Ownership of Copyright and Investment Protection Rights in Teams and Networks

Need for New Rules?

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Overview

- Introduction: What is new and what is not
- Copyright and investment protection rights in hierarchical teams
  - Possible role of copyright contract law and collective management of rights
- Copyright and Investment Protection Rights in Open Networks
  - Possible role of copyright contract law
- Conclusion
Introduction: What isn’t new?

- Creativity in Hierarchical Teams
  - Teams, Workshops etc.

Damien Hirst: Shark

Jeff Koons: Balloon Dog
Introduction: What isn’t new?

- Creativity in Hierarchical Teams
  - Teams, Workshops etc.

*Peter Paul Rubens: The massacre of the innocents*
Introduction: What isn’t new?

- Creativity in Hierarchical Teams
  - Open Results: *Fluxus*, Appropriation Art etc.

*Wolf Vostell:*
The Hay Wain-Happening

*Ai WeiWei:*
Tea Brick

*Robert Rauschenberg:*
Erased De Kooning
Introduction: What is new?

- **Creativity in Hierarchical Teams**
  - Investment intensive productions with large number of contributions
    - Film → Special provisions concerning the assumption of assignment of the main use rights.
    - Computer Programs (Art. 2 (3) Computer Program Directive)
    - *Are these areas so special any more (and were they ever?)*
      - Works of architecture, geographical maps, databases and other collective works, multi-media productions etc.
  - The problematic **overlap** with related rights protecting investments
    - Film producers, phonogram producers, broadcasters
    - Proliferation of investment protection rights: database makers, possibly news publishers (Germany)
    - Overlap with other IP rights (example: patent-protected computer programs)

- **Creativity in Open Networks (heterarchical)**
Hierarchical Teams

- Work made for hire vs. natural person who created the work
  - Dichotomy over-estimated
  - Special areas:
    - Films (Art. 2 (5) Rental and Lending Dir., and special provisions in many European Member States)
    - Computer Programs (Art. 2 (3) Dir.), no comparable provision in Database Dir.
    - Collective Works (e.g. Art. L. 113-2 (3), 113-5 CPI)
    - General assumptions of licensing of (economic) rights in employment (e.g. Sec. 43 German Copyright Act)
  - Are these areas so special any more?
    - Example: Multimedia-Works
    - Even more imminent problems
      - Creation of the making available right has not been complemented by provisions on the collective management of rights in the WIPO Treaties of 1996.
Hierarchical Teams

- Need for change?
  - Need for an across-the-board provision on collective works or works created in the course of an employment?
  - Inextricable link with basic concepts of national copyright law
    - Protected subject matter
    - Monistic or dualistic concept
      - Possibility of complete assignment of economic copyrights depends upon the basic conception (monistic/dualistic) of the underlying copyright system
      - Example: Preparatory works of the revision of the Swiss Copyright Act 1992
    - Any such provision would inevitably influence the incentive structure of copyright law (W. Fisher III [1998]; Benkler [2002], Ramello [2004], Metzger [2009])
      - I.e., the conditions of the (possible) transposition of private reward (and efficiency) into public benefit will be changed by any such rule.
      - Again: inextricable link with the policies behind copyright law.
  - The present national solutions reach essentially similar results in practice
    - However, moral rights, and (internationally mandatory) provisions in copyright contract law as a barrier to any complete assignment of the rights (in particular in monistic systems).
“Overlap“ Problems

- Overlap with (related) rights protecting investments
- Film producers, phonogram producers, broadcasters, and database makers
- Further proliferation of related rights protecting investments (e.g. news publishers)
- Comparison and overlap with patent law
  - Example: Sec. 69b (1) German Copyright Act vs. Act on Employee´s Inventions
    - Special compensation for patentable computer programs? Yes.
    - Special compensation for mere working improvements? No.
Interdependency with Investment Protection

- Interdependency of investment protection, ownership of copyright and copyright contracts
  - Reciprocal blocking effects
  - Alternative ways to recoup investments in certain areas
    - Example: news publishers claim for a new related right in German law
  - The intended initial assignment of rights in creative works and its effects might be further undermined by the proliferation of investment protection rights!
    - Consequences, concerning the incentive structure of copyright law, and the conditions of free competition in certain areas (in particular after markets).
  - Unfair Competition as an alternative?
    - Problem of licensing such claims
Possible Perspectives

- **Solutions in Copyright Contract Law**
  
  - Flexibilisation concerning the assignment of rights, providing at the same time for protection of the (economic) interests of individual authors?
    - Inextricably linked to the basic concepts of national copyright law.
    - Policy problems (public choice)
  
  - Establishment of a framework of default rules (non-mandatory copyright contract law)?
    - Effectiveness doubtful.
    - However, might have (contra-intentional) effects: “stickiness” of non-mandatory rules, economic costs of across-the-board deviations from the framework etc.
  
  - Establishment of best practices, model licenses etc.

  
  - Choice of law rules (concerning ownership <-> co-ownership <-> contracts etc.) \(\rightarrow\) (… will be hard enough to establish …)
Open Networks

- **Open Source Movement**
  - De-central movement based upon the GPL
  - Enforcement of the license as a problem and other problems of de-central ownership of copyright
  - Need for centralization?
    - Any such attempt would possibly endanger the movement as such (at least in the primary creative market).
    - Behavioural economics: Material incentives might undermine pro-social motivation
  - Need for a set of default rules (non-mandatory framework of copyright contract law for that area)?
    - Behavioural economics suggest that even such set of non-mandatory rules might endanger the open source movement’s incentive structure.
    - **No need for any legislative action.** On the contrary, certain legislative initiatives might have to “carve out” that area.
      - Example: “Open Source”-Clause of German copyright contract law (Sec. 32 (3) 3 German Copyright Act)
Open Networks

- **Creative Commons**
  - Creative commons licenses
  - International Creative commons, “porting” the licenses to different national legislations
  - Remaining problems
    - Internationally mandatory provisions of copyright contract law
    - Multi-State Use (mosaic of licenses as a solution?)
Open Networks

- **Scientific Commons**
  - Successful examples: SSRN, Scientific Commons etc.
  - However, establishment of open journals has not proven to be a sustainable success, yet

- **Interdependency with investment protection and ownership of rights → Policy pressure for complementary legal measures**
  - **Example:** discussions on a revision of the German copyright act concerning works at universities and publicly funded research institutions (possible Sec. 43 (2) German Copyright Act)
    - Initial ownership of the institution (following the example of the Employee’s Inventions Act in patent law)
  - **Example:** specific provisions in (non-mandatory) copyright contract law in some countries (e.g. Sec. 38 (1) German Copyright Act)

- **However, any intervention with the competition of different publishing systems in that area certainly needs to be justified.**
  - Barriers to market entry might justify subsidies for Open Journals etc.? Assymetries might justify the protection of authors in copyright contract law.
  - However, **individual ownership** of the natural persons who created the scientific work has to remain the central element of any competition of systems in that field.
  - No need for legislative action (in the field of ownership).
Conclusion

- (Co-)Ownership issues and assignment of rights inextricably linked with other key concepts of (and policies behind) copyright
  - Choice of Law

- Interdependency with the proliferation of related rights for certain investors and investment protection in general

- Possible solutions in copyright contract law and in the system of collective rights management
  - Best practices
  - Choice of Law

- No need for any immediate legislative action in substantive law
Thank you very much for your attention!

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