Summary

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I. Introductory remarks

Presenting a report on, and summing up what has been said during the last two days on the issue of copyright by all the different speakers and discussants with regard to copying and disseminating protected material through digital networks, seems to be an almost impossible task. It will either be a one-to-one replica of each and every word, or a rather vague summing up of major themes. A task like the one present always reminds me of the story told by Paul Auster in "Ghosts". In this middle part of his New York Trilogy, Auster presents a character called Blue, who has been retained by White to spy on Black. Having done so for several days, Blue then is looking through his notes "to see what he has written", only to be "disappointed to find such paucity in detail." It is, the story goes on, "as though his words, instead of drawing out the facts and making them sit palpably in the world, have induced them to disappear." And although reading his final report forces him "to admit that everything seems accurate", Blue nevertheless feels dissatisfied, because "what happened is not really what happened".[1] Or, in other words, all I can come up with at this point, is hardly more than the world of levies and DRM "according to Thomas Dreier", to quote yet another book title of a famous U.S. novel. Hence, no details, no chronological retelling of what we have heard, but rather some reflections and hopefully enlightening thoughts about it.

The first – and very likely the most lasting – impression seems to be the feeling that we are stuck. The feeling was expressed that "we are moving around in circles" (Sirinelli), and that "we are at the crossroads, not knowing where copyright will go" (Strowel) – to recall just the most succinct formulations. If this is true, the crucial question then is, why do we feel stuck? If an answer to this question can be found, then maybe we can develop strategies which may eventually lead us out of the impasse. This is precisely what I intend to do: try to explain why we are stuck, and what strategies might be available in order to escape the seemingly inescapable.

[1] *Auster,* Ghosts, The New York Trilogy, 1990, pp. 175/176.

II. Why are we stuck?

Why is it so difficult, if it doesn't altogether seem impossible, to avoid the impression that we are at an impasse?

My answer to this question would be that the fact that we feel stuck has to do with the intricate and highly complex relationship between law, technology and the economy (or even broader: society). In intellectual property literature, one often reads that law is merely reacting to technology (which is then usually followed by a lamento that law is always running behind, correcting errors and unwanted results that have already materialised, rather than helping technology to develop and risks being avoided). However, in my opinion, there is not only a two-way relationship between law and technology. Rather, technology in itself is neutral, and if the law reacts, then it reacts to economic and social changes brought about by technological advances (or, if the law tries to stay ahead, then it envisages possible economic and societal changes which a new technology might entail). We are thus in the presence of a triangle formed by the forces of technology, the economy, and the law. The problem is that each of these forces interacts with each other in a dialectic way. Applied to the context of DRM and levies, this means that the law does not react to DRM-systems (DRMs) unless it has become clear how DRMs work and what economic consequences DRMs might have. But then DRMs will not take off as long as the law does not provide for sufficient protection of DRMs against unauthorized circumvention. Similarly, business models adapted to DRMs will not be developed unless technical protection measures (TPMs) enabling DRMs are in place, but TPMs enabling DRMS will not be put in place until there are coherent business models. Whether or not appropriate business models will be developed for DRMs largely depends on the predictability and suitability of the legal framework, pretty much in the same way as the law mostly regulates business models once they have been put to practice.

In order to avoid any misunderstanding: there is, of course, always one sure way out of this dilemma, provided, however, that one of the three factors – law, technology or business model – is regarded as fixed and not as binding on the other two factors. For example, if one works from the assumption that technology can provide strong anti-copying and access-blocking protection, and that the possibilities offered by existing technologies should be utilized, then this invariably enables business models of product diversification and price discrimination which in turn require full legal protection against unauthorized circumvention in order to prevent user leverage. Similarly, if one starts from the assumption of a business model for information goods that is based on product diversification and price discrimination, this likewise requires DRM based on TPMs which can only be effective if the law provides strong protection against unauthorized cir-

cumvention. If, on the other hand, one is of the opinion that the benefits regarding producers' income and consumer choice resulting from business models which are based on product diversification and price discrimination do not outweigh the value of the public domain eliminated by such business models, then one would reject the application of TPM-based DRM and, consequently, decide against strong legal anti-circumvention protection. Similarly, if one starts from the assumption that certain fundamental values of public policy should keep access to, and uses made of copyrighted works open, then the lack of legal anti-circumvention protection would hinder business models based on technological product diversification and hence price discrimination, and this in turn would not work as an incentive to make available and implement DRM based on TPMs.

Needless to say that the reasoning just described sound all-too familiar, since they all reflect certain positions held by the parties concerned. But by definition, none of these kinds of reasoning can claim the one and only truth, because no reason is given for the choice of the respective starting point of each of them.

III. A possible solution?

Is there a solution? In my opinion, the description of the dilemma at the same time hints at a possible solution. In my view, the point is not to ask different questions, but to ask the same questions in an – if only slightly – different way. To me, "DRM versus levies" seems to be an oversimplified narrowing down of the issue, a question which calls for a yes/no answer under circumstances where neither a simple "yes" nor a simple "no" seems to be a satisfactory answer. The same is true for questions such as "Will levies be phased out or not?", or "Shall we maintain the principle of the exclusive right or not?". Rather, I would like to take up the point made by Shira Perlmutter who asked "where are we?", "where do we want to go", and, most importantly, "how do we get there". As a footnote, it should be emphasised in this respect that, of course, defining the next step towards what is the desired goal rather than letting the law in place decide which step we are allowed to make next, ascribes to the law the function of a social tool, to be used in order to shape society rather than a dogmatic set of rules adopted in the past in order to regulate the future. Jane Ginsburg seems to argue in a similar way when she describes private copying as a "legal construct" rather than an extra-legal concept. In order to avoid any misunderstanding, it should be emphasised that I do not want to deny the regulatory role of the law. Rather, here as well, we find a dialectic relationship between the law prescribing certain effects on the one hand, and these effects in turn impacting the law on the other hand.

"Where do we want to go?" What kind of digital legal world do we want to live in? This seems to be the primordial question, and it is exactly the question brought to our attention by Lawrence Lessig in his famous book entitled "Code and other

laws of cyberspace". There, Lessig argues that we need a plan which will enable us to make the "choices that a changing cyberspace will present".[2] It is not my intention to answer the question where we want to go, what choices we should make, or according to which plan we should make these choices. These questions and the answer thereto have much to do with fundamental attitudes and beliefs, with cultural experiences, anxieties and visions of the future. An attempt to answer them would go beyond the purpose of my brief summary of the debates of the past two days. Also, I cannot make these choices myself (although I'll get back to the parameters for such choices later on).[3] They have to be made collectively. Rather, I want to draw your attention to the fact that once we have made our choice where we want to go, then the decisive question is "how do we get there" departing from where we are now. And if this is the question to ask, then the initial question "DRM or levies?" can be formulated somewhat differently, e.g., as follows: Will maintaining or even strengthening levies in the digital field hinder the implementation of DRM up to a point that DRM no longer works? Can the introduction or extension of levies in the digital field be reversed, once DRM can be successfully applied, or once they are sufficiently refined so as not to clash with fundamental public policy concerns? Do levies provide less choice to consumers? What are the market forces that speak in favour of, or against, levies? Why are existing DRMs, in particular those of the telephone system, not used for the communication of copyrighted material other than display-logos and ringing tones? What are the incentives at work? Under what circumstances could negative external effects be better internalized by levies or by DRMs? What role could collecting societies assume in a DRM-world? Should the legislature support or suppress the extension of levies or the application of TPM-based DRMs? What are the values to be propagated by the one and by the other of these two systems (see the contribution by Yamamoto)?

Of course, these questions are by no means exhaustive. Rather, they provide a hint about what kind of questions we should ask. Again, I am not suggesting that different questions should be asked, but I am convinced that once we ask the existing questions in a – at least somewhat – different way, we can escape from the impasse and we will no longer be stuck.

IV. Further implications

If a technology is beneficial, then the law should probably do everything to further its development and practical application. However, if a technology brings with it certain risks, then the law should react in order to minimise these risks, or

[2] *Lessig,* Code and other Laws of Cyberspace, 1999, p. 221.

[3] See below, IV.

at least reduce them on the basis of a cost-benefit relationship. In this respect, the question "Where do we want to go?" touches upon a large number of issues, some of which have been addressed during the last two days of the conference, and, therefore, shall be briefly recalled.

A first of such issues would be to find out in which respect DRM is – as has often been claimed – superior to the levy system. Indeed, in this respect we have heard conflicting remarks. On the one hand, complaints have been made about the rough justice of levies, and the much finer-grained use-tracking capability of DRMs has been praised. Moreover, since DRM might better capture the existing market demand, DRM, it has been claimed, will most likely generate more income from the use of copyrighted works. On the other hand, it has been said that levies are author-oriented, whereas DRM would be marketing or consumer-oriented, and hence not favour the author to the same extent as does DRM. In sum, rough justice is preferred by some over what is at times feared to be no justice at all.

A second, related issue is whether the assumption is true that DRM really increases the overall social benefit. True, product diversification and the ensuing price discrimination help to better capture the market demand. Producers increase the proceeds of marketing their products, and consumers, although in the aggregate they pay more than they used to pay before, get better choices and ultimately, more consumers than before can legitimately access copyrighted works.[4] However, it has also been pointed out that DRM eliminates the public domain so that consumers who were previously able to use copyrighted works without payment will have to pay once DRM is in place.[5] Moreover, to a large extent TPM-based DRM artificially disenables uses which digital technology with its ease of copying and its transmission rates and speed has enabled. Nor should it be overlooked that due to the non-substitutability of each single hit (at least while the hit is listed in the charts), there is a certain danger of monopoly rents. These conflicting uses will have to be further examined.

A third issue concerns the policy effects of locking contents in by way of TPM-supported DRM. Such locking in (or, as some would say, locking away) might exclude those who cannot afford to pay the price even for the most restrict-

[4] For this line of argument, see in particular *Einhorn,* Digital Rights Management and Access Protection: An Economic Analysis, in: Proceedings of the ALAI Congress, June 13–17, 2001, New York 2002, 82, available at http://www.alai-usa.org/2001_conference/pres_einhorn.doc; for product differentiation and differential Pricing in the information economy, see also *Shapiro/Varian,* Information Rules, 1999, pp. 26 and 37 et seq.

[5] For this view see, in particular *Benckler,* Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, available at http://www.nyu.edu/pages/lawreview/74/2/benkler.pdf.

ed use possibilities. Of course, politically the effects of such "lock-outs" might be less dangerous in the field of entertainment, but they are far less acceptable in the field of information. Moreover, lock-out strategies might turn out to be rather unpopular at the global level. The World Summit on the Information Society to be held in Geneva in December 2004 and again in Tunis in April 2005 will certainly devote considerable attention to this issue of a possible north-south digital divide.

A fourth issue, related to the third one, is to know about the effects that any lock-in of copyrighted content based on TPM-enabled DRM will have on competition amongst different systems. It does not seem too far-fetched to assume that effective lock-in of digital copyrighted content will favour, or even result in, far-reaching platform integration (i.e., vertical integration), which in itself could pose a threat to competition. Should such a development be prevented *ex ante*, i.e., from the outset, or only *ex post*, i.e., as a corrective measure once such vertical systems integration has become reality?

This leads us to the fifth issue regarding the institutional question as to who is supposed to make these decisions (even if only the decision to let technology and the market decide)? The traditional democratic institutional model places such decisions in the hands of national parliaments. This model is based on the assumption that these bodies represent the power and the will of the people and, therefore, are best suited to take the decisions which impact the population as a whole. However, in practice, the decision whether or not to implement TPM-based DRM in the area of digital copyrighted content will most likely be taken by producers. The tension which results from the fact that a decision affecting the public as such is taken by an extremely restricted number of players (in the music industry, there are no more than five majors world-wide), is reflected in the fierce opposition to be found in numerous public forums outside of the proprietary realm. But one may also ask to what extent the legislature – and in particular, the national legislature – is still the appropriate form in which the issues at stake can be properly decided. First of all, economic liberalists are of the opinion that there is nothing wrong with private decision-making as long as the market decides, and industry representatives have repeatedly pointed out that the decision-making process within big media enterprises largely resembles, if not substitutes for the parliamentary democratic decision-making process, due to the fact that big media companies represent a multitude of diverging interests. But nowadays, public law scholars likewise seem to favour self-regulation where the matter to be regulated proves to be too complex for the legislature to dispose of sufficient expertise to develop appropriate regulatory answers, or where, in view of the global nature of the problem, any national solution falls short of solving the problem anyway. Moreover, in view of the convergence of systems and services in the digital area, the possibilities for differentiated legislation are diminishing.

Therefore, in my opinion, legislatures – national, regional and international alike – would probably be well-advised to content themselves with providing a legislative framework which ensures that the technological and market forces can develop in an equilibrium, rather than trying to achieve all too detailed, and often all too technology-specific legislation.

Finally, it should not be overlooked that in making the choices Lessig talks about, we are no longer operating in an empty space. Rather, the outer limits of what can and what cannot be done at the legislative and at the practical level are prescribed by international intellectual property obligations. Here, in particular, the three-step test of article 9 (2) of the Berne Convention and of article 13 TRIPS[6] has to be observed, as well as the decision of the EU-legislature in the famous article 6 (4) of Directive 2001/29/EC, not mandated by the WCT, to give TPM overriding effect vis-à-vis all copyright exceptions and limitations in cases where the copyrighted material has been made available to the users online on contractually agreed terms. Of course, such limits are "man-made" and not "God-given", but in view of the tendency of ever-increasing protection, which seems to be almost inherent in the intellectual property system, it is difficult to see how these limits could be removed in the near future.

V. A look back to the present from the future?

Of course, a more radical approach might be the one presented by Jon Bing, who in essence has proposed not to look from the present to the future and ask how we might get there from here, but to look at the problem from the perspective of the future and ask how to get here from there. Of course, at first sight, such a reversion of positions may appear to be hardly more than a cardplayer's trick. But that does not do justice to the approach proposed. In essence, looking from the present to the future is an evolutionary approach, whereas looking from the future to the past is a visionary approach.

Such a visionary approach would take as its starting point the technological situation of the future and shape the law accordingly. Jon Bing described the main change in paradigm: the future digital and networked scenario will be one where emphasis is no longer on goods but, rather, on services. If this is accept-

[6] So far, see the WTO-Panel-Report of June 15th 2000 (United States – § 110 (5) of the U.S. Copyright Act), WTO-Doc. WT/DS 160/R, and in literature, e.g., *Lucas,* Le "triple test" de l'article 13 de l'Accord ADPIC a la lumiere du rapport du Groupe spécial de l'OMC "Etats-Unies – Article 110-5 de la Loi sur le droit d'auteur", in: Ganea et al. (eds.), Festschrift für Adolf Dietz, 2001, p. 423, and for an extensive overview Senftleben, Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law, 2004 (forthcoming).

ed, then the legal concepts should also focus on the service aspect, and no longer on the goods aspect. Analysed in this way, does it then come as a surprise that in my copyright lectures at the Technical University of Karlsruhe, a few semesters ago, my students with a computer science background, expressed their astonishment that copyright law is still built around the notion of reproduction rather than around the notion of communication? It was Adi Dietz who, in the discussion, came up with an interpretation of the German provision of private copying, suggesting that the use made of a particular copy, which was initially made as private reproduction, should decide the legality of its prior making, i.e., of the act of reproduction. In my opinion, this perfectly illustrates that we are witnessing, within copyright, the transition from reproduction to communication. On a practical level, the legislative perspective opened up by such a visionary approach would, of course, be to design a copyright act which is centered around the act of communication rather than around the act of reproduction and see how far we get in solving today's problems.

VI. Not to be forgotten: the authors

Finally, as much as we may seem to be on shaky ground, we should not forget the interests of the authors, the human creators. We should not forget their interests because as ALAI we are a society for the protection of the interests of individual, human creators. Nor should we forget the interests of human, individual authors, because, after all, they are the creative "source" of whatever might turn into a commercial product later on in the value-added chain.

Seen from this perspective, the decisive question is: which system, levies or DRM, and under what circumstances, serves the authors (which authors) better? Does the "cake" to be shared by authors and producers get bigger if we opt for DRM, or are we only faced with a question of how the piece of cake received by the producers and authors should be distributed amongst them? At any rate, it seems that the question of adequate participation of individual authors in the proceeds of the exploitation of their works cannot be disassociated from the issue of levies and/or DRM.

I believe that these issues raised and the questions asked should provide enough material for further debate, and lead us out of a situation which we might perceive as an impasse.