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Enforcement vs. access: wrestling with intellectual property on the internet

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Abstract: Politicisation of intellectual property, driven by the digitisation of media and the rapid expansion of the internet, has made intellectual property rights relevant not only for a limited number of corporate actors, but increasingly for individual citizens in their everyday practices. The article assesses the current state of intellectual property politics and draws attention to three parallel processes: 1) the growing focus on enforcement, 2) the plurilateralisation of international intellectual property policies, and 3) the trend towards open access. The regional focus of this analysis is on Europe, but similar trends are visible in the US as well.

Keywords: Anti-Counterfeiting Trade Agreement (ACTA), Intellectual property, Copyright, Content, Academic publication, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Free trade agreements, Intellectual Property Rights Enforcement Directive (IPRED), Digital rights management (DRM)

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The last years have seen a growing politicisation of intellectual property issues, especially those relative to the internet. The politicisation of intellectual property, driven by the digitisation of media and the rapid expansion of the internet, has made intellectual property rights relevant for not only a limited number of corporate actors, but increasingly, individual citizens and their everyday practices.

Politicisation means that these issues have become part of general political debates in non-specialist fora, that mobilisations around these issues are no longer limited to a select group of stakeholders and, that conflicts about these issues have become visible in the general public sphere – in daily newspapers, TV news, and public demonstrations. The emergence of Pirate

Parties in several European countries and their electoral success in the last European election in Sweden and in several regional elections in Germany are clear indicators that issues of internet-related intellectual property rights can mobilise voters beyond a small group of geeks and activists (Bieber et al., 2012; Haunss, 2013; Niedermayer, 2013).

The successful mobilisation against the Anti-Counterfeiting Trade Agreement (ACTA) can serve as another indicator, that intellectual property rights have ceased to be technical specialist issues, and that civil society actors are closely monitoring current developments in this emerging policy field. ACTA was an attempt by core industrialised countries, led by the USA and Europe, to create an international organisation to strengthen and coordinate measures for intellectual property rights enforcement. Strong civil society mobilisation ultimately led to European Parliament's rejection of the agreement, and thus its de-facto international failure (Matthews, 2012). Whether or not these developments are already a sign of the end or rather a turning point in the often diagnosed "upward ratchet" of intellectual property policies (Sell, 2008) is up to debate (Hofmann, 2013). But with the growing number of participating actors and an expanded scope, the complexity of the policy field is certainly on the rise.

This article assesses the current state of the policy field and draws attention to three parallel processes, which structure the future development of intellectual property policies related to the internet: 1) the growing focus on enforcement, 2) the plurilateralisation of international IP policies, and 3) the trend to open access. The regional focus of this analysis is on Europe, but similar trends are visible in the US as well.

1. FROM EXPANSION TO ENFORCEMENT

The last decades of the 20th century saw in many areas substantial expansions of intellectual property rights. Most notably the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which came into effect in 1995, has brought mandatory and high minimum standards of IP rights for all WTO member countries (May and Sell, 2006), and within the OECD-countries, copyright terms were extended and new subject areas came under the protection of copy or similar rights (Ginsburg, 2013). More recently, this process has not come to a complete standstill but substantial expansions of internet-related intellectual property rights have become rare. ¹<http://rechtsanwalt-schwenke.de/faq-zum-presse-leistungsschutzrecht/>

Instead of copyright expansion, the main focus of recent policy initiatives is on the enforcement of intellectual property rights. This was already visible in the US Digital Millennium Copyright Act and in the European information society directive.²

¹http://oami.europa.eu/ows/rw/resource/documents/observatory/1366012743_representativ es_mep.pdf Both prohibit the use, manufacturing, and distribution of technologies to circumvent digital rights management (DRM) technologies. In Europe, this new focus was reinforced in the 2004 IPR Enforcement Directive (IPRED) which expands (or in the EU lingo "harmonises") civil measures against counterfeiting and piracy. A subsequent attempt to strengthen criminal law measures failed on formal grounds due to missing competencies of European institutions with regard to national criminal law. This new focus on IP enforcement is also visible in the public statements of the G8. Around the same time, in 2004, the G8 switched its IP rhetoric from development to counterfeiting and piracy. Until then, the eight heads of state of the leading western powers plus Russia had praised intellectual property rights mainly

for their alleged benefits for developing countries. Around 2004, the dominant framing became the fight against counterfeiting and piracy, and emphasis was accordingly placed on cooperation and technical assistance. This brought these countries' argumentation in line with their reasoning in bi- and multilateral trade negotiations (Haunss, 2013).

Enhanced enforcement, with a specific focus on the internet, features prominently in the EU Commission's strategy paper on "A Single Market for Intellectual Property Rights" (COM, 2011). Moreover, in 2009 the European Observatory on Counterfeiting and Piracy was established as a platform within the Office for Harmonization in the Internal Market (OHIM) in order to streamline and coordinate EU policies on this issue. As is often the case in the field of IP policies, and in striking resemblance to the ACTA negotiation process, the Observatory is open to business associations and negligent towards citizens' or civil society interests. Many member states are represented by their customs or intellectual property offices, and the European consumer organisation BEUC is the only participating stakeholder representing citizens' interests.

The focus on enforcement is most clearly visible in the various leaked drafts of the ACTA negotiation process. The leaked treaty documents put enforcement first and they explicitly address criminal measures against IP infringement in the digital environment. In early drafts this was meant to cover all acts of IP infringement, regardless of intended or realised financial gains (Kaminski, 2011); the final text addresses only "commercial activities for direct or indirect economic or commercial advantage" (Council of the European Union, 2011: Art 23.1). The secrecy of the negotiations fuelled a growing protest mobilisation against the proposed agreement. In addition, the European Commission's disregard of the European Parliament (the EC for a long time denied access to Parliament information that was available to the negotiating national governments and selected industry stakeholders), added an institutional rift and strengthened the Members of the European Parliament's willingness to reject the said trade agreement.

In the course of the negotiations, the ACTA provisions have been watered down so that some commentators went on to call the final text "ACTA lite" (Ermert, 2010). This, and ACTA's final demise in the European Parliament would not have been possible without the massive civil society mobilisation that brought tens of thousands in the streets to demonstrate against the limitation of internet freedoms and the undemocratic and secretive negotiation process (Beckedahl, 2012).

2. PLURILATERALISATION OF INTERNATIONAL IP POLICIES

Regardless of the scope and expected impact of ACTA on national legislations, the most remarkable aspect of the agreement is its free-standing institutional structure (Yu, 2012). In this respect ACTA is – after TRIPS – the second attempt by the US and Europe to create a new institution responsible for intellectual property rights at the international level. In the political process that led to the creation of TRIPS, core countries of the "global North" in the 1980s shifted the forum from the more inclusive structure of the UN World Intellectual Property Organization (WIPO) to the Uruguay round negotiations within the framework of the General Agreement on Tariffs and Trade (GATT). In 1994, the World Trade Organization (WTO) was created out of the GATT as the new international organisation responsible for intellectual

property rights at the global level (Sell, 2003). With ACTA, the same group of countries led by the USA, Europe and Japan tried to create another international organisation as within the WTO developing countries, especially the emerging economies of Brazil, China, India, Russia, and South Africa (BRICS), had become forces to reckon with (Yu, 2011).

The ACTA negotiations are thus an example of what may be called the “plurilateralisation” of intellectual property rights. ACTA is embedded in a whole series of bi- and plurilateral trade agreements, which are currently being negotiated between the US or Europe and developing countries – among them the currently negotiated Trans-Pacific Partnership (TPP) agreement between Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam, or the proposed EU-India Free Trade Area. These and other free trade agreements contain intellectual property regime chapters that go well beyond TRIPS. Unlike in the UN organisations or the WTO, where every country’s vote has at least formally the same weight, developing countries are in structurally weak positions in bi and plurilateral negotiations. These negotiations offer Europe and the US a possibility to establish higher IP standards in a club approach: they negotiate initially with a small number of countries to create standards that potentially affect a larger group of countries, and with the aim to reach, at one point, a critical mass to set a new de facto global standard.

One part of this plurilateralisation process can be identified as the EU Commission’s aim to further strengthen intellectual property rights among EU member countries by creating a comprehensive framework for copyright in the digital single market. This can be achieved by strengthening enforcement measures within the EU and at its outer borders, by creating a unitary European copyright code, or by harmonising the fragmented national licensing systems. In this case, the initial club is composed of EU member states, among which the EU Commission tries to establish higher standards. Once these standards are established within the EU, they then may serve as yardsticks for future bi and plurilateral trade agreements or even international treaties.

3. ESTABLISHING OPEN ACCESS

Against the backdrop of strengthening intellectual property rights and their enforcement, a number of parallel and sometimes interwoven movements for open access to information, data, and cultural products have developed over the last decade. These parallel processes are often summarised as the “free culture movement”. While this term highlights the desired wider political and social impact from an activist perspective, I would argue that the less emphatic term open access – at least for the time being – more appropriately describes the commonalities of the various processes to enable unrestricted access to scientific publication, administrative data, and cultural artifacts. Some of the initiatives, especially within the cultural sphere, would certainly subscribe to the idea of a free culture movement, but some – like the more technical open administration/government data initiatives – are usually less concerned with the idea of free culture than with accountability, transparency and efficiency of governance processes. I thus use the term open access in a wider sense, meaning not just open access to scientific publications, but to highlight the centrality of this particular aspect of various and widely differing projects that enhance public access to knowledge, information, and cultural goods.

Among these initiatives, certainly the most prominent is Creative Commons. Creative Commons is a non-governmental organisation founded in 2001 as a US charitable corporation by – in their own words – “[c]yberlaw and intellectual property experts James Boyle, Michael Carroll, and

Lawrence Lessig, MIT computer science professor Hal Abelson, lawyer-turned-documentary filmmaker-turned-cyberlaw expert Eric Saltzman, and public domain web publisher Eric Eldred'. The project originally grew out of widespread discomfort with the current state of the intellectual property rights system among US legal scholars and other academics working in the field of internet and society.

Today, Creative Commons offers a set of copyright licences and a web-based interface to attach these licences to digital works, so that they can be reliably identified and searched over the internet. It builds on the concept of a 'copyleft' licence, the 'GNU General Public licence' (GPL), originally developed within the free/open source software (FOSS) community, a licence that effectively reversing the workings of the established copyrights system by granting public access instead of reserving all rights.

Creative Commons's success is obvious: Within ten years, it grew from an abstract idea of a handful of US academics to a set of licences used worldwide, making several hundred thousand documents, images, sound and video files available for everyone to use freely and for non-commercial (and sometimes also commercial) purposes. By turning the exclusivity of the existing copyright on its head, Creative Commons has helped secure free access to all sorts of digital cultural goods, available on the internet (Bollier, 2008; Haunss, 2013: Chapter 6, 12). Creative Commons thus has enabled the anarchic - that is the un-ordered and decentralised - creation of a massive de facto open access repository.

The rise of Creative Commons is preceded and accompanied by less visible, much smaller, but nevertheless also important initiatives to create open access repositories of scholarly works. These initiatives cannot compete in size with the sheer volume of creative works made available by millions of internet users worldwide. Their importance stems more from the fact that they are driven by and are likely to influence elite actors in society.

In the academic world open access initiatives developed on two parallel levels. Scientists in cooperation with libraries have created various open access repositories for research articles in order to disseminate knowledge more widely and more quickly than through the usual journal publication process.³ These bottom-up approaches have been strengthened by more centralised initiatives from research funding agencies (like the US National Institutes for Health or the Swiss National Science Foundation) who encourage or even require recipients of their funding to publish the results of their scientific work under open access requirement. A publicly visible result of these initiatives within the academic world is the 2003 "Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities" which calls for a global and accessible representation of knowledge, where the internet serves as a tool to enable open access to this knowledge. With 19 initial signatories, the declaration currently has more than 400 institutional signatories, among them 14 (mostly European) research funding organisations and 50 national research organisations and institutes. These initiatives are important because they have the potential to alter the perception of the academic elite of the mechanisms that should govern the creation and dissemination of knowledge. It is no coincidence that Creative Commons grew out of an academic community in which the notion of sharing knowledge is central and in which acknowledgement of authorship is often more important than the concept of intellectual property.

While the idea of open access to information, scientific works, and cultural artifacts is most likely not in a dominant position within the academic community yet, the growing movement for open access in universities and research institutions is important, especially when one considers the privileged position of scientists and academics within knowledge societies.

Support among the scientific community and the massive adoption of Creative Commons licences by ordinary citizens are creating opportunities for a re-evaluation of proprietary copyright-based models. Not only in the field of scholarly publication but also in areas like administrative data or cultural heritage, there are currently a multitude of initiatives - from public administrations and private actors - that attempt to make information available in various flavours of open access, competing with more traditional exclusive access models. Open government data initiatives in Europe (open-data.europa.eu), the US (data.gov), Great Britain (data.gov.uk) or Germany (govdata.de), among other, are illustrations of the radiance of open access ideas, where the established notion of maximising control and restricting access slowly - and partially - makes way to the idea that data created in public institutions should also be available to the public, and that administrations may even gain from the accessibility of their data.

To be sure, these initiatives are in most cases still minority models, but the underlying idea of enabling open access to knowledge, information, and cultural goods is increasingly perceived as one possible supplement and maybe even an alternative to the established exclusive copyright regime.

WHAT'S COMING NEXT?

These three developments happen under conditions of increased public scrutiny of intellectual property rights issues, especially those relative to the internet. The era where it was possible to frame intellectual property issues as “experts only”, as technical solutions to an information allocation problem, are definitely over. The genie of politicisation unleashed by extending the reach of intellectual property enforcement from corporate actors to individual citizens, cannot be put back into the bottle. At the international level, the growing powers of the BRICS countries may or may not herald the fall of the current intellectual property powers (Yu, 2012), but within each polity it is very likely that the politicisation of intellectual property will further grow. For a great part, the current focus on enforcement aims at the practices of many individual internet users. It is unlikely that they will consent to the incrimination of their practices of sharing, which are generally accepted in the material world, but which are said to be unacceptable in the digital realm.

Enforcement and plurilateralisation are both defensive measures from representatives of an intellectual property order which has increasingly become under attack. Open access and the wider free culture movement are important, not because they solely challenge the dominant intellectual property order, but because they offer a viable alternative. This alternative is still embraced by a minority but – judging by the growth rate of Creative Commons licenced content on the internet, by the expansion of scientific open access publishing opportunities or by the increased trend towards making public documents freely available on the internet, this is a minority that is growing quickly.

The conflictuality of intellectual property issues will further grow. The current developments reflect an entrenched conflict, where established players defend and/or try to expand the proprietisation of knowledge within an exclusive access model. This maximises profit for the established IP-holding industry but increasingly comes into conflict with a growing number of other actors – from civil society and also from the economic sphere – who have become more vocal over the last decade. In this politicised framework, success and failure will increasingly depend on the ability to consistently frame the issue beyond the articulation of individual

interests and to create and sustain coalitions that are no longer epistemic communities of experts with a purely technocratic perspective on intellectual property rights and the internet.

FOOTNOTES

1. The copyright term extension for musical composition with words¹ from 50 to 70 years in the 2011 EU Directive is one of the few such examples. Another one is the recent introduction of a “Leistungsschutzrecht für Presseverleger” (ancillary copyright for news publishers) in Germany which aims to extend copyright protection on the internet to “snippets” from news articles – although it is unclear whether and/or which material consequences this new right will have. a detailed discussion of the “Leistungsschutzrecht” see: 2. For a list of representatives from the public and private sector, see: 3. Examples are arXiv for Physics, Mathematics, Computer Science, Quantitative Biology, Quantitative Finance and Statistics (arxiv.org), SSRN for the social sciences, legal studies, economics and humanities (ssrn.com), RePEc for economics (repec.org), or PubMed Central for life sciences (www.ncbi.nlm.nih.gov/pmc).

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