

A photograph of a person in a crowd, seen from the side, holding up a smartphone to take a picture. The person is wearing a grey sweater and a watch. The background shows other people and a water bottle, all in a blue-tinted, semi-transparent style. The overall mood is one of everyday digital activity.

Media Practice and Everyday Agency in Europe

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edition lumière

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A Crooked Balance of Interests? Comparing Users' Rights in Printed and Electronic Books

Hannu Nieminen, Anna-Laura Markkanen

1. Introduction

Copyright governance has traditionally been predicated on a negotiated balance of interests between three main actors: the creator, the publisher, and the user. Originally, the balance was created by acknowledging the private interests of the creator and the publisher, on the one hand, and, on the other, public interest, defined in terms of the cultural and social benefits resulting from citizens' public access to the works (Ricketson, 2003; Hugenholtz & Senftleben, 2011; European Copyright Code, 2010: 121). To serve the public interest, certain limitations were imposed on the creator's privileges, including limits on the duration of copyright, a principle of "fair dealing" that allows members of the public to copy the work for personal use and to employ the works for social and cultural purposes (Sirinelli, 1999; Hugenholtz, 2001: 6; Ricketson, 2003; European Copyright Code, 2010: 123-6).

In literature the arguments for copyright are usually divided into four different approaches: the economic rights approach, the moral rights approach, the utilitarian approach, and the citizens' rights approach (Guibault 2002; May/Sell 2005; Davies 2002).

The economic rights approach is based on conceiving the end product as a result of creative work, over which the creator has an exclusive right. This includes the creator selling all ownership rights to another party at a price which is freely at their own discretion. At its extreme, this approach does not recognise any moral rights of the creator – if he or she so wishes, the creator can sign over all rights to another party (a publisher) leaving themselves with no claims whatsoever concerning the further use of the work. This conception of copyright is usually tied in with the Anglo-American legal tradition.

Nieminen, H./Markkanen, A.-L. (2014) 'A Crooked Balance of Interests? Comparing Users' Rights in Printed and Electronic Books', pp. 285-296 in L. Kramp/N. Carpentier/A. Hepp/I. Tomanić Trivundža/H. Nieminen/R. Kunelius/T. Olsson/E. Sundin/R. Kilborn (eds.) *Media Practice and Everyday Agency in Europe*. Bremen: edition lumière.

The moral rights approach derives from the notion that there is an inseparable connection between the work and its original creator, independent of its ownership. This gives the creator a right to supervise the use of their work, meaning that its original form should be respected and that they should be recognised as the original author in all uses of the work. Discernible in this approach is the strong influence of natural rights philosophy, according to which the creator has a natural right to all of his or her creations, and this right cannot be declined or denied by simply handing over the usage or economic rights to another party. This notion of copyright is usually linked with continental European law.

The utilitarian approach emphasises the social utility of copyright, in so far as the creator's exclusive rights encourage them to continue creative production, thus benefiting the public (and society) in the form of more new works. The creator's remuneration is thought to consist of two components: the remuneration for the actual work plus an incentive to continue production. In this way, the balance between the creator's economic interest and the public interest is met efficiently and beneficially for both parties. Moreover, understanding copyright in this way creates an incentive for other potential actors to engage in creative work.

The approach centred on citizens' rights accentuates democracy as a system based on an informed citizenry, i.e. one that enjoys freedom of speech and expression. The basic idea is that all new knowledge and all novel forms of culture are necessarily based on earlier achievements, and if citizens are restricted or denied the access to existing works of art and science, societies will eventually regress. From this it follows that, while the creators' exclusive rights are recognised and respected, these must be balanced by exemptions, thus allowing as wide public access to their works as possible. One application of this is the Public Domain movement, which aims to make the works (mostly scientific articles) freely available with the active consent of the authors.

The first two approaches concentrate solely on the author's rights but the latter two perspectives take users' rights into consideration. The utilitarian approach takes into account the need of an incentive to create anew. The approach focusing on citizens' rights requires an acknowledgement of the rights that users have or should have. The problem is, however, that the concept of users' rights is seldom explicitly defined. In this article we see users' rights as the requirements inherent within the copyright system not only to protect authors but also to promote reading and other uses of copyrighted products. The limitations imposed on the author's privileges in copyright legislation aim at securing users' rights.

2. Copyright limitations and exemptions

Global copyright regulation is a mixture of all those four approaches. Although there is a well-established international copyright law, based on international treaties (the two fundamental ones are the 1886 Berne Convention and the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights, TRIPS), the national copyright regimes differ much in detail – meaning that any comparison between different countries needs to be conducted very carefully. It has been pointed out that the main difference between the international copyright regime and national laws concerns the balance of rights: the international treaties concentrate on securing the creators' economic rights, whereas the national legislation stresses more the societal and welfare aspects – citizens' democratic, cultural and social rights (Okediji 2006). In order for the copyright system to serve the public interest and guarantee user rights, it has been agreed that – especially with regard to social and educational purposes – several limitations can be imposed on the creator's privileges.

Because the international copyright treaties are by their nature the products of compromises secured by coordinating national copyright regimes, they leave much discretion to nation states. This has meant that there are two categories of limitations and exceptions: general limitations, stipulated in the international treaties, which all the signatory countries must apply in their domestic laws, and specific limitations and exceptions which are allowed under the treaties but whose implementation is left to the signatory countries alone.

2.1 General limitations

The general limitations coordinated through the treaties, which all signatory states are obliged to implement in their national legislation, are rather flexible and leave much discretion to signatories. One of the basic stipulations concerns what constitutes a copyrightable work: only an original work, reflecting “some level of intellectual creativity” should be protected by copyright (Okediji 2006: 11). How this is determined varies from country to country. Other general stipulations include the distinction between an idea and its expression – the idea does not get protection, only its expression. The same type of demarcation applies to the difference between factual contents and their expression – the expressions of facts are protected, the facts are not. A major issue of global coordination concerns the duration of copyright protection, which as a global standard was the length of the author's life plus fifty years, but in recent decades this has been extended to life duration plus seventy years (Okediji 2006: 10-11).

The other set of limitations and exceptions – those allowed under the international treaties but whose precise form and content are left to national governments to decide – include a number of means to limit the creator’s exclusive rights. Most limitations aim at allowing the widest possible public access to the copyrighted works without essentially harming the copyright owner’s right and, in many cases, compensating the copyright owner for the potential financial loss resulting from the specific limitation. Here we concentrate only on those limitations and exceptions relevant to our focus. How do they relate to the user rights in the transformation from the printed book to the digital one?

Another important issue that concerns the use of copyrighted works is that ownership of the copy, e.g. a book, and the conditions under which the ownership can be handed over to another person. In the case of a printed book this is clear: the copy of a book can be donated, inherited, traded on the secondary market, or even destroyed. The owner of a copy has a sovereign power over it. But how is this to be handled in the case of digital books?

2.2 Limitations and exceptions from the viewpoint of user rights

From the viewpoint of user rights, we can make a distinction between two types of rights in copyright law: those related to basic citizens’ rights, such as access to information, the needs of education, the use for social purposes (people with special needs, people in institutions etc.), and those related to creative purposes – scientific, artistic, etc. uses of copyrighted works. These are partly overlapping – for example, access to factual information is required in science – but principally they refer to somewhat different needs in respect of access to and uses of copyrighted works.

A prerequisite for both classes of rights, but especially for the latter type, is the full ownership of a copy of the work in question – be the copy originally in a material form (a print book) or in a digital form (e-book) – so that the user is able to reproduce the work for their own creative purposes, for further study and reflection. This must also include the full determination of the further use of the copy – including donating the copy or signing it off for the use of the secondary market. All these conditions have applied in one form or another in most countries in the case of printed books; and this has been a central element in the conceived balance between the creator’s exclusive right and the public interest-based limitations to copyright.

Just to sum up the main challenges to this balance: When copyrighted material is used in a digital environment, the risk of copyright infringement grows. Thus, the digital material is protected by tools called digital rights management technologies (DRM). They have been subject to much criticism as

they have been seen to restrict the freedom of users, and inasmuch are also regarded as a threat to the application of the earlier agreed and adopted copyright limitations.

Now the question is, to what degree are the prerequisites described above still in force concerning digital books; and if they are found wanting, what are the consequences from the viewpoint of general societal conditions for creative work?

3. The electronic book: from traditional value chain to something else²

A radical change has occurred between the traditional model of book production and production in the digitalised environment. In the following, we analyse this change with reference to the value chain process.

3.1 *Traditional value chain*

The traditional publishing value chain starts with the author, who produces a manuscript and offers it to a publisher. The publisher selects for publication the best manuscripts from among those offered. Print-ready files are then delivered by the publisher to the printing house. The end product, the book, is then distributed through retailer channels and sold. In addition to traditional bookstores, the Internet has become a permanent channel, a long way ahead of e-books. In Finland, publishers do not sell traditional books directly to libraries but through wholesalers, such as Kirjavälitys (www.kirjavalitys.fi) or BTJ (www.btj.fi), formerly known as Kirjastopalvelu (Library Services).



Figure 1. Traditional publishing value chain.

Technological development has brought changes in the value chain and the actors involved in book publishing. However, the publishing industry has been struggling with falling consumer demand, and thus not all changes are associated exclusively with the transition to a digital environment. Established players have had to adapt to a new environment.

3.2 New players in the value chain

The transition to digital publishing has introduced new players to the publishing value chain. They include online stores; (content) platforms; technological system providers; media companies; and Internet service providers.

Emerging actors can assume different roles: one may act as a technology provider (e.g. Securycast), another as a content provider (e.g. OverDrive), a third as an online shop (e.g. AdLibris), and a fourth as all of the above (e.g. ElisaKirja, Ellibs). In the e-book market, Internet and media companies now play new and different roles, offering combinations of devices, content and platforms.

An additional new dimension is the internationalisation of the publishing business. The e-publishing market is much more open to international platforms and data providers than before, when jobs in publishing production generally required Finnish language skills or precise knowledge of the local infrastructure. For example, an American e-book distributor, OverDrive, an important content provider for Helsinki City libraries, has no staff in Finland but conducts its business online from the US.

Opening the value chain to new communities, such as readers, may help provide a new kind of enriched content to readers or build new business possibilities based on direct interaction, e.g. in the form of virtual book clubs. Lucy K ung (2008: 34) asks whether the industry can really take off if e-books are regarded as an alternative to paper ones and not as an entirely new category of creative media product. However, if e-books are viewed in the broadest possible sense, it is possible that the value chain will not change per se, but that new players and operations will be introduced to support the old ones.

New routes are emerging for the book to travel from writer to reader. Instead of traditional bookstores, online shops, wholesalers and libraries, new technological agents are coming on stream, providing alternative routes from publisher to reader, as shown in Figure 3 (and the example of CrimeTime [2012], an independent publisher established by Finnish authors of detective fiction in 2010).

4. Copyright restrictions: from copyright to DRM

Another current concern is the protection of digital books, particularly against pirated versions. The current digital rights management (DRM) system provides strong protection for the interests of publishers and authors; however, for users and readers it makes the “normal” (as with the traditional printed book) utilisation of the work difficult or even impossible. Plans are afoot to design and apply a less rigid system, the so-called “social DRM” (such as watermarking)³, but to date Adobe Digital Editions remains the most popular DRM system.

Most e-books sold in Finnish bookstores are in EPUB+DRM or PDF+DRM formats. Negotiations about which DRM system is to be used take place between the author and the publisher, but it is the publisher who has the final say. From the viewpoint of an individual user (sometimes called the “honest reader”), the social DRM would be easier to use than the current system. Even though the current DRM system may be strong, it is not effective in preventing illegal use, as it is relatively easy to break.⁴

DRM controls access to and reproduction of digital material, whereas digital watermarking and fingerprinting are techniques enabling the identification of digital works (Van Tassel, 2006: 79-80). The current DRM system applied in Finland is relatively strong, not only because of its technical qualities but also because of the fear created by the music and movie industry’s aggressive tactics in pursuing potential piracy (see e.g. EFFI, 2012).

For the consumer, the system could be easier. The current system enables the consumer to make a few copies of the e-book they have bought, as long as the copies are made by a device registered to the same user ID. A less rigid form of DRM – social DRM or watermarking – would allow the consumer to share the e-book with as many friends as they wish, but if the e-book were illegally uploaded to the Internet, it could be traced back to the original consumer.

5. Conclusions: from user rights to user wrongs?

The basic assumption in this paper is that in the new digitalised environment the traditional balance between the creator, the publisher and the reader/user has been tilted in favour of the publisher. As a result, the users’ rights in copyright regulation – represented by cultural and societal values – have been undermined.

The Berne Convention, which dates as far back as 1886, struck a fine balance between the actors in this field, based on the one hand on recognition of the ownership rights of the original creator, and, on the other, on wider

Figure 2. Digital publishing alters the traditional publishing value chain.

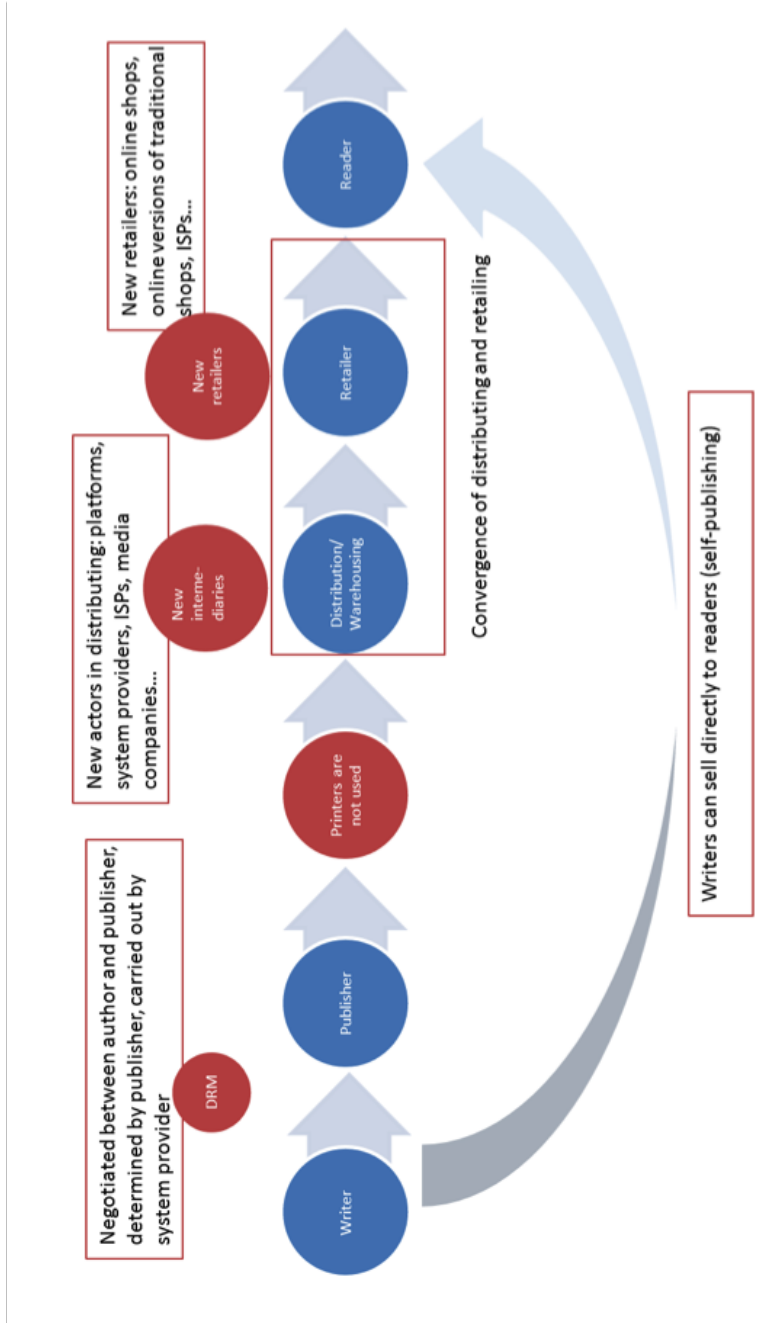
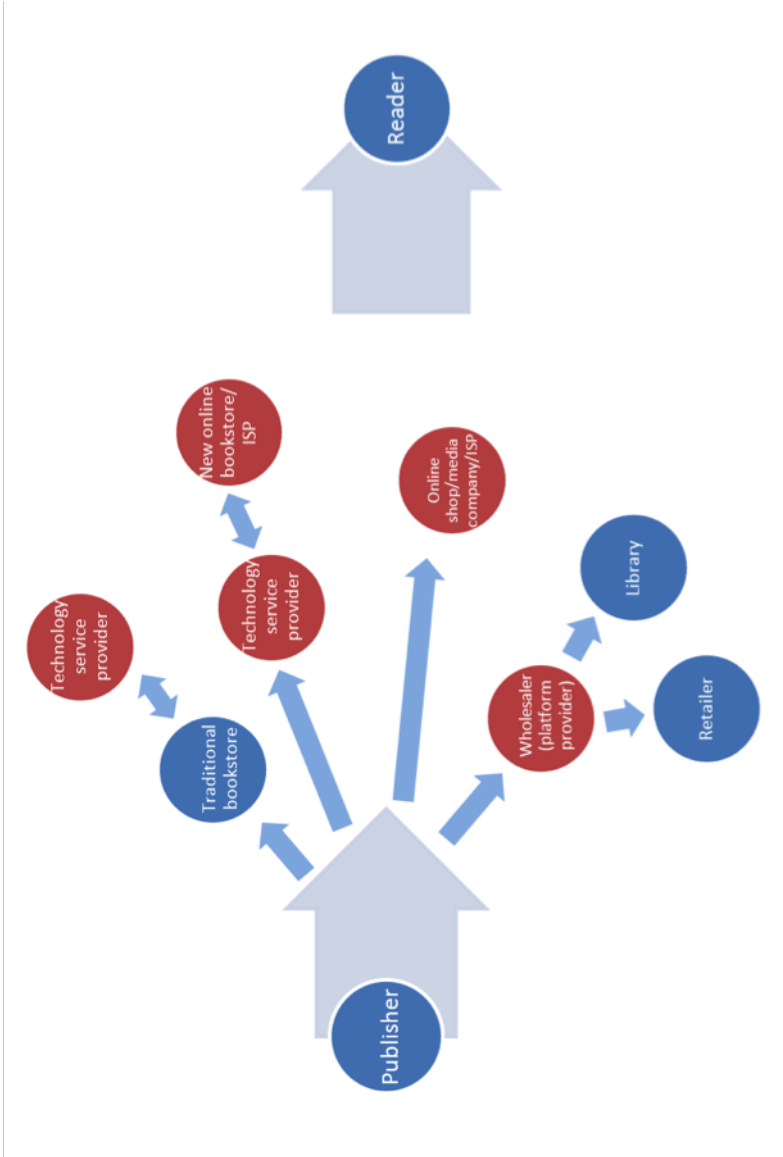


Figure 3. Alternative routes for a book from publisher to reader.



societal interests (democratic, cultural, educational and social needs), which were served by establishing certain limitations and exceptions to the creator's exclusive rights.

In the digital age, there are problems in reconciling the creator's legitimate right to reproduce their work with wider societal interests. This paper has discussed the central issues in more depth. Although the advent of e-books on a large scale is still ahead of us, at least in countries like Finland, it raises many weighty issues. First, there is the question of the reader's/user's right of ownership of a legally purchased copy, including the right to make copies for private use, to store a copy or to loan, borrow, resell and inherit the copy. In this respect, the DRM models that are being planned and are in operation seem to violate the principles confirmed and agreed in several international treaties (Berne, Geneva, Rome).

Second, the new e-book publishing models do not take account of the needs of libraries. In order to facilitate the cultural, social and educational functions of a library, there needs to be a standardised and simple model for lending books and monitoring their use. It cannot be the task of individual libraries or even regional groups of libraries to negotiate solutions with publishers and intermediaries; obviously this is a wider issue of state cultural policy.

It seems obvious that there is an urgent need to negotiate a new balance between the actors involved, in order to safeguard especially the public-interest based rights in relation to democratic, cultural, social and educational considerations. Copyright issues have not traditionally been high (if anywhere at all) on the agenda of media and communication scholars. It is high time to correct this.

Notes

- 1 Ricketson, 2003; Hugenholtz & Senfileben, 2011; European Copyright Code, 2010, p. 121. Although the concept of the public interest is problematic for many reasons – who has the right to define what it is – we will not discuss this here.
- 2 Additional information for chapters 3 and 4 was retrieved from interviews with a number of experts working in publishing business. The full list of interviewees can be found in the attachment. All interviews were conducted by Anna-Laura Markkanen. The authors express their gratitude to all the experts.
- 3 On watermarking, see e.g. Rosoff, 2007.
- 4 In Google, search words “how to break epub drm” give almost 400 000 results.

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Interviews

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