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- Open Access and Legal Exceptions to Copyright: Towards a General Fair Use Standard?

Copyright is probably the main obstacle to open access in legal information

- Almost every source of legal information is subject to copyright
- almost every use of such information over the Internet constitutes an exploitation of copyright
- As a general rule, every exploitation needs an authorization of the author or of legal acquirers of copyright rights.

Some exceptions

- law texts (including not only laws approved by parliaments, but also regulations of public authorities) are not considered as copyrightable
- texts of decisions of legal courts are not protected by copyright.

Examples of sources subject to copyright

- doctrine contributions,
- databases of legal information
- abstracts of decisions, provided they are creative excerpts
- data, which are not copyrightable as such (ex.: like court decisions) may be collected into databases, which are subject to copyright or protected through “sui generis” rights

No payment, no access

- normally made possible under payment of fees, which are determined by the copyright owner
- that means that access to legal texts is made dependant upon contractual agreements about payment of compensation to copyright owners, provided the copyright owner is interested in such agreements and doesn't want to reserve to himself the exploitation of his exclusive right.

Copyright and market economy

- such a system is perfectly coherent to a market economy and to competition, where resources are in principle accessible under property rules and free contracts
- under this point of view, it's improper to say that access to legal information is made dependant upon payment of fees that are fixed by the copyright owner; and it should be more correctly stated that fees are fixed according to market and competition rules

The crucial point

- should the market perform its function to allocate the resources in the field of research
- Should a researcher who doesn't want or who can't pay for access to legal information be considered as an uncompetitive researcher, who should be expelled from market like any other manufacturing enterprise?
- The answer is not so simple, and is first of all a political answer.

Exceptions and limitations to copyright in the EU directive

- art. 5 of the 2001/28/EC on the protection of copyright in the information society.
- The enumeration of these exceptions is considered exhaustive, but not mandatory
- Member States are not obliged to provide for these exceptions in their national systems.
- the European system doesn't provide for a general fair use exception.

Free use and scientific research

- art. 5.3.a EC directive
- Member States may provide for exception to reproduction, communication and distribution right “for the sole purpose of illustration for teaching or scientific research [...] to the extent justified by the non-commercial purpose to be achieved”

Implementation of art. 5.3.a

- this rule is not mandatory for the Member States
- in some systems it has been implemented in a rather restrictive perspective.
- According to the Italian system only reproduction of excerpts or parts of copyrighted material is allowed.
- Under such a system, we are far from a general fair use exception in the field of scientific (and legal) research.

Some questions

- according to patent law a general free use for research purposes is provided, whereas no such use is provided in the field of copyright although technical research is in principle much more costly than (in our case) legal research
- Shouldn't scientific and legal research be ruled by uniform principles in the whole EC?

A general fair use standard proposal - objections

- Possible objections
 - some copyrighted works (such as doctrinal contributions, scientific reviews, legal databases) are essentially used in the world of research
 - a general free use of these works could deprive the authors of important sources of revenues, and after all could lessen the scientists' effort

A general fair use standard proposal – arguments

- the importance of intellectual property rights in fostering inventions and creations is probably overestimated
- the main reason to grant patents and copyrights lies in the interest in giving inventions and creations a market price, which they wouldn't have if they were accessible for free

A general fair use standard proposal – arguments

- the importance of copyright in fostering creation is especially questionable in the field of scientific legal research, where most researchers are publicly funded, and are interested in earning a good reputation in a wide community, rather than in making money from their research

To price or not to price, this is the question

- are we sure a price system should work in the field of scientific and legal research
- the interest of book editors is important, and copyright might be essential for them to recover investments in publishing. Nevertheless it's also true that printed books should be less and less important in production and dissemination of scientific knowledge, which can now be more easily accessible in electronic form

Rules and standards

- a general fair use standard is a standard, not a strict rule
- art. 5.5 of information directive “the exceptions and limitations [...] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.
 - It would be questionable the application of a general rule, which made free the reproduction and access to copyrighted works for scientific purposes.

The legitimate interests of the rightholder

- Probably it's a legitimate interest of the rightholder, that his work may not be freely reproduced in a physical form,
- The situation is different when legal texts are made accessible in electronic form, inside the circles of researchers and students of universities and other educational institutions, through electronic communication networks

Price system and public funding of research

- public institutions pay three times the costs of research: the first time as they pay the researchers for their work, the second time when they acquire books and databases, the third time when they subsidize researchers to pay the cost of access to texts and databases.

The interest in recovering investments

- Private enterprises could in any case recover their investment through contractual means
 - Typically, making their databases disposable under payment agreements.
- Under this system, the use and the extraction of data from databases legally acquired by public research institutions for scientific purposes should in principle be free.
 - And even the need of public institutions to pay for databases should be probably reconsidered, when these databases have been created with contributions of publicly funded researchers.

Conclusion

- research in the legal field is actually more hindered than fostered by copyright law.
- the introduction of a general fair use standard is suggested
- Th standard should be modelled according to article 5.3.*a* information directive, which should be made mandatory for all of the Member States, and interpreted according to the general principles of art. 5.5.

Market and research

- copyright performs its function in a market context, where investment and resource allocation are determined by prices and disposability of money
- disposability of money is not necessarily a good measure of efficiency and resource allocation in the field of research.

Thanks

- For questions and informations
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