

# Debate/Débat

## **THOMAS DREIER**

I thank Henry Olsson for having contributed to the discussion in broadening the view and showing us the framework of the political arena. Now I open the floor for questions.

## **MICHAEL LEHMAN**

Michael Lehman, University of Munich and Max-Planck Institute.

If you are risking to move in circles as a lawyer, it is advisable to look into classical theories. One of the classical theories is the theory of the relationship of law and economics. It is at a theoretical meta-level, of course. If you study, for example, the works of Calabresi/Melamed (Harvard Law review, vol. 85, p. 1089 ss (1972)), you will come across some solutions to the question of whether we should go on with the levy systems or we should rather transfer more or less everything to DRM.

One of the fundamental questions is whether we should continue with property rights or whether we rather support liability rules. Looking at the history of copyright, we can see that private copying was not considered an infringement for a long time. Perhaps we could and should turn back the wheel in the digital world, remembering the old wisdom that one bird in our hands is better than two birds in the bush. There are new markets and new business models, but the levy system as a temporary solution could be compared to a situation in which you put a tax on the devices a thief may use for committing burglary, because you are unable to catch him. Putting a levy on equipment used for infringing activities instead of going after the infringers is certainly this kind of wrong solution.

The new markets in the digital world are oriented towards services, communication services. And one of the advantages of the European law in comparison with the US law is the existence and application of the new making available right introduced by the 1996 WIPO treaties, which is a service right. The United States, in this context, support the distribution right.

### **THOMAS DREIER**

I take this a comment rather as a question that would require answer. I give the floor for further questions or comments.

### **ANTOON QUAEDVLIEG**

I would like to put a question to Thomas Dreier. He suggested that we should leave more space to agreed commercial standards within companies and between companies. This may be a truly important development, and we should think about it. But is this a truly *new* way of solving problems? After all, it is not so uncommon that companies develop their own rules and standards. Another remark. Some problems can be solved appropriately by companies because they know commercial practices and the foreseeable impact of certain measures. But are they the best placed to pay sufficient attention to aspects like the freedom of information or the protection against unfair competition?

### **THOMAS DREIER**

In fact I do not want to suggest that we should go away from traditional forms of decision making by the legislators and leave everything to the interested parties. Simply the issue of who decides what in our society is quite an important general question, and it relates to our debate. We certainly may find some examples where certain rules and standards are developed outside the traditional constitutional, democratic framework, and yet they may be at the benefit of the society at large and yet may be accepted. The thinking of the academics, of course, is a little bit influenced in this respect by the popular book of Larry Lessig who draws our attention to the fact that the freedom we all enjoy in the digital environment has nothing to do with natural constraints; is not a God-given thing. Very much depends on the technicians who produce the hardware and on those who create the software. These may function in a way that they may infringe our personal freedoms. Thus, in this respect we cannot give complete free hand to those people alone.

### **Madelaine de Cock Buning**

We may find inspiration in the Dutch phenomenon of “conditional self-regulation”. This is a form of self regulation with certain safeguards. Although self-regulation can be a very efficient way of settling certain issues connected to advanced technologies, I have to agree with Antoon Quaedvlieg that we should take care that *all* important interests are taken into account in the self-regulatory process. Leaving out of certain interested groups that are for some reason not properly represented in the process (e.g., lack of organization) should be avoid-

ed, since this will lead to absence of acceptance of the outcome of the self regulatory process.

Most interested parties are involved in the process of “conditional self-regulation”, but in addition to them, also representatives of the government participate in the negotiations to safeguard non represented interests such as for example consumer interests. This should also be in the interest of the companies involved since if they work out a solution that is not acceptable for the consumers, that solution will not work in practice.

**THOMAS DREIER**

Thank you for this comment. Any other question or comment? Yes, I can see Adi asking for the floor.

**ADOLF DIETZ**

Henry Olsson made a remark in his impressive presentation on policy questions. It was about the effect of copyright in smaller countries and in developing countries. We always speak about the promotion of creativity, but it is truly right to ask the question of the promotion of creativity in which country or countries we are speaking about. If we consider this on worldwide level, of course, from the viewpoint of the availability of the fruits of creativity, it may be regarded irrelevant where, in which countries, creativity is promoted in an efficient manner. However, we cannot forget that copyright is supposed to also serve the interests related to creativity and culture in each individual country.

This leads us to the discussion on the issue whether the ever higher media concentration would not lead to an unhealthy level of homogeneity and a reduction of cultural diversity, and whether an increase of the level of copyright protection enjoyed by such media concentrations might not lead to a decrease of creativity at the world level.

**THOMAS DREIER**

Thank you Adi, for this comment. Since I cannot see other participants asking for the floor, I thank again all those who have participated in this summary debate, and I close this session.