years. Most countries in the world are signatories to a large number of those, and, of course, memberships in international political and economic unions such as the EU influence legislation in the area of IP a great deal, as we have already seen in Sessions 2, 3 and 4.

The two most important bodies under whose control IP rights are administered at an international level are the already mentioned WIPO (World International Property Organization) and the WTO (World Trade Organisation). WIPO is a specialized agency of the United Nations Organization. It was founded in 1967 and administers some of the oldest international agreements in the area (see WIPO, 2013). The WTO, on the other hand, is a rather new organisation – it was founded in 1994 – and the fact that it is in charge of one of the most important (and also most contested) international agreements on IP, TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights), is indicative of the growing economic importance assigned to IP rights and the fact that IP more than anything else is an issue of trade and commerce. WIPO and WTO entered a cooperation agreement in 1996.

58 Dardot, Pierre, and Christian Laval. *The New Way Of The World: On Neoliberal Society*. London and New York: Verso, 2013, p. 4.

Further Reading

For the claim that patents are a system of "private monopoly taxation" and some ideas how a fair system could be designed instead, see Abbott, Frederick M. 'Rethinking Patents: From 'Intellectual Property' to "Private Taxation Scheme"'. *Kritika: Essays on Intellectual Property*, edited by Peter Drahos et al., vol. 1, Cheltenham: Edward Elgar, 2015, pp. 1–16.

Cox, Krista L. 'Rigidity in Global Intellectual Property Norms'. *Columbia Journal of Law & the Arts*, no. 3 (2016): 327–34, https://jla.journals.cdrs.columbia.edu/wp-content/uploads/sites/14/2017/05/3_40.3_CoxArticle_FINAL.pdf.

May, Christopher. *The global political economy of intellectual property rights: The new enclosures?* Vol. 3. London: Routledge, 2013.

1 The TRIPS Agreement

The TRIPS agreement[59] stems from the increasing tendency to shift administration of IP rights into the domain of trade and commerce which became more and more pressing during the 1980s. It was initially negotiated within the so-called Uruguay round of the GATT (General Agreement of Trade and Tariffs) talks which began in 1986 and lasted until 1993. Out of these talks in 1994, the WTO (World Trade Organization) was born, and one of its first tasks was to administer the TRIPS agreement which is compulsory for WTO members. In this way, the powerful countries which had not signed the Berne Convention until the 1990s, like China and Russia, had a strong incentive to surrender to the dominant IP regime.

In terms of levels of protection, TRIPS is very similar to the Berne and Paris conventions. Yet, it does not contain any reference to moral rights, but concerns only economic rights and reduces acceptable limitations to "special cases". Furthermore, it also – in addition to a set of minimum requirements – introduces a system of enforcement; the WTO dispute settlement mechanism.

To put IP at the agenda of the GATT talks and hence to link it to trade policy was in no way an undisputed move. It was initiated mainly by the USA with the support of the EU, Japan, and other industrialised countries. It was not favoured by "developing" countries – lead by Brazil, India, and Korea amongst others – who put forward different policy proposals, yet very often lost out.

The following critical points dominated the debate:

- expectation of wealth concentration effects on the side of rights holders
- prevention of low-scale investments, because many people and organisations are not wealthy enough to afford licensing

59 World Trade Organisation. 'TRIPS Agreement (as amended on 23 January 2017)', https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm, visited on 2019-08-27.

- competitive advantage for the leading pharmaceutical companies when pre-clinical trials or the submission of samples for approval until a patent expires become illegal

However, the concession granted by the WTO members was a prolonged implementation period for developing countries which expired in 2005. For least developed countries (LDC), for pharmaceutical patents, the transition period was extended several times, now to 2033, after strong requests by the LDC group, supported by the World Health Organisation (WHO). They were unsuccessfully aiming at a transition period as long as the LDC status persists.[60]

Further Reading

Duncan, M. *Globalising Intellectual Property Rights. The TRIPS Agreement*. London; New York: Routledge, 2002. Especially chapters 1, 3 and 5.

2 The Doha Declaration

In 1998, 41 pharmaceutical companies filed a lawsuit against South Africa, in order to stop the government from legalising the production and parallel import[61] of generic drugs for affordable AIDS treatment – without recognising patents. TRIPS does actually permit this in case of "national emergency or extreme urgency".[62] However, the drug industry obviously had doubts seeing one out of five South Africans being infected with HIV as national emergency. Three years later, and after protests, they dropped the case, but a long-term solution was needed.

In 2001 "developing" countries initiated the so-called Doha Declaration on the TRIPS Agreement and Public Health[63] to limit the agreement and adapt it to the needs of "developing" countries. The main focus is on compulsory licences for patented pharmaceuticals in the case of public health emergencies.

> The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. (Paragraph 4)

In order to reach this goal, WTO members should issue compulsory licences to export generic versions of patented medicines to countries with insufficient or no manufacturing capacity in the pharmaceutical sector. The WTO members agreed on an according amendment text, and eventually, in January 2017, with Russia's

60 International Centre for Trade and Sustainable Development. 'WTO members approve 17-year extension of pharmaceuticals transition period for LDCs'. *Bridges Africa,* 17 November 2015, https://www.ictsd.org/bridges-news/bridges-africa/news/wto-members-approve-17-year-extension-of-pharmaceuticals-transition, visited on 2019-08-27.
61 Parallel import is to buy a product cheaper in another country without permission of the IP owner.
62 Wadman, Meredith. 'Gore under Fire in Controversy over South Africa AIDS Drug Law'. *Nature* 399, 24 June 1999, 717–18. https://doi.org/10.1038/21472.
63 World Trade Organisation. 'Declaration on the TRIPS Agreement and Public Health', 2001, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm, visited on 2019-08-27.

signature the required two thirds of WTO member countries was reached for the TRIPS amendment to enter into force.

In Swedish: Marianne Levin. *Lärobok I Immaterialrätt Upphovsrätt, Patenträtt, Mönsterrätt, Känneteckensrätt - I Sverige, EU och Internationellt.* 11th ed. Alphen aan den Rijn: Wolters Kluwer, 2017, pp. 49-52.

3 TRIPS-plus

TRIPS-plus (or: TRIPS+) are bilateral agreements that extend TRIPS. There is no official list of these agreements. Often, Free Trade Agreements between states also include some IP provisions. If they were put into place in the years after 1994, they are added to TRIPS-plus. The "plus" also indicates that these provisions usually are more restrictive than TRIPS itself, and that potential negative effects on the public health and economy of "developing" countries are even more likely:

> Common examples of TRIPS plus provisions include extending the term of a patent longer than the twenty-year minimum, or introducing provisions that limit the use of compulsory licences or that restrict generic competition. [… Also,] information concerning a drug's safety and efficacy is kept confidential for a period of, say, five or ten years. If a generic manufacturer wants to register a drug in that country, it is not allowed simply to show that their product is therapeutically equivalent to the originator product. Instead, it must either sit out the exclusivity period, or take the route of repeating lengthy clinical trials […].[64]

Further Reading

Ho, Cynthia. 'An Overview of "TRIPS-Plus" Standards'. In *Access to Medicine in the Global Economy*. Oxford University Press, 2011, http://dx.doi.org/10.1093/acprof:oso/9780195390124.001.0001.

Kur, Annette. 'From Minimum Standards to Maximum Rules'. In *TRIPS plus 20. From Trade Rules to Market Principles.* Edited by Hanns Ullrich, Reto M. Hilty, Matthias Lamping, Josef Drexl, 133–62. MPI Studies on Intellectual Property and Competition Law. Berlin, Heidelberg: Springer, 2016, http://doi.org//10.1007/978-3-662-48107-3_4.

4 ACTA, TTP, and TTIP

Based on TRIPS, the United States, Australia, the EU and a considerable number of other WTO member states started negotiating a new international agreement called ACTA (Anti-Counterfeiting Trade Agreement) in 2007. It was a hotly debated multilateral agreement,[65] and was criticised severely because, in its initial version, it would have required internet service providers to monitor (and probably censor) their costumers' traffic. Also, negotiations that led to it had been kept secret. The proposal was watered down substantially while protests were powerful, but, probably

64 Médecins Sans Frontières Access Campaign. 'TRIPS, TRIPS Plus and Doha', https://www.msfaccess.org/content/trips-trips-plus-and-doha, visited on 2019-08-27.
65 See e.g. La quadrature du net. 'ACTA', http://www.laquadrature.net/en/ACTA, visited on 2019-08-27.

because of the complexity of the legal text and the difficulties of retrieving correct and up-to-date information about the negotiations, much misinformation was spread with the protests.[66] The European Parliament rejected the agreement in July 2012.

Equally lacking transparency of negotiations, the Trans-Pacific Partnership agreement (TPP), which also regulates trade related aspects of IP, was leaked to WikiLeaks in November 2013.[67] In total, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US and Vietnam negotiated for seven years. The leaked documents included a number of typical TRIPS-plus provisions, threatened the public domain and the access to affordable medicines. Other parts of the leaked text included provisions intended to enhance the protection in the digital realm, and by doing so, favouring the entertainment industry.

When TPP was signed in February 2016, it has not been amended substantially regarding the criticised aspects of IP regulations. Similar results can be expected from the Transatlantic Trade and Investment Partnership (TTIP) negotiation between the European Union and the United States, which is classified as well. Provisions similar to ACTA are very likely to be on the table once more. After a major leak of TTIP documents by Greenpeace in May 2016, activists find their worst expectations materialised.[68]

A few days after his inauguration in January 2017, US president Trump withdrew the US participation in TPP, and paused the TTIP negotiations.

5 The WIPO Copyright Treaty

As already mentioned in Session 2, the WCT (WIPO Copyright Treaty)[69] went into force in 2002. In its preamble, it explicitly states that the signing parties "recognize the need to maintain a balance between the right of authors and the larger public interest, particularly education, research, and access to information, as reflected in the Berne Convention". However, the WCT extends the restrictions under Berne substantially. Articles 6 to 8 allow authors to control distribution and commercial rental. Furthermore, the first sale doctrine is mentioned in an international copyright agreement for the first time:

> Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the [… unrestricted distribution

66 See Lee, Timothy B. 'As Anonymous protests, Internet drowns in inaccurate anti-ACTA arguments', 30 January 2012, https://arstechnica.com/tech-policy/2012/01/internet-awash-in-inaccurate-anti-acta-arguments/, visited on 2019-08-27.
67 Farrell, Henry. 'Five key questions – and answers – about the leaked TPP text'. Interview with Susan Sell. *The Washington Post,* 15 November 2013, http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/15/five-key-questions-and-answers-about-the-leaked-tpp-text/, visited on 2019-08-27.
68 New, William. 'Alleged Leaked TTIP Report Reveals Differences, Convergence On IP Issues'. *Intellectual Property Watch,* 3 May 2016, http://www.ip-watch.org/2016/05/03/alleged-leaked-ttip-report-reveals-differences-convergence-on-ip-issues/, visited on 2019-08-27.
69 World Intellectual Property Organisation. WIPO Copyright Treaty, 1996, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295166, visited on 2019-08-27.

> right] applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author. (Article 6.2)

In many national copyright laws, it is defined that economic rights expire after the first sale of a copy. However, the WCT leaves it with the national laws to introduce a first sale doctrine or not. Article 6.2 also makes clear that contracts can always overrule copyright laws. This leads to many problems, especially for libraries which often have to negotiate against "paracopyright": contractual restrictions to the usability of online content which are not covered by copyright.

Since the UsedSoft vs. Oracle judgement by the EU Court of Justice, within the EU, the first sale doctrine unmistakeably also applies to downloaded software, and, consequently, for other remotely stored media that is downloaded, since the court conceptualised the matter as purchase of a copy, not as usage licensing.[70] In exactly that regard, it differs from the now overwhelmingly popular streaming services that clearly are services that are licensed by a user: any access or storage of copies is typically illegal after the service contract terminates. Outside the EU, it is still contested whether the first sale doctrine applies to downloaded media or not.

Article 11 of the WCT prohibits the circumvention of technological measures for the protection of works. Therefore, even to circumvent such a measure to use the work under the terms of fair use, suddenly becomes illegal.

In the US, WCT and WPPT where implemented with the highly influential Digital Millennium Copyright Act (DMCA)[71] in 1998. Since then, the act has been enforced in a number of notable cases. For instance, the decryption software DeCSS allows it to play CSS encrypted DVDs on a Linux system. Providers of US websites where forced to stop the distribution of the software, while one of the developers was acquitted in his home country Norway, because the Norwegian implementation of the WTC allows the circumvention for private use of the work. However, to stop the distribution of the DeCSS source by legal means drew a lot of criticism, especially with the ground that this would undermine the freedom of speech: why could an author distribute any text freely, but no source code?[72] Eventually, DeCSS is widely available today. Another point of criticism against the DCMA is that it inhibits the freedom to point at security flaws in technical equipments capable of reading protected media.

6 The EU Copyright Reform

The "serious" part of the discussion about an EU copyright reform started in 2015, with an official communication by the Commission.[73] It received mixed reactions.

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70 The Court of Justice of the European Union. Judgement of the Court (Grand Chamber) ECLI:EU:C:2012:407. InfoCuria, 3 July 2012, http://curia.europa.eu/juris/document/document.jsf;?docid=124564&doclang=EN, visited on 2019-08-27.
71 US Congress. 'Digital Millennium Copyright Act (DMCA)', 29 July 1997, https://www.congress.gov/bill/105th-congress/house-bill/2281/text, visited on 2019-08-27.
72 Touretzky, David S. 'Gallery of CSS Descramblers', 2000, http://www.cs.cmu.edu/~dst/DeCSS/Gallery/, visited on 2019-08-27.
73 European Commission. 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards

There has never been a general concern regarding a legal harmonisation between EU countries, and an adaptation to new technologies. However, cultural heritage organisations, academia, and people concerned about an "Open Web" protested against a number of specific aspects, that were lobbied for by the "content industry". Those aspects are all in the final direction, but in a milder fashion then initially drafted.[74] The objectives of the EU copyright reform were a "more cross-border access to content online; wider opportunities to use copyrighted materials in education, research and cultural heritage; a better functioning copyright marketplace."[75] This last point specifically aims at more transparency, and at benefits for (press) publishers, as well as for rights holders of content on content-sharing platforms.

In March 2019, after a very cumbersome process you learn about in Kretschmer's talk,[76] the most important and controversial of the new directives and regulations, the Directive on Copyright and Related Rights in the Digital Single Market,[77] was voted for with 53% in the European Parliament, and finally was adopted by the Council in April. As usual, it has to be implemented by the member states within two years. The two most disputed issues which made it to the final directive are the "upload filters" and the "link tax".

The requirement for upload filters for user generated content on for-profit platforms is believed to impact negatively on the freedom of expression. The Polish Government already filed a lawsuit at the EU Court of Justice because of that. The most common example for such a technology is the continuously developing "Content ID" algorithm introduced by Google's YouTube in 2007. In 2016, Google acknowledges development costs of US$60 million, while US$2 billion of royalties have been paid to rights holders identified via Content ID. Half of this revenue comes from fan content that the industry decides to monetize instead of requesting to take it down.[78] Some spectacular cases of erroneous copyright claims have been reported, such as the 10 hours recording of white noise by Sebastian Tomczak,[79] and recordings of public

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a Modern, More European Copyright Framework', December 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:626:FIN, visited on 2019-08-27.

74 For a summary of the protests see Reda, Julia. 'EU copyright reform: Our fight was not in vain', 18 April 2019, https://juliareda.eu/2019/04/not-in-vain/. For the specific position of libraries, and for a visualisation of the positions of different stakeholders see IFLA. 'European copyright reform: where do we stand?', updated on 8 March 2018, https://www.ifla.org/node/31339?og=5852; also see EBLIDA. 'Copyright reform. Why should libraries care?', updated on 18 April 2019, http://www.eblida.org/copyright-reform, all visited on 2019-08-27.

75 European Commission. 'Modernisation of the EU copyright rules', updated on 8 July 2019, https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules, visited on 2018-10-20.

76 For a detailed overview, see CREATe. 'EU Copyright Reform', updated on 26 March 2019, https://www.create.ac.uk/policy-responses/eu-copyright-reform/, visited on 2019-08-27.

77 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, https://eur-lex.europa.eu/eli/dir/2019/790/oj, visited on 2019-08-27.

78 Google. 'How Google Fights Piracy', 2016, https://drive.google.com/file/d/0BwxyRPFduTN2cl91LXJ0YjlYSjA/view, visited on 2019-08-27.

domain compositions whose copyright had expired.[80] "Even in clear cases of fair use, it can often require months as well as legal help and expert knowledge of copyright law to achieve a successful fair use claim".[81] Since Content ID is up and running, those problems are not addressed by the reform. On the contrary, other for-profit platforms will have to provide a similar technology or leave the EU market.

The new press publisher's right, also called "link tax", is granting press publishers the "ancillary" exclusive right of distribution and reproduction of their publications for two years. That prohibits, without explicit license, e.g. news summaries – a format established since centuries, and snippets of content presented on search engine websites. While individuals can still quote for non-commercial purposes, any press quote in a commercial context, until now an exception guaranteed under the Berne Convention, is subject to license. Even titles of articles are protected if they are longer than a few words. Search engine providers are required to acquire a license for this content, which might be feasible for major service *and* content providers – on both sides of the negotiation, but not for the large number of small players, so the search engine would naturally avoid to list their content. Further, two layers of exclusive rights are imposed on the news content which seems contradictory, complicates licensing, and reduces the author's share. Similar regulations are already in place in Germany and Spain – and they did not secure the survival of independent journalism as initially stated, on the contrary: the rapporteur of the EU Parliament responsible for the reform, Axel Voss, was discovered hiding and neglecting a study that proved the lack of success of the regulations.[82]

However, especially libraries and other cultural institutions celebrated the following new provisions:

- everyone with legal access to the sources can now use them for text and data mining, if the rightsholders do not explicitly forbid (the latter limitation does not apply to research and cultural heritage institutions; this cannot be overridden by licenses)
- cultural institutions can now allow online access to works from EU countries which are no longer commercially available, independent of their copyright status

79 Baraniuk, Chris. 'White Noise Video Hit by Copyright Claims'. *BBC News,* 5 Jan. 2018, https://www.bbc.com/news/technology-42580523, visited on 2019-08-27.
80 Kaiser, Ulrich. 'Google: Sorry Professor, Old Beethoven Recordings on YouTube are Copyrighted'. *Ars Technica*, 3 Sept. 2018, https://arstechnica.com/tech-policy/2018/09/how-contentid-knocked-down-decades-old-recordings-of-beethoven/, visited on 2019-08-27.
81 Soha, Michael, and Zachary J. McDowell. 'Monetizing a Meme: YouTube, Content ID, and the Harlem Shake'. *Social Media + Society*, vol. 2, no. 1, 2016, https://doi.org/10.1177/2056305115623801.
82 EU. 'Online News Aggregation and Neighbouring Rights for News Publishers' (Ref. Ares(2017)6256585), 20 December 2017, https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf, visited on 2018-10-20.

Important issues added to the final directive after negotiations in the several committees of the EU Parliament and after the protests were:

- fair remuneration of artists as a fundamental principle
- publishers and labels have to report financial details to the artists whose work they exploit, on a regular basis
- when copyright had expired, there is no way it can be revoked, as e.g. with photographs of paintings that are already in the public domain
- several provisions now make preservation easier for cultural heritage organisations
- the exception for educational purposes cannot easily be overridden by licensing contracts, and education can also take place outside formal educational institutions (but must be still held under their authority)
- member states can keep or introduce exceptions that exceed those provided by the directive

Suggested but not included were:

- a "remix exception" to allow "digital use of quotations or extracts of works […] within user-generated content for purposes such as criticism, review, entertainment, illustration, caricature, parody or pastiche", provided proper source attribution and no commercial harm is caused (Amendment 390)
- a general freedom of panorama[83]

Other regulations and directives included in the EU copyright reform that are also in the process of formal adoption by the member states:

(1) "Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market": Europeans travelling within the EU will no longer be cut off from online services such as media streaming they have paid for back home, even though content may vary.

(2) "Regulation (EU) 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled", and Directive (EU) 2017/1564, which introduces a copyright exception for the same purpose: the EU implementation of the Marrakesh treaty.[84]

83 See the petition signed by 555,236 supporters on change.org. 'Save the Freedom of Photography! #saveFoP', 2015, https://www.change.org/p/european-parliament-save-the-freedom-of-photography-savefop-europarl-en, visited on 2019-08-27.
84 European Council. 'Marrakesh Treaty on access to published works for blind and visually impaired persons: EU paves the way for ratification'. *Press releases and statements (*10 May 2017), http://www.consilium.europa.eu/en/press/press-releases/2017/05/10-marrakesh-treaty/, visited on 2019-08-27.

(3) “Directive (EU) 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions”: copyright has to be cleared for the broadcaster’s country of principal establishment only, even if transmission reaches further, online or via satellite. Further, compulsory collective management applies to online retransmission in the same way as it is established with cable retransmission.

Session 6: Global Perspectives and Traditional Knowledge

Mandatory reading for this course session

Forsyth, Miranda. 'Making Room for Magic in Intellectual Property Policy'. *Kritika: Essays on Intellectual Property*, edited by Peter Drahos et al., vol. 1, Cheltenham: Edward Elgar, 2015, pp. 84–113. LUBSearch.

Muzaka, V. 'Contradictions, Frames and Reproductions: The Emergence of the WIPO Development Agenda'. *Review of International Political Economy* 20, no. 1 (2013): 215–239, http://doi.org/10.1080/09692290.2011.623111.

1 "Developing Countries"

As was already touched upon in Session 5, when discussing the TRIPS agreement and specifically the Doha Declaration, the position of so-called "developing" countries towards IP is contested.

However, to begin with, it is of course often not particularly helpful to lump together a whole host of very different countries under the label "developing" and to assume their positions and needs would be the same, when it comes to IP, any more than in regard to any other issue. And of course they are not. Countries normally subsumed under this category have very different positions in this matter, "from outright opposition to reforming IPRs to an unthinking acceptance that doing so will encourage innovation and growth".[85]

Positions depend on socio-economic, cultural and historical factors, and these countries' interests as well as alliances have also changed over time. The category "developing country" is in fact insulting, since it implies that there is a correct way to develop, and the so-called "developed countries" have exclusively reached that final higher state of maturity, do not need to develop any more, and define the way to go for others.

Nevertheless, there is also a certain power in this label as it is being re-appropriated by these countries themselves, and used as a platform from which to formulate a common position. Obviously, there are other names used, some of them established as self-description, such as "the South", the "Global South", the "Third World", or "Low Income Countries" etc. Each of these categories come with its own set of associated problems, and each, at the same time, can also act as a platform for actors from these countries to speak from.

In the context of the various international arenas where IP is discussed, it is typically referred to the categories established by the World Bank or the United Nations. Since 2016, the World Bank no longer divides countries into two groups by Gross National Income (GNI); all but high income countries were referred to as "developing

85 Fink, Carsten, and Keith E. Maskus (eds.). *Intellectual Property and Development: Lessons from Recent Economic Research*. New York: World Bank and Oxford University Press, 2005, p. 2, http://hdl.handle.net/10986/7443, visited on 2019-08-27.

countries". Instead, the development of a country is measured with statistical indexes such as income per capita, life expectancy, and the rate of literacy. The UN has developed the Human Development Index (HDI), a compound indicator including the above statistics, and assigns countries to one of the following groups: very high, high, medium, and low human development. Although it is hardly possible to assume what people refer to when they use the category "developing countries", it is likely that they think of countries which can be found in all of the three latter groups. However, it is a clear majority of countries in the world, hosting the vast majority of world inhabitants, and a great number of countries used to be colonies of European powers at one time or another.

All over the world, people have (and have had) their various own systems of knowledge, different from the ones from which the European IP system developed. At the same time, it was generally the respective colonising country's legal system which was imported, including IP laws, including adherence to the various international agreements and protocols.

Two main problem fields relating to IP and "developing countries" can be distinguished, each with an entire set of sub-areas: (1) the position of "developing countries" in trade negotiations, and (2) "traditional"/"indigenous" knowledge and the issue of (bio-)piracy. However, it is important to bear in mind how these two areas become increasingly intertwined, as, by now, IP is almost exclusively dealt with as a trade issue.

2 Positioning in Patenting and Trade (Negotiations)

The predecessor of WIPO, United International Bureaux for the Protection of Intellectual Property (BIRPI), worked hard to establish regional IP organisations on the colonised African continent just before many countries became independent, in 1960. That way, African countries would not need to be convinced to join the Western IP regime. "They only had to be prevented from leaving."[86] The francophone countries came first, in 1962, with the Organisation Africaine de la Propriété Intellectuelle, OAPI. The African Regional Industrial Property Organization, ARIPO, followed in 1978.

Stiglitz, Chief Economist of the World Bank 1997-2000, confirms that the current IP regimes benefit the most privileged countries, institutions and individuals because that is what they were designed for.[87] Looking at World Bank data on the payments and purchases of IP, contrasts become particularly evident for Latin America: during

86 Peukert, Alexander. 'Intellectual Property: The Global Spread of a Legal Concept'. *Kritika: Essays on Intellectual Property*, edited by Peter Drahos et al., vol. 1, Cheltenham: Edward Elgar, 2015, pp. 114–33, p. 124. Also see Deere, Carolyn. *The implementation game: the TRIPS Agreement and the global politics of intellectual property reform in developing countries*. Oxford; New York: Oxford University Press, 2008.
87 Stiglitz, Joseph E. *The Price of Inequality: How Today's Divided Society Endangers Our Future*. W. W. Norton & Company, 2012, pp. 270f. and 370f.

2017, the US profited by US$79 billion, while Brazil spent an extra US$4.5 billion, Argentina US$2.1 billion and Chile US$1.4 billion.[88]

The problems that lead to this situation are complex, and mostly also apply to businesses with small capital or not-for-profit organisations in every kind of country as well: patent law is extremely tricky. Within those organisations, patent expertise is rarely available. Patent drafting services are expensive, and patenting fees are also high. So even if a working patent office exists in the respective country, it will have few applications to grant. Even if a patent is in place, it again costs a lot of money to enforce violation at court.

Not only the participation of “developing countries” in patenting is low, “regions such as sub-Saharan Africa, the Caribbean and the Arab States, are still playing a marginal role in international flows of cultural goods and service”[89]. In 2010, China overtook the USA as top exporter of cultural goods. However, this is mostly due to its jewellery exports. Worldwide, “arts and crafts”, mainly consisting of gold and silver products, represent around two thirds of all cultural trade by value. Talking about IP trade for cultural goods, there is data available for only a few countries in the world. The USA surely is the main exporter of licenses for the use of its cultural IP, summing up to US$101.4 billion of royalties for the year 2012, while licenses imported to the USA stand at US$35.4 billion.[90]

The often weak position “developing countries” have in trade negotiations, might, at times, lead to concessions which are detrimental to the country's interest and its (economic) “development”. For instance, Kim et al. found that “patent protection enhances innovation and economic growth in countries where the capacity to conduct innovative research exists”, and when it is lacking, stronger IP protection is rather damaging to initiatives.[91] This problem is currently unaddressed by the existing protocols and treaties established between “developed” and “developing countries”.

It has also been argued that increased IP protection has a negative effect on foreign direct investments in countries with a large informal economy (also called “shadow economy”): multinational companies have to compete for resources with informal businesses. If IP protection is increased, cost of production is also increased for informal businesses. Small informal economies can thereby simply be liquidated by the IP regime, releasing resources to the benefit of multinationals. Contrarily, in countries where at least one third of the economy is informal, public administrative institutions are unlikely to have enough impact to control IP violation by informal

88 The World Bank. ‘Charges for the use of intellectual property, receipts’, 2018, https://data.worldbank.org/indicator/BX.GSR.ROYL.CD; and ‘Charges for the use of intellectual property, payments’, 2018, https://data.worldbank.org/indicator/BM.GSR.ROYL.CD, both visited on 2019-08-27.
89 UNESCO Institute for Statistics. *The Globalisation of Cultural Trade: A Shift in Consumption. International Flows of Cultural Goods and Services 2004-2013*, 2016, http://dx.doi.org/10.15220/978-92-9189-185-6-en.
90 Ibid.
91 Kim, Yee Kyoung, Keun Lee, Walter G. Park, and Kineung Choo. ‘Appropriate Intellectual Property Protection and Economic Growth in Countries at Different Levels of Development’. *Research Policy* 41, no. 2, March 2012: 358–75. http://dx.doi.org/10.1016/j.respol.2011.09.003.

businesses, so they will continue, at risk for occasional confiscation. This again pressures the resource market.[92]

In conclusion, it becomes obvious, that any attempt to implement a universal IP regime globally, can only fail – especially if its objective is to foster innovation globally: "equal chances for development require unequal regulations of innovation".[93]

Interestingly, it has been observed that US government and companies are now starting to lobby for "greater flexibility of patentability criteria, compulsory licensing and effective exemptions for experimental use. [This can be explained by the fact that] … China, may even be an example of a country that is making better use of IP laws than was anticipated by those whose incentive rhetoric built the global standards of IP protection."[94] The effectiveness of Chinese businesses when it comes to patents and their exploitation has left US businesses realising that the times of uncontested US market power are coming to an end, because the IP regime starts to impact on them negatively: "those who created the so-called incentive framework might be beaten at their own game."[95] Now that the Western instruments of undisturbed market exploitation are used by outsiders to *their own* benefit, the West is working towards changing those instruments.

In its own words, "WIPO is committed to working with developing and least developed countries to enable them to reap benefits from the IP system and to enhance their participation in the global innovation economy".[96] In 1992, with the UN Convention on Biological Diversity (CBD), traditional knowledge about the human role in ecosystems is formally recognized, and should not be simply overridden by IP law. Nonetheless, this is exactly how TRIPS was used, and since the CBD does not include any instruments of legal enforcement, it is not much more than a lip service. To address that, in 1999, WIPO was requested by the convention's signatories to work towards the lacking international legal instruments.

Moreover, a Voluntary Fund for Accredited Indigenous and Local Communities was created in 2005 in order to allow representatives of those communities to travel to meetings in Geneva, which is empty at times.[97] WIPO also implemented a

92 Canavire-Bacarreza, Gustavo J., et al. *Intellectual Property Rights, Foreign Direct Investment and the Shadow Economy*. Documentos de trabajo. Economía y Finanzas, no. 12-33 2012. Medellín, Colombia: Centro de Investigación Económicas y Finacieras, 10 June 2012, https://papers.ssrn.com/abstract=2647096, visited on 2019-08-27.
93 Peukert, Alexander. 'Intellectual Property and Development – Narratives and Their Empirical Validity'. *The Journal of World Intellectual Property*, vol. 20, no. 1–2, 2017, pp. 2–23, https://doi.org/10.1111/jwip.12072.
94 Frankel, Susy. 'It's Raining Carrots: The Trajectory of Increased Intellectual Property Protection'. *Kritika: Essays on Intellectual Property*, vol. 2, Cheltenham: Edward Elgar, 2017, pp. 159–86.
95 Ibid.
96 World Intellectual Property Organisation. 'Cooperation', http://www.wipo.int/cooperation/en/, visited on 2019-08-27.
97 Saez, Catherine. 'WIPO Members Agree On Revision Of Draft Treaty On Protection of TK, Folklore'. *Intellectual Property Watch*, 17 Dec 2018, https://www.ip-watch.org/2018/12/17/wipo-

Development Agenda in 2007 which mostly set the base for the WIPO to become an organisation which truly also represents “developing countries”, but is short on specific ideas how to adapt the IP system to that end.[98] However, in October 2015, WIPO set up an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC-GRTKF), which is meeting regularly.[99] Many years after the WIPO initiative started, it still struggles for a definition of traditional knowledge and traditional cultural expressions, from which it would be possible discuss instruments of legal protection.[100]

In the meantime, at least for the complex of genetic resources, measures for access and benefit sharing (ABS) with local communities were taken. 2010, at a CBD conference, the Nagoya Protocol was adopted, and went into force in 2014. It currently has been ratified by 111 countries and the European Union.[101] If the individual legislations of the parties to the protocol will actually work in the interest of local communities remains to be seen.

Further Reading

An excellent collection of arguments and further references is delivered by Peukert, 2017, loc. cit.

For more details on the WIPO Development Agenda and a balanced discussion of the TRIPS(-plus) regulations in the context of development, see Netanel, Neil (ed.). *The development agenda. Global intellectual property and developing countries*. Oxford; New York: Oxford University Press, 2009.

Deere, Carolyn. *The implementation game: the TRIPS Agreement and the global politics of intellectual property reform in developing countries*. Oxford; New York: Oxford University Press, 2008.

Drahos, Peter. ‘Developing Countries and International Intellectual Property Standard-Setting’. *The Journal of World Intellectual Property* 5, no.5 (2005): 765–789, http://dx.doi.org/10.1111/j.1747-1796.2002.tb00181.x.

To follow up on the WTO perspective, read Fink and Maskus, 2005, loc. cit.

3 “Traditional”/”Indigenous” Knowledge vs. the IP System

To understand the conflict between the IP system as it is internationally dominant today, and alternative systems of (non-)control for creative products which are based on a different epistemic tradition, consider the following description provided by a

members-agree-revision-draft-treaty-protection-tk-folklore/, visited on 2019-08-27.
98 World Intellectual Property Organisation. ‘Development Agenda for WIPO’, http://www.wipo.int/ip-development/en/agenda/, visited on 2019-08-27.
99 World Intellectual Property Organisation. ‘Intergovernmental Committee (IGC)’. http://www.wipo.int/tk/en/igc/, visited on 2019-08-27, especially the 55th session’s protocol, Agenda Item 17, 5-14 October 2015.
100 Saez, loc. cit.
101 Convention on Biological Diversity. ‘Parties to the Nagoya Protocol’, https://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml, visited on 2019-08-27.

member of the Canadian Blood tribe, who gives an account of how tipi designs are passed on:

> If I have a tipi design and Dorothy wants my design, she can send a messenger and ask for it to be transferred. If I agree she has to transfer it through a ceremony. Once I give my rights to the design over to her, I transfer the right to use it. I can't even use it: I cannot make a replica, it is simply not mine anymore, it's hers. She is only allowed to make replica if the first one is destroyed, but she can't pitch two or ten tipis with the same design. There is only one.[102]

What "traditional" or "indigenous" knowledge is, can be discussed at length. Just as the term "developing country", it is full of pitfalls: if there is something traditional, there must be something modern or progressive; if indigenous, then universal or cosmopolitan is opposed to it. Which connotations are tied to these terms? At the same time, and pragmatically, the terms can also be appropriated to work in the interest of those cultures whose knowledges are defined as such. Again at the same time, cultural aspects are appropriated by the dominant culture, from a minority culture, without its consent, distorting the meaning of these aspects. This has caused an ongoing heated debate under the keyword of “cultural (mis)appropriation”.[103]

Furthermore, since systems of knowledge known as traditional, indigenous, or local knowledge, are not codified, they are very often disregarded in the patent application process. This process requires for "prior art" to be available in a printed or otherwise published form. Hence, the possibility for piracy arises – bio-piracy, but also otherwise – basically, from the way in which the patent application system is structured. The most (in)famous case probably was the Texas-based company RiceTec that was granted a US Patent on Basmati rice lines and grains in 1997. After a successful claim made by the Indian government, major parts of the application were finally withdrawn in 2002. However, parts of the patent were also upheld.[104] To prevent cases like these from occurring, various, "developing countries", most notably India, are working on databases documenting their "traditional" knowledge.[105]

In August 2010, ARIPO adopted the Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, short: Swakopmund Protocol, signed by nine member states.[106] In force since 2015, it enables the knowledge holders and local

102 Quoted in Hemmungs-Wirtén, Eva. *No Trespassing. Authorship, Intellectual Property Rights, and the Boundaries of Globalization*. Toronto: University of Toronto Press, 2004, p.118. Even though too generalising about “the Third World”, it is still interesting to also look at Gana, Ruth L. ‘Has Creativity Died in the Third World – Some Implications of the Internationalization of Intellectual Property’. *Denver Journal of International Law and Policy*, vol. 24, no. 1, 1995, pp. 109–44. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/denilp24&i=115, pp. 125ff.
103 See e.g. Rogers, Richard A. ‘From cultural exchange to transculturation: A review and reconceptualization of cultural appropriation.’ *Communication Theory* 16, no. 4, 2006: 474-503.
104 Mgbeoji, I. *Global BioPiracy. Patents, Plants, and Indigenous Knowledge*. Ithaca; New York: Cornell University Press, 2006.
105 ‘Protecting India’s Traditional Knowledge’. *WIPO Magazine*, no. 3, 2011, http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html, visited on 2019-08-27.
106 WIPO Lex. ‘Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization

communities in the Member States to register trans-boundary traditional knowledge and expressions of folklore at ARIPO, to make use of dispute settlement procedures at ARIPO, to license the according expressions and knowledge, and to receive benefits for their commercial use.

Further Reading

For a chronicle and critique of the production of international IP agreements that follow the line of colonial world views and power relations, see Hemmungs Wirtén, Eva. 'Colonial Copyright, Postcolonial Publics: The Berne Convention and the 1967 Stockholm Diplomatic Conference Revisited'. *SCRIPTed: A Journal of Law, Technology & Society*, no. 3 (2010): 532-550, http://www.diva-portal.org/smash/get/diva2:391816/FULLTEXT01.pdf.

As an expansion of the Forsyth text you read for this session, the following is recommended since it discusses different pathways of how "traditional knowledge" can be protected and how notions about intellectual property are closely associated with modernity and western society: Halbert, Debora J. 'Critical Copyright, Cultural Flows, Traditional Knowlegde, and the Future'. In *The State of Copyright: The Complex Relationships of Cultural Creation in a Globalized World*, 143–180. London: Routledge, 2014. LUBSearch.

Nwauche, E.S. 'The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa'. *Journal of World Intellectual Property* 17, no. 5–6 (2014): 191–201, http://dx.doi.org/10.1002/jwip.12027.

For an introduction into the effects of the IP regime on African countries, specifically for examples of how it collides with a strong oral culture, see Röschenthaler, Ute, and Mamadou Diawara (eds.). *Copyright Africa: How Intellectual Property, Media and Markets Transform Immaterial Cultural Goods*. Canon Pyon: Sean Kingston Publishing, 2016.

If you are interested in the area and in cases similar to the Basmati case or the tipi example see: Hemmungs Wirtén, 2004, loc. cit., pp.100-124 et seq.; and I. Mgbeoji. 'Lost in Translation? The Rhetoric of Protecting Indigenous Peoples' Knowledge in International Law and the Omnipresent Reality of Biopiracy'. In *Accessing and Sharing the Benefits of the Genomics Revolution*. Edited by P.W.B Phillips and C.B. Onwuekwe Dordrecht: Springer, 2007, pp. 111–142.

The Finish government recently published a study about the challenges of protecting Sámi handicrafts within the existing IP regime: Mattila, Tuomas. *Needs of the Sámi People for Intellectual Property Protection from the Viewpoint of Copyright and Trademarks – Especially with Regard to Duodji-Handicrafts and the Sámi Dresses.* Helsinki: Ministry of Education and Culture, Finland, report no. 2018: 40, 11 Dec. 2018, http://urn.fi/URN:ISBN:978-952-263-606-5.

(ARIPO)', 2010, http://www.wipo.int/wipolex/en/details.jsp?id=12117, visited on 2019-08-27.

For recent news, see IP-watch, Traditional and Indigenous Knowledge topic section, http://www.ip-watch.org/category/themes/traditional-and-indigenous-knowledge/, visited on 2019-08-27.

4 Preliminary Conclusion

As has been touched upon throughout, but will become probably most evident in Session 8 about piracy, IP law is challenged, and specifically copyright, as it stands today. This becomes acutely obvious in regard to digital information. While earlier copying was generally complicated, costly, and often not economically interesting for most people, copying digital files is easy, fast, cheap, and, importantly, can be achieved without the slightest difference between the original and the copy. It is clearly an economically interesting option for most users, consumers, listeners etc. At the same time, copyright has become increasingly relevant economically, and it has also grown in scope and complexity, and everything points to it developing even further in that direction. However, many feel that copyright, or patents for that matter,[107] in their current form, are not particularly suitable for a lot of the content they pertain to.

It is criticised that IP rights do not actually do what they are at least said to be there for, and that is to stimulate invention and creation, ultimately for the good of society. Of course, what one considers to be the greater good of society, and how the creation of knowledge expresses itself, varies considerably depending on ones position.

Then, there is criticism of the ever expanding scope and term of IP protection, and specifically of copyright, essentially never releasing works into the “public domain”, or only when they are outdated and irrelevant for most intends and purposes. However, there are alternative propositions for dealing with IP that we will turn to in the following.

107 See ‘Societal views on patents’. Wikipedia, updated on 7 March 2019, https://en.wikipedia.org/wiki/Societal_views_on_patents, visited on 2019-08-27.

Session 7: The Public Domain and "Open Everything"[108]

Mandatory reading for this course session

Giancarlo Frosio. 'Communia and the European Public Domain Project: A Politics of the Public Domain'. In *The Digital Public Domain: Foundations for an Open Culture*, edited by Melanie Dulong de Rosnay and Juan Carlos De Martin, 2:3–45. Cambridge: Open Book Publishers, 2012, http://www.communia-association.org/wp-content/uploads/the_digital_public_domain.pdf.

Tennant, Jonathan P., François Waldner, Damien C. Jacques, Paola Masuzzo, Lauren B. Collister, and Chris. H. J. Hartgerink. 'The Academic, Economic and Societal Impacts of Open Access: An Evidence-Based Review'. *F1000Research* 5 (21 September 2016): 632,1-23, http://doi.org/10.12688/f1000research.8460.3.

Over last years, a movement, sometimes called the "open everything movement", developed that calls for sharing IP to different extents, or even to abolish the concept all together. An example for that would be a DIY (do it yourself) approach to medicines, aiming to crack the monopolies of the pharmaceutical industry.[109] The most successful and best known of the less radical approaches are probably Creative Commons licences, the free software movement with Copyleft licences, the Open Source movement, and Open Access to research publications and data, as well as alternative patent licensing models.

Further Reading on the Public Domain

Dusollier, Séverine. 'Scoping study on copyright and related rights and the public domain'. 2010. WIPO, http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3_rev_study_inf_1.pdf.

Hemmungs-Wirtén, E. '"Don't fence me in": Travels in the public domain'. In *New Directions in Copyright Law.* Vol 6. Edited by F. Macmillan. London: Edward Elgar, 2007, p.112-121, http://www.evahemmungswirten.se/.cm4all/iproc.php/Travels.pdf?cdp=a.

1 Alternative Copyright Licensing Models

Creative Commons (CC) is a non-profit organisation which has developed a licensing system which is intended to communicate very clearly to potential licensees how the

108 See ccalpssalon openeverything. 'Everything Open and Free'. Mindmeister, 26 January 2014, https://www.mindmeister.com/de/28717702/everything-open-and-free, visited on 2019-08-27. Also see Tkacz, Nathaniel. *Wikipedia and the Politics of Openness*. Chicago: University of Chicago Press, 2014, pp. 26 ff.
109 Piller, Charles. 'An anarchist takes on the drug industry – by teaching patients to make their own meds'. *STAT*, 12 October 2017, https://www.statnews.com/2017/10/12/michael-laufer-drug-prices/, visited on 2019-08-27.

licensed work can be used without asking for permission: CC licences.[110] Founded by Lawrence Lessig in 2001 in the USA, the licences have been used increasingly worldwide. Therefore, up to the 3rd edition, CC licences have been adapted (ported) to the legislations of 60 countries.[111] Today, since national copyright regimes implemented international treaties, the porting project was cancelled, and with the current 4th edition, only generic "international" (unported) versions, which are officially translated to other languages, should be used.

CC licences are based on the copyright system and require it for their working. While they are mostly associated with digital content (except software) they are, in fact, equally applicable to other, non-digital kinds of content. There are seven different licence types, depending on which rights copyright owners want to reserve and which ones they want to give up. Six of them are based on a combination of "attribution (BY)" plus none, one, or more of the following elements: share alike (SA); non-commercial (NC); no derivative works (ND). The SA/ND combination is not possible, obviously. The seventh licence type is CC0, the public domain mark which does not require attribution and is recommended to be used for (research) data.

The model is quite complex,[112] and some licence types are very restrictive. If the intention is to make licensing simpler, and if the work should be distributed and reused as much as possible, CC BY is the best choice.

Further Reading

For a different aspects of CC and milestone projects, see B. Fitzgerald (ed.). *Open content licensing. Cultivating the creative commons*. Sidney: Sidney University Press, 2007, http://eprints.qut.edu.au/archive/00006677/01/6677.pdf.

For an analysis of the relation between the creative commons and copyright as well as the public domain, see M. O'Sullivan. 'Creative Commons and contemporary copyright: A fitting shoe or "a load of old cobblers"?'. *First Monday* 13 (2008), http://dx.doi.org/10.5210/fm.v13i1.2087.

2 Free Software and Open Source

While Free and Open Source Software are often named together, they actually are two different movements, based on different premises, philosophically and politically.

Free Software is the older one of the two, being associated with the Free Software Foundation (FSF), a US-registered non-profit organisation, founded already in 1985. The FSF administers the GNU Public Licences. "GNU" cryptically stands for "GNU is Not Unix", an acronym chosen by Richard Stallman, also the FSF president, when he developed a non-proprietary operating system. The basic idea is that people should

110 Creative Commons, http://creativecommons.org, see especially the different licences: http://creativecommons.org/about/licences, both visited on 2019-08-27.
111 Creative Commons. 'CC Ports by Jurisdiction', updated on 2 October 2014, https://wiki.creativecommons.org/wiki/CC_Ports_by_Jurisdiction, visited on 2019-08-27.
112 You get an idea of that if you read the Frequently Asked Questions on https://creativecommons.org/faq, updated on 15 July 2019, visited on 2019-08-27.

be able to adapt software freely to their needs. The meaning of free in Free software is often described as follows: “free as in ‘free speech’, not as in ‘free beer’”, and it does not actually mean “for free”. Although, in reality, it very often is for free, this is more or less a semantic coincidence which is hard to avoid in the English language. This is why “libre software” is sometimes used alternatively.[113]

GNU Public licences provided the blueprint for the CC BY SA (share alike) licence: what starts out as free software, cannot be turned into proprietary software as it is being developed further by different people. The concept has been labelled “Copyleft”. Copyleft uses copyright law, but flips it over to serve the opposite of its usual purpose: “instead of a means of privatizing software, it becomes a means of keeping software free [..] If making changes were an excuse to deny the users freedom, it would be easy for anyone to take advantage of the excuse”.[114]

In addition to the GPL, there is a special licence for documentation, called the GNU FDL (Free Documentation licence) which is specifically suited for software documentation.

Is it obvious that free software, in the understanding of Stallman and the FSF, is much more than merely a way to produce software collaboratively and make it available for free use. It is tied to an entire philosophy and concept of freedom and as such part of a larger vision of a more egalitarian society. This is – roughly – also what distinguishes it from the widely known Open Source concept.

Open Sources has its origin with the free software movement, but it is less a political project and much more pragmatic. It came into being in 1998 in connection with the release of Netscape as “free” software and was coined as a term precisely to avoid the political implications and connotations of free software and, also, to make it more attractive for the business community. It is, today, represented by the Open Source Initiative (OSI). Per definition, open source software needs to be distributed freely, the source code must be openly available, free to modify, and human readable.[115] The latter requires the use of a so-called “higher programming language”.

At the same time, both movements – while continuously highlighting their differences, ideological and otherwise, and not exactly exchanging niceties with each other – to a large degree also see themselves as in the same camp, with proprietary software as their counterpart.

Further Reading

If you are interested in the development of the FSF, and the conflict between Free and Open Source Software, start off with Stallman, 2002, loc. cit.

113 Klang, M. ‘Free software and open source: The freedom debate and its consequences’. *First Monday* 10.3, 2005, http://dx.doi.org/10.5210/fm.v10i3.1211.
114 Stallman, R.M. *Free Software, Free Society. Selected Essays of Richard M. Stallman.* Boston: GNU Press, 2002, p. 22 et seq., http://www.gnu.org/philosophy/fsfs/rms-essays.pdf, visited on 2019-08-27.
115 Open Source Initiative. ‘The Open Source Definition’, http://www.opensource.org/docs/osd, updated on 22 March 2007, visited on 2019-08-27.

3 Open Access

Open Access describes a way of making research publications available for free and to keep them freely available online, perpetually so.

As with all other movements mentioned in this session, Open Access is based on the idea of IP. In fact, one could argue that it relies on a strengthening of the moral rights of the author (at the cost of the economic rights). However, it is still an alternative to the way in which scholarly publishing has traditionally required authors to sign away their copyright to publishers; authors retain copyright, e.g. under the terms of CC.

The term “Open Access” itself goes back to the so-called Budapest Open Access Initiative (BOAI) in 2002, under the auspices of the Soros Foundation's Open Society Institute in Budapest. It defines the term as “free and unrestricted access” to the ”peer-reviewed journal literature”.[116]

Many initiatives and petitions have been released since the BOAI. One of the most important ones is the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities which was issued in 2003. The Berlin Declaration contains a comprehensive definition of Open Access, which developed into somewhat of a standard, has been translated into 16 languages, and signed by almost 1,000 organisations:

> [..] Open access contributions include original scientific research results, raw data and metadata, source materials, digital representations of pictorial and graphical materials and scholarly multimedia material.
>
> Open access contributions must satisfy two conditions:
>
> 1. The author(s) and right holder(s) of such contributions grant(s) to all users a free, irrevocable, worldwide, right of access to, and a licence to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship [...].
>
> 2. A complete version of the work and all supplemental materials, including a copy of the permission as stated above, in an appropriate standard electronic format is deposited (and thus published) in at least one online repository using suitable technical standards (such as the Open Archive definitions) that is supported and maintained by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, inter operability, and long-term archiving [...].[117]

Open Access is very much a movement which, to a considerable degree, has been spearheaded by libraries and librarians. As reason for that, the so-called “serials crisis” played a major role: the prices for journal subscriptions exploded when from the 1950s, many journals, previously owned by scholarly societies, were sold to one

116 Budapest Open Access Initiative. ‘Read the Budapest Open Access Initiative’, 2002, http://www.budapestopenaccessinitiative.org/read, visited on 2019-08-27.
117 Max-Planck-Gesellschaft. ‘Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities’, 2003, https://openaccess.mpg.de/Berlin-Declaration, visited on 2019-08-27.

of the few major publishers. Their profits of, today, around 30%[118] rely on the fact that publications are no interchangeable commodity, and therefore create monopolies for the publisher. Libraries just have to pay any price to fulfil their mission: to provide access to literature to their patrons, even when, with the establishment of the Internet, production and distribution costs go down.

Today, the Directory of Open Access Journals (DOAJ)[119] lists 12,192 curated journals, and most research institutions provide a repository for their researchers to pre- or re-publish their work, preferably with open access.[120] Furthermore, a growing number of book publishers also devote themselves to Open Access, and several business models have been developed. The major publishers started negotiating so-called offsetting deals, or read&publish deals, most influentially with library consortia, such as with, the pioneer, Jisc Collections in the UK, from 2014,[121] and with Bibsam in Sweden, from 2016.[122] The deals were supposed to cut cost from both the library budgets for journal subscriptions and the research institutions' funds installed to cover "article processing charges" (APCs) which incur from publishing in some open access journals. In reality, the result were price increases compared to previous "big deals" (large journal packages subscriptions, see Session 4), explained with the larger packages that the institutions would now have access to, and the "increased value" for the institutions' authors who now enjoyed an "open access publishing flat rate". However, most journals in the packages were not flipped to open access, but now included both closed and open access papers, hence they are so-called hybrid journals, which secure long-term subscription income for the publishers.

The major publishers only started offering open access options since many research funders, like the Swedish research council (Vetenskapsrådet) and the European Research Council require that results of research funded by them should be open access. In some cases, so-called embargos – delays of six to 24 months after publication are accepted. In 2018, eleven European funders announced their "Plan S", requiring publication in genuine open access journals, including a license that will allow re-use, e.g. translation, of the work (see Section 2 of this Session). Publishing in hybrid journals is not permitted. This will have a huge impact on the dominating business model of the major publishers. Even though much critique was uttered from researchers, who saw their freedom to choose a publication outlet restricted, the revised Plan S holds on to this central principle, but extended the transition period

118 For Elsevier, see 'RELX Group Interim Results 2018', https://www.relx.com/media/press-releases/year-2018/interim-results-2018, visited on 2019-08-27.
119 Directory of Open Access Journals, http://www.doaj.org, visited on 2019-08-27.
120 If publishers allow open access pre- or re-publishing can be looked up in the RoMEO list : http://www.sherpa.ac.uk/romeo, visited on 2019-08-27.
121 Earney, Liam. 'Offsetting and Its Discontents: Challenges and Opportunities of Open Access Offsetting Agreements'. *Insights: the UKSG Journal*, vol. 30, no. 1, March 2017, pp. 11–24, https://doi.org/10.1629/uksg.345; also see Björk, Bo-Christer. 'Growth of Hybrid Open Access, 2009–2016'. *PeerJ*, vol. 5, Sept. 2017, p. e3878, https://doi.org/10.7717/peerj.3878.
122 Eriksson, Jörgen. 'Offsetting: No Big Deal?' *Nordic Perspectives on Open Science*, no. 1, May 2018, https://doi.org/10.7557/11.4430.

to January 2021.[123] "Plan S would bar researchers from publishing in 85% of journals, including influential titles such as Nature and Science".[124]

Recently, more and more libraries and consortia started to oppose the ever increasing prices and unattractive open access options by cancelling contracts with aggregators and publishers, first of all with Elsevier.[125]

Open access publishing is just one aspect of opening up research to the scientific communities and interested public. The umbrella term is "Open Science", and, amongst others, it includes open research data, open research software, open lab notes, open peer review, open evaluation (metrics), and open educational resources.

Further Reading

A good introduction into Open Science, and at the same time demonstrating Open Science through its format, a living gitbook, is Bezjak, Sonja et al. *Open Science Training Handbook*. Updated on 14 June 2019, https://book.fosteropenscience.eu/, visited on 2019-08-27.

For a good overview read Peter Suber. 'The open access overview'. Updated on 5 December 2015, http://www.earlham.edu/~peters/fos/overview.htm and Peter Suber. *Open access*. Cambridge, Mass.: MIT Press, 2012, https://mitpress.mit.edu/books/open-access.

For more about the history of copyright and access to knowledge, with special recognition of "developing countries", see Bannerman, Sara. *International Copyright and Access to Knowledge*. Cambridge Intellectual Property and Information Law: 31. Cambridge: Cambridge University Press, 2016. LUBSearch

Willinsky, J. *The access principle. The case for open access to research and scholarship*. Cambridge, MA: MIT Press, 2005.

Scheufen, Marc. *Copyright Versus Open Access. On the Organization and International Political Economy of Access to Scientific Knowledge*. Cham: Springer, 2015, http://archive.org/details/CopyrightVersusOpenAccess.

Oppenheim, C. 'Electronic scholarly publishing and open access'. *Journal of Information Science* 34, no. 4 (2008): 577-589.

4 New ways of Patent Licensing

Maintaining patent protection requires maintenance fees, and not paying them results in inactive patents, and the technology is public domain. The MichiganTech Open Sustainability Technology (MOST) lab created a tool to look for inactive US patents: Free Inactive Patent Search at http://freeip.mtu.edu/home/. However, there

123 Plan S. 'Part I: The Plan S Principles', https://www.coalition-s.org/principles-and-implementation/, visited on 2019-08-27.
124 Else, Holly. 'Radical Open-Access Plan Could Spell End to Journal Subscriptions'. *Nature*, vol. 561, September 2018, https://doi.org/10.1038/d41586-018-06178-7.
125 For a list see SPARC. 'Big Deal Cancellation Tracking'. https://sparcopen.org/our-work/big-deal-cancellation-tracking/, visited on 2019-08-27.

are also several alternative licensing models for active patents of which I will introduce some in the following.

Patentleft is directly analogous to Copyleft: patents are licensed waiving royalties, on the condition that adopters license any derivative technologies under the same terms. This can result in Free Hardware or Open Source Biological Technologies. However, although there have been some examples for Patentleft around the turn of centuries, e.g. the Biological Open Source (BiOS) licences,[126] it is not widely used, because patenting is expensive, and few companies which devote themselves to openness (which are few already) will invest this money just to protect the openness of the derivates of their idea.

One more alternative patent licensing model is the Innovator's Patent Agreement (IPA) which Twitter launched in 2012.[127] While without IPA, the inventor usually assigns the technology to a company which then issues the patent, IPA gives the inventor more control over her invention. The company still owns the patent, but cannot "launch an offensive patent lawsuit without the inventor's permission. This reduces the risk of frivolous patent litigation (in theory) because inventors are often reluctant to approve a frivolous lawsuit."[128]

From November 2013-2018, the Defensive Patent licence (DPL) was available.[129] Anyone could join the club, under the agreement not to sue anyone else in the DPL patent pool, unless someone behaves aggressively. The idea was that every member brings its technology into the DPL pool where it becomes "open" technology to all members. Anyone outside the pool can jump in, but they need to bring all of their patents with them. Leaving the DPL required a "discontinuation announcement", 180 days up front. As of today, it has only three users, among them the Internet Archive. It seems like the project was discontinued.

To conclude with, the licence on Transfer (LOT)

> cuts [patent] trolls off at the source by activating a special licence any time a member of the LOT club sells a patent to someone outside of the club. This sale will trigger a free licence from the new owner to everyone inside the LOT club. As a result, the new owner can't use the patent to sue anyone in the LOT clubhouse.[130]

Many highly influential companies are member of the LOT club. It was started as a Google-led initiative in 2014.[131]

126 BiOS. 'BiOS licences & MTAs', https://cambia.org/bios-landing/bios-licenses-mtas/, visited on 2019-08-27.
127 Twitter. 'Innovators Patent Agreement (IPA)', *Github,* 2012, https://github.com/twitter/innovators-patent-agreement, visited on 2019-08-27.
128 Adler, Eric. 'The Basics Of Open Patent Licensing'. *Tech Crunch Network,* 23 April 2015, https://techcrunch.com/2015/04/23/open-patent-licensing/, visited on 2019-08-27.
129 See Internet Archive, Wayback Machine. 'Defensive Patent licence', https://web.archive.org/web/20190711003225/https://defensivepatentlicense.org/, visited on 2019-08-27.
130 See Adler, loc. cit.
131 LOTNETWORK. 'Eliminate the Patent Troll Threat', http://lotnet.com/, visited on 2019-08-27.

Patent pools, in general, are no new idea. In 1917, Roosevelt set up a patent pool that all American aviation companies joined, so technologies could be combined to built the best possible military aircrafts, because the more complex the product, the more impeding are patents: a "patents thicket" prevents innovation. This problem is also known as the "tragedy of the anticommons",[132] analogous to the "tragedy of the commons", a concept by the Victorian economist William Forster Lloyd from 1833: acting out of self-interest can result in depleting or spoiling a unregulated resource. The “tragedy of the anticommons” proves that regulation alone, even if it prevents the good from overuse, does not ultimately solve the problem, but can turn it into another problem.

Very recently, a research group on “Open IP models for emerging technologies and implications for an equitable society” has been founded at Cambridge University.[133]

Further Reading

P. van Zwanenberg, M. Fressoli, V. Arza, A. Smith, and A. Marin. ‘Open and Collaborative Developments’. *STEPS Working Paper* 98, Brighton: STEPS Centre, 2017, https://opendocs.ids.ac.uk/opendocs/handle/123456789/13128.

Ziegler, Nicole, Oliver Gassmann, and Sascha Friesike. ‘Why Do Firms Give Away Their Patents for Free?’ *World Patent Information* 37 (June 2014): 19–25, http://dx.doi.org/10.1016/j.wpi.2013.12.002.

Hope, Janet. *Biobazaar: the open source revolution and biotechnology.* Harvard University Press, 2009, https://www.jstor.org/stable/j.ctt13x0j7x.

Geertrui van Overwalle (ed.). *Gene Patents and Collaborative Licensing Models: Patent Pools, Clearinghouses, Open Source Models, and Liability Regimes*. Cambridge Intellectual Property and Information Law: 10. Cambridge; New York: Cambridge University Press, 2009.

132 Heller, Michael. ‘The Tragedy of the Anticommons: Property in the Transition from Marx to Markets’. *William Davidson Institute Working Papers Series* 40, 1997. William Davidson Institute at the University of Michigan, https://ideas.repec.org/p/wdi/papers/1997-40.html, visited on 2019-08-27.

133 Tietze, Frank. ‘Launch of OpenIP research group at Cambridge CRASSH’, 24 May 2017, http://www.franktietze.de/?cat=92, visited on 2019-08-27.

Session 8: Piracy and Digital Rights Management

Mandatory reading for this course session

Lessig, Lawrence. *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. London: Bloomsbury Academic, 2008, https://archive.org/details/LawrenceLessigRemix. Selection of app. 40 pp.

Yar, Majid. 'The Rhetorics and Myths of Anti-Piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom'. *New Media & Society* 10, no. 4 (2008): 605–623. LUBSearch.

Daubs, Michael S. 'HTML5, Digital Rights Management (DRM), and the Rhetoric of Openness'. *Journal of Media Critiques* 3, no. 9 (2017): 77–94, http://doi.org/10.17349/jmc117106.

1 The Principle of Territoriality and the History of Copyright Piracy

Copying without permission of the rights holder, referred to as piracy, is as old as IP rights themselves. Of course, some of this copying is not illegal, but specifically allowed by the law which restricts the rights of the rights holder in important respects: private copy, citation, critical review, certain limits for libraries and archives etc. (see Session 2). Now, we will look at some of the cultural mechanisms behind calling certain activities piracy, and behind assigning piracy with a negative or a positive slant, or even condemning the use of the concept.

As Lawrence Lessig points out, it has happened more than once, that practices which were condemned as piracy by one industry, turned out to become the founding stone of another.

> The film industry of Hollywood was built by fleeing pirates. Creators and directors migrated from the East Coast to California in the early twentieth century in part to escape controls that patents granted the inventor of filmmaking, Thomas Edison.[134]

As we have already seen in Session 1, specifically the publishing trade has a long history of piracy. Thanks to the principle of territoriality, the book publishing trade in many countries is founded on, what some would call, the pirating of the works of rights holders of other countries.[135] Having said that, as long as in the respective country this is not specifically outlawed, no illegal activity takes place and essentially, such an activity cannot really be called piracy, that is if we understand piracy as "unauthorized copying and distribution (often though not necessarily, for commercial gain) of copyrighted content".[136]

134 Lessig, Lawrence. *Free culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press, 2004, p. 53, http://www.free-culture.cc/freeculture.pdf, visited on 2019-08-27.
135 Drahos,P., and J. Braithwaite. *Information feudalism: Who owns the knowledge economy?* Earthscan, London, 2002, especially pp. 19-38.
136 Yar, Majid. 'The Rhetorics and Myths of Anti-Piracy Campaigns: Criminalization, Moral Pedagogy and Capitalist Property Relations in the Classroom'. *New Media & Society* 10, no. 4,

Obviously, since today the majority of countries have signed one or another international agreement on IP and enacted it into local law, most importantly the TRIPS agreement, the principle of territoriality has become a purely hypothetical issue and is mostly of historic interest. Today, more and more practices which used to be within the scope of legality have become illegal. At the same time of course, it probably makes sense to distinguish between activities that are for profit and such that are not, as Lessig does.[137]

Whether copying is understood as a perfectly acceptable or even necessary activity, if it is perceived as an act in defiance of control and censorship, as a creative act, or if it is seen as a criminal act, before the law of course, but also in the eyes of the "average" citizen, is very much a question of position, of history, and of culture. Just think back to Session 1 and especially try to recall Carla Hesse's historical outline of the development of copyright. Calling something sharing or calling it piracy makes all the difference, and it is clear that much lies in the eye of the beholder, and also that this view and this understanding changes over time.[138]

For example, the Free Software Foundation lists piracy as a "word to avoid", reasoning that piracy conjures up images of violent crime that are disproportionate portrayals of copyright infringement: "If you don't believe that copying not approved by the publisher is just like kidnapping and murder, you might prefer not to use the word 'piracy' to describe it".[139] We can call this "discursive coupling" of unauthorized copying and violence.

Others, of course, (want to) re-enforce precisely this association with violence. Yet again others re-appropriate the term and radically turn its meaning on its head, at least for their own constituency. Pirate Parties, popping up in many countries from 2006, now disappearing again, are probably the most successful and best-known example of such a re-appropriation.

In Swedish: About the technical, but also legal implications the establishment of the photocopying machine had for the way reproductions were made: Eva Hemmungs-Wirtén. 'McLuhan och maskinen: fotokopiatorn, informationssamhället och användarrätten'. *Dædalus. Tekniska Museets Årsbok* 74 (2006): 26-37, http://digitalamodeller.se/daedalus/bocker/Daedalus%202006.pdf, visited on 2019-08-27.

Further Reading

Drahos & Braithwaite, 2002, loc. cit., pp. 19-28 for a historical – and highly critical, international perspective.

2008: 605–623.

137 Lessig, loc. cit., pp. 63-79.

138 Only read, from today's perspective, Yar, Majid. 'The Global "epidemic" of Movie "piracy": Crime-Wave or Social Construction?' *Media, Culture & Society* 27, no. 5, September 2005: 677–96, http://dx.doi.org/10.1177/0163443705055723.

139 Free Software Foundation, GNU Operating System. 'Words to Avoid (or Use with Care) Because They Are Loaded or Confusing', updated on 18 December 2018, http://www.gnu.org/philosophy/words-to-avoid.en.html#Piracy, visited on 2019-08-27.

For an inquiry into copyright legislation and metaphors, how these are influenced by societal changes and digitization see Stefan Larsson. *Metaphors and Norms – Understanding Copyright Law in a Digital Society*. Lund Studies in the Sociology of Law 36. Diss. Lund University, 2011, http://lup.lub.lu.se/record/2157989, visited on 2019-08-27.

Vaidhyanathan, S. *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*. New York: NYU Press, 2001. Discusses how intellectual property rights are culturally biased and undermine African American culture and creative industry.

A specific case of remix are memes. This paper is highly recommended, especially if you are a YouTube user: a discussion of copyright issues concerning memes, and how these are used for monetisation by YouTube, illustrated by the case of the "Harlem Shake": Soha, Michael, and Zachary J. McDowell. 'Monetizing a Meme: YouTube, Content ID, and the Harlem Shake'. *Social Media + Society*, vol. 2, no. 1, 2016, https://doi.org/10.1177/2056305115623801.

For a history and current examples of the art of collage, see McLeod, Kembrew, and Rudolf Kuenzli. *Cutting Across Media: Appropriation Art, Interventionist Collage, and Copyright Law*. Durham and London: Duke University Press, 2011.

Special tip

The video series "Everything is a remix" by New York-based film maker Kirby Ferguson, http://everythingisaremix.info/watch-the-series/, visited on 2019-08-27.

2 From File Sharing to Streaming

The issue that has found most attention in the media is peer-to-peer file sharing of material, without the consent of the copyright holders. Specifically music downloads are omnipresent, but also downloading of films via torrent, and, since many years, the unauthorised distribution of licence keys for software. It is also here where the construction of piracy as a moral issue is primarily situated. The battle lines are hardened, each side constructing its own moral case.

The official argument of the content industry in defiance of file sharing holds that the creators of the content fall foul of their legitimate payment for their work, and that this, in turn, hinders further creative production. This is often based on reinforcing the likening of immaterial property with physical property. The IPRED legislation (see Session 2) can be understood as being enacted in the interests of this group. Research confirmed the scepticism of file sharers against their main argument: only very popular artists slightly loose album sales, while lesser known artists profit from the additional publicity via file sharing.[140]

140 Lee, Jonathan F. 'Purchase, Pirate, Publicize: Private-Network Music Sharing and Market Album Sales'. *Information Economics and Policy*, vol. 42, Mar. 2018, pp. 35–55, https://doi.org/10.1016/j.infoecopol.2018.01.001.

The counter argument, on the other side, holds that the actual content creators see, in fact, only a very small share of the profits made by the media corporations with their creations. Further, file sharing offers good promotional possibilities. Also, by no means, everybody who downloads would also have bought legal access to the content, thus not depriving anybody of any income. Very often, this is based on re-enforcing the distinction between physical property, on the one hand, and immaterial property of non-alienable, non-rival goods, on the other. Of course, there are numerous further arguments made on either side.[141]

Whatever the argument or the position, it is clear that our way to consume and acquire (but also to produce and distribute) music and other media products has changed considerably and it will not go back to the way it used to be. The music and film industries have, in the beginning, been slow in recognising this. They were trying to win the game with lobbying for ever stricter laws, harsher penalties and by introducing not exactly consumer friendly copy protection mechanisms. ACTA (see Session 5) might have been the tipping point of this movement.

The industry's classic defence strategy started to take absurd forms and got high-jacked itself: a couple of years ago, "copyright trolls" appeared on the US scene.

> IP-addresses are accused of "stealing" copyrighted work. The trolls then request a subpoena from the court so they can ask the corresponding ISPs to reveal the identities of account holders. They then contact the defendants with a settlement offer for a few thousand dollars, telling them that they will be named in the lawsuit if they refuse to pay up.[142]

The recent success of media streaming services seems to be the logical consequence from this whole development. "Audiovisual services are increasingly becoming the most important cultural service traded."[143] Many people who used peer-to-peer networks to discover new media, now subscribe to large packages of content for this purpose. It is more comfortable: press play, song starts. They seem to accept that they no longer decide independently from these streaming companies which devices to use, and if to be online or not while listening. Ownership remains with the service provider, and with it the control over the data that is produced while the service is used. However, at the moment, streaming and unauthorised copying seem to be complementary strategies for single users.[144] "Pirates" are here to stay, and they will grow with a more and more fragmented streaming market, since music and film

141 See Larsson, Stefan. *Metaphors and Norms - Understanding Copyright Law in a Digital Society*. Lund Studies in the Sociology of Law 36. Diss. Lund University, 2011, http://lup.lub.lu.se/record/2157989, visited on 2019-08-27.
142 Ernesto. 'Copyright Trolls Threaten to Call Neighbors of Accused Porn Pirates', *Torrentfreak*, 13 May 2013, https://torrentfreak.com/copyright-trolls-threaten-to-call-neighbors-of-accused-porn-pirates-130513, visited on 2019-08-27.
143 UNESCO Institute for Statistics. *The Globalisation of Cultural Trade: A Shift in Consumption. International Flows of Cultural Goods and Services 2004-2013*. UNESCO Institute for Statistics, 2016, http://dx.doi.org/10.15220/978-92-9189-185-6-en.
144 Borja, Karla, and Suzanne Dieringer. 'Streaming or Stealing? The Complementary Features between Music Streaming and Music Piracy'. Journal of Retailing and Consumer Services 32, September 2016: 86–95. http://dx.doi.org/10.1016/j.jretconser.2016.06.007.

producers increasingly buy into exclusive deals with single streaming services. The only other possible development seems to be a full monopoly for each type of streaming service.

Not only that streaming services like Spotify themselves violate copyright,[145] but the more worrying issue seems to be that they use their market power to make content creators agree to terms that are basically minimising IP claims they are legally entitled to for that content. When artists upload their songs to Spotify, the irrevocable license they agree to also covers that Spotify can sub-license the material to third parties, including for advertisement purposes, as well as any modification of the material by all licensees. The fact that Spotify operates as a giant black box, makes it very difficult to follow up on its business practices, meaning: how it actually uses the content and the user data.[146] As an artist,

> you also agree to waive any "moral rights" [...], such as your right to be identified as the author of any User Content, and your right to object to derogatory treatment of such User Content. If such moral rights are not waivable, then you at least agree not to sue us [...].[147]

The terms do not specify any royalties paid out to artists or their labels, because Spotify does not pay royalties in the classic sense, but some kind of a revenue share based on the artist's share in the total amount of user streams. Therefore, any independent artist's revenue depends on Spotify's total revenue, which can vary, and which also depends on the (undisclosed) contracts that major labels have with Spotify: the lion's share. It basically is impossible to earn a living from distributing music through the platform, even with ten thousands of streams each day.[148] In the case of YouTube, it is still possible to profit directly from monetisation through advertisement. However, the other way to monetise, royalties, are handled in a similar way as by Spotify, but they exclusively stem from the revenue Youtube earns from its paid ad-free service.[149] Individual artists' shares are naturally minimal.

As soon as the EU copyright reform will actually be implemented by member states, many of those practices will have to change. Please try to remember what you learned about the reform, and gather issues that will likely soon be illegal. Follow up on the developments and see what Spotify and YouTube actually change in the future!

All streaming services depend on so-called Digital Rights Management (DRM) systems, technical measures to prevent certain ways of using media. The technology recently reached a new level: with the Encrypted Media Extension (EME) for media embedded in HTML5 websites, DRM is built into the Internet which, initially, was

145 See Eriksson, Maria, et al. *Spotify Teardown: Inside the Black Box of Streaming Music*. Cambridge, MA: MIT Press, 2019.
146 Ibid.
147 Spotify. 'Spotify for Artists Terms and Conditions', https://www.spotify.com/us/legal/spotify-for-artists-terms-and-conditions/, visited on 2019-08-27.
148 'Criticism of Spotify', Wikipedia, updated on 10 August 2019, https://en.wikipedia.org/wiki/Criticism_of_Spotify, visited on 2019-08-27.
149 YouTube Creator Academy. 'Lesson: Make money with your music on YouTube', 2019, https://creatoracademy.youtube.com/page/lesson/artist-monetization, visited on 2019-08-27.

supposed to be open. Everyone who builds browsers, and everyone who offers licensable media, will have to adapt to this standard, sooner or later. Mozilla surrendered already in 2014.[150] The implementation on the server side is rather demanding, so small services will probably drop out. Most importantly, users will only realise this when alternatives to the big players in the content industry are already missing. Until then, at best, entertainment technology will solely become easier to use. It can be expected that users subscribe to ever larger packages to hit fewer paywalls. At some point, the acceptable total spending is reached – and the queried content stays behind the paywall. This is quite similar to the 19th century cinema: you watch what your theatre serves you.

Further Reading

Lemmer, Catherine A., and Carla P. Wale, eds. *Digital Rights Management: The Librarian's Guide*. Lanham: Rowman & Littlefield, 2016.

Quantitative analysis of the music industry sales vs. file sharing, based on data from 2008: Lee, Jonathan F. 'Purchase, Pirate, Publicize: Private-Network Music Sharing and Market Album Sales'. *Information Economics and Policy*, vol. 42, Mar. 2018, pp. 35–55, https://doi.org/10.1016/j.infoecopol.2018.01.001.

On piracy surveillance strategies (US-centric, but still very interesting): Sonia Katyal. 'Filtering, piracy, surveillance and disobedience'. *The Columbia Journal of Law and the Arts* 32, no. 4 (2009): 401-426.

Summary of important "piracy" cases and argumentation based on the UDHR: Brown, I. 'Copyright Technologies and Clashing Rights'. In *Sage Handbook of Intellectual Property*, edited by David, M. and Halbert, D. London: Sage, 2014, pp. 567–585.

A classic, still interesting: Peter Biddle, Marcus Peinado, Paul England, and Bryan Willman. 'The Darknet and the Future of Content Protection'. In *Digital Rights Management: ACM CCS-9 Workshop DRM 2002, Washington, DC, USA, November 18, 2002 : Revised Papers*, edited by Joan Feigenbaum. Berlin; New York: Springer-Verlag, 2003. http://dx.doi.org/10.1007/978-3-540-44993-5_10.

Special Tip

If you found Yar's paper interesting: campaigns to "educate" children about IP are still ongoing in a similar manner. On the teaching resources platform "Cracking Ideas", funded by UK and EU IP offices, you can find a curriculum aimed at under 12-year-olds, https://crackingideas.com/third_party/Nancy+and+the+Meerkats, and you can watch a related video here: https://www.youtube.com/watch?v=GhZJLr5BWC4, in which file sharing is equated with physical theft. Also interesting along those lines is "YouTube Copyright School", https://www.youtube.com/watch?v=InzDjH1-9Ns,

150 Shankland, Stephen. 'Mozilla holds its nose and supports DRM video in Firefox', *CNET News*, 14 May 2014, https://www.cnet.com/news/mozilla-holds-its-nose-and-supports-drm-video-in-firefox/, visited on 2019-08-27.

visited on 2019-08-27. There, copyright law is pictured as a drastic threat, making no attempt to actually explain fair use.

Cato Institute Podcast, June 11th 2008, feat. Timothy B. Lee: 'File sharing, Fair Use, Commerce', http://www.cato.org/multimedia/daily-podcast/filesharing-fair-use-commerce, visited on 2019-08-27.

3 Aaron Swartz and Shadow Libraries

Aaron Swartz was a highly talented and skilled programmer and open knowledge activist.[151] Aged 26, in 2013, he was found hanged, two years after he has been arrested for downloading a large number of journal articles from the JSTOR database that he had access to as Harvard research fellow. However, he had connected his computer to the – physically unsecured – MIT network hub directly with a cable, to avoid that his IP address would be blocked because it sent too many requests.

In order to force the federal prosecutors (JSTOR and MIT did not want to prosecute) itself to justify their pursuit, Swartz was not accepting a plea deal that required him to plea guilty for 13 federal crimes, and serve a six months prison sentence. Charges were dropped and added along the way, but as things stood a few months before Swartz' death, he could have expected 50 years of imprisonment and US$1 million in fines.

After Swartz death, countless memorial activities were set up, and the federal prosecutors were criticized sharply. Please look at the picture on the next page. Ahmet Öğüt made a bronze bust depicting Aaron Swartz, attached to a crane, hovering over an old-fashioned pedestal. This strong picture reminds us of how fragile the positions of idols are, and that they can be replaced, even though it takes some effort.

It is not entirely clear what Swartz had planned to do with the downloads, but since he argued in favour for Open Access at several occasions, and the Open Knowledge Foundation just had given up its approach to acquire JSTOR in order to make publicly accessible – because it was far too expensive –, it can be expected that he saw it as a last resort to upload the content to some kind of, probably illegal, open digital library. Since 2011, the same year that Swartz downloaded the JSTOR papers, Alexandra Elbakyan developed exactly that: Sci-Hub.

In 2018, 85% of all articles published in closed access journals can be accessed through "the world's de facto open-access research library"[152]. For books, there is

151 His legacy is described on 'Aaron Swartz'. Wikipedia, last updated on 21 August 2019, https://en.wikipedia.org/wiki/Aaron_Swartz, visited on 2019-08-27. The following is based on information from this Website. Also see Halbert, Debora J. *The state of copyright: the complex relationships of cultural creation in a globalized world*. London: Routledge, 2014: 1-4 pp.
152 Bohannon, John. 'Who's Downloading Pirated Papers? Everyone'. *Science* 352.6285 (2016): 508–512, http://doi.org/10.1126/science.352.6285.508, also see Himmelstein, Daniel S., et al. 'Sci-Hub Provides Access to Nearly All Scholarly Literature'. *ELife*, vol. 7 (Mar. 2018), https://doi.org/10.7554/eLife.32822.

Library Genesis. This type of Websites came to be called “shadow libraries”, or black Open Access, and are funded by donations and advertisements.

*Ahmet Öğüt (*1981, Turkey)*

Information Power to the People

Wood and bronze

Roboson Holdings Ltd, Rennie Collection, Canada

Installation at Skissernas Museum, Lund, Sweden, Exhibition “Memory Matters”, 4 October - 12 February 2018

It is not so important in the context of this course how these Websites technically manage to make the content accessible, and in what way any user would be indictable. We rather concentrate on what these cases, including the Swartz case, tell about IP legal culture, the scholarly publication system and society. Even though, in those cases, the content is referred to as pirated, there is a huge difference to the classical and present-day criminal pirate: the accused do not “steal” to enrich themselves, but provide “freedom of information” to everyone with Internet access and interest in that information. Therefore, a suitable mythical figure would rather be Robin Hood, fighting for social justice.[153] Even though most people would agree that

153 Oxenham, Simon. ‘Meet the Robin Hood of Science’. *Big Think*, 9 Feb. 2016, https://bigthink.com/neurobonkers/a-pirate-bay-for-science, visited on 2019-08-27.

stealing is not right, many would still pay tribute to Aaron Swartz and Alexandra Elbakyan. In a – probably biased – Science Magazine survey of 11,000 readers, "88% overall said it was not wrong to download pirated papers", even though 41% had never used Sci-Hub before.[154] While more than half primarily explain their positive attitude towards "paper piracy" with a lack of legal access, 23% object to the profits of the industry.

The cases described can be seen a "hack" of academic publishing, as sign of not being convinced that the legal Open Access movement will lead to a desirable outcome any time soon – and the slow growth of open access publications parallel to the fast increase of publisher's profits is not to be dismissed. A hack always denotes an error in the system, and is usually followed by its fix. However in this case, no fix is being offered by the publishing industry, because the error lies in running it as an oligarchic for-profit business in the first place. It is exactly that business which copyright enforcement is now busy to protect, but not by representing the creators' rights, solely by enforcing the publishers' ancillary rights. In the mentioned Science survey, 62% of the respondents believe that Sci-Hub will "disrupt the traditional science publishing industry." Even if all Internet Service Providers available would block the Website, there will be workarounds. Even if Russia, where the serves are running, would care to take legal action, Sci-Hub will easily find asylum elsewhere.

Further Reading

Morrison, Laurie, Elizabeth Yates, and Carol Stephenson. 'Walking the Plank: How Scholarly Piracy Affects Publishers, Libraries and Their Users'. *2017 ACRL Conference Proceedings, March 22-25, 2017, Baltimore, Maryland*. Chicago: Association of College and Research Libraries, 2017. http://hdl.handle.net/10464/12969.

4 Patent Piracy

Without going into much detail, the infringement of industrial IP should be tackled here, as well. Someone who wilfully commits this infringement would be referred to as patent pirate.

There is another way of pirating the IP system: even though the enforcement is expensive and difficult, the so-called patent troll's strategy we discussed in session 7 is to defend its patents aggressively, often with no intention to market the invention. This has become a serious threat to innovative businesses, especially in the US.

Finally, those who make use of the submarine patent strategy might be called "patent pirates", too. This strategy delays the registration and publication of the patent for a long time. This strategy requires a patent system which, firstly, does not require the publication of patent applications, and, secondly, measures the patent term from the grant date, not from the filing date.[155] The idea is to be as unspecific as possible in

154 Travis, John. 'In Survey, Most Give Thumbs-up to Pirated Papers'. Science, 6 May 2016, http://doi.org/10.1126/science.aaf5704.
155 'Submarine patent'. Wikipedia, updated on 4 February 2019, https://en.wikipedia.org/wiki/Submarine_patent, visited on 2019-08-27.

the application, and to issue adaptions as the technology develops. As soon as competitors are close to establishing an industry standard, the patent is published, and these competitors can either pay royalties, or drop out of the market. Since TRIPS, this strategy is no longer very attractive to pursue, because the protection period starts with the application now, not with the issuance. After 1999, US law, as many other regimes, also require to publish applications.

Further Reading

Johns, Adrian. *Piracy. The intellectual property wars from Gutenberg to Gates.* Chicago: University of Chicago Press, 2009.