Access control of freedom of access?

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Access Control or Freedom of Access?

(comment)

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1. Introduction

As accurately described by Christoph Beat Graber in the preceding contribution, the advent of digital rights management systems (DRMs) has radically extended the control of copyright owners over their digital content. In the digital era, content providers are indeed in a position to impose restrictive conditions of access to and use of the digital content upon their users by a combination of technological and contractual protection mechanisms.

By contrast, in the analogue/pre-digital world (of books, paintings, LPs, etc.), the copyright owners were generally not able to control the access to their works or the conditions of their use. This, however, does not mean that the issue of access in general, and most particularly, access to information and the related issue of the balance between copyright protection and access to information was not addressed in the pre-digital copyright philosophy.

Quite the contrary, this topic was and still is a core tenet of a sound copyright policy with respect to the definition of the object of protection (i.e. what is protected by copyright law?).

The principle is (or should be) that information shall not be protected by copyright law. Free access to information as protected by the human rights of freedom of information and expression, shall not be prevented by (and be in conflict with) copyright law. Information frequently does not reach the threshold of originality and creativity in order to be considered as a literary or artistic work deserving copyright protection. Information generally rather represents mere factual data or ideas which are not protected by copyright and which stand in contrast to the expressions of such ideas that are potentially copyrightable. This distinction is generally referred to as the copyright’s

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1 See ANRÉ LUCAS, Droit d’auteur et numérique, Paris 1998, at p. 26 («Le droit d’auteur ne saisit que des œuvres, pas des informations. Or toutes les informations ne sont pas des œuvres et ce n’est que par une approche exagérément réductrice qu’on peut ramener les œuvres à des informations»).
idea/expression dichotomy. As emphasized by the Supreme Court in the famous Harper & Row Publishers Inc. v. Nation Enterprises decision (to which Christoph Graber also refers in his introduction), the «copyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of acts while still protecting an author’s expression’». Consequently, the basic policy of copyright law is that it shall not block access to information.

It can further be noted that the issue of access to a protected work was already relevant in the pre-digital era for establishing the proof of copyright infringement (under U.S. copyright law) to the extent that the success of a copyright infringement claim frequently depended on the showing of copying by the alleged infringer, whereby such proof could be brought forward by the circumstantial evidence of access to the allegedly infringed work. As a result of this, the unavoidable interplay between access (to information or to protected content) and copyright protection has always been one of the fundamental copyright law policies. However, recent developments, which are not related to the digital (r)evolution, have shown that copyright protection could (unduly) extend to protect informational content and thus could endanger the freedom of access to information. In some instances, corrective measures have proved necessary, as this was evidenced by the decisions of the European Court of Justice in the Magill and IMS Health cases, which introduced significant exceptions to the copyright monopoly based on competition law arguments for the purpose of granting access to informational content.

2. Moving from Copyright to Access Right

In spite of the importance of the concept of access in the pre-digital copyright thinking, this concept has become substantially more acute in the digital world. Controlling access to works (through DRMs) has indeed become a key concern for content owners and content providers in the on-line digital environment. As a result of this, copyright policies have focused on the legal protection of access to works. As noted by Jane Ginsburg, «as we move to an access-based world of distribution of copyrighted works, a copyright system

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4 Joined Cases C-241/91 P and C-242/91 P, RTE and ITP v. Commission [1995] ECR I-743; Case C-418/01, IMS Health v. NDC Health (Judgment, April 29, 2004). In the context of these two cases, see infra Dorothea Senn’s contribution to this volume.
that neglected access controls would make copyright illusory». The advent of the network economy emphasizes indeed the importance of access in the system of copyright law. In a world where copyrighted works will be accessible on-line, access control may well become the most important issue for copyright owners, to the extent that some have referred to a new access right. This evolution could thus be viewed as a shift from copyright to access right. While the control over the making and distribution of material copies of works was critical in the past, the key question in the digital environment is the issue of access control.

A new right of access has thus been – indirectly – introduced in the copyright legal environment in the course of the implementation of the WIPO Internet Treaties by the adoption of a new legal protection against the circumvention of technological protection measures. Even though the relevant provisions of these treaties do not specifically address the issue of access control (i.e. these provisions do not specifically require the implementing member states to provide for legal protection against the circumvention of access control

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7 See RAYMOND NIM~IER, Information Law § 4.17, New York 2002, at pp. 459 seq. («Concepts about distributing a work in copies or transmitting a work as a primary exclusive right under copyright law reflect one view of marketing and distribution. That view suggests that the principal economic interests of a copyright owner focus on the multiple distributions. These characterize an environment that consists of distribution in tangible form, fixed to disks, pages, and the like. In cyberspace, that mass market will not necessarily be the norm. Instead, it may be much more important to be able to control and charge for access to copyrighted materials located on a network system»).

8 GINSBURG, at p. 13 (noting that the access right «respond[s] to what is becoming the dominant way in which works are in fact exploited in the digital environment»).

9 GINSBURG, at p. 3.

10 The circumvention of technological protection measures is made unlawful by Article 11 of the WIPO Copyright Treaty (WCT), December 20, 1996, 36 I.L.M. 65 (1997) which provides: «Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law». A similar provision is set forth in Article 18 of the WIPO Performance and Phonogram Treaty (WPPT), December 20, 1996.
technologies), some national implementing regulations, most significantly the U.S. Digital Millennium Copyright Act (DMCA), and the European Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, have introduced a legal protection against the circumvention of access control technological protection measures. This new ‘layer’ of protection (which comes in addition to the legal protection of the copyrighted work and to the technological protection against circumvention) has thus created an ‘access right’ for the benefit of copyright owners.

Recognizing such an access right to copyright owners is, however, not without risk. If copyright owners are granted too extensive a right, they might then control each and every use of their works in a way that would extend the protection far beyond what is possible under the pre-existing copyright regime. It has therefore been convincingly argued that the new access right should also be submitted to the general limitations of copyright law, such as fair use. In this sense, one might consider whether users should benefit from a ‘fair access’ exception to copyright protection. This risk of overprotection resulting from too broad an access right was particularly felt in the context of adoption of legal protection against circumvention of technological protection measures both in the U.S. and in the European Union. Under the (complex) regime adopted in the DMCA, the circumvention of an access control technology in order to access a protected work for certain fair use purposes will not be considered unlawful in specific cases defined narrowly in the DMCA (or in the rule-making system implemented under it).

Similarly, the system adopted in the Directive 2001/29/EC provides for the obligation of copyright owners to make available to the beneficiaries of specific copyright exceptions the means to enjoy these exceptions. However,

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13 Ginsburg, at p. 25.
16 17 U.S.C. § 1201(a)(1)(B) and (C).
17 Article 6(4) subparagraph 1: «Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(c) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and
this obligation which is imposed on copyright owners does not apply when the protected works are made available for use on demand (in which case the copyright exceptions are simply not applicable). Furthermore, even outside of on demand use, this obligation is imposed only provided that the user had legal access to the work at issue (which practically means that the user has paid to gain access to the work).

The new legal regimes which have created the access right (by introducing a legal protection against the circumvention of access protection measures) have built-in (adaptive) systems providing for limitations of the protection that they grant to copyright owners. However, these legal frameworks do not create any general right of access to protected content for the benefit of the public which could be based on free speech arguments.

The question is thus whether copyright owners could be legally forced to grant access to their DRM protected content by application of free speech arguments beyond the (narrow) exceptions to the new protection against circumvention of technological protection measures. In this context, it can be noted that these novel legal regimes have carefully specified that the new layer of protection did not affect the protection of freedom of expression/freedom of speech. Recital 3 of Directive 2001/29 thus provides that «[t]he proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest». Similarly, 1201(c)(4) DMCA states that «[n]othing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products». These general statements do not, however, specify in any way how the balance between copyright protection and freedom of expression and information is to be found in reality.

In any case, it appears quite unlikely de lege lata that free speech arguments may be successfully invoked in order to gain and justify access to protected content (i.e. by making it lawful to circumvent technological protection measures) beyond the reach of the restrictive exceptions and limitations built-in and defined in the statutes themselves. In this context, it can be noted that courts are normally reluctant to apply exogenous legal factors (i.e. legal

where that beneficiary has legal access to the protected work or subject-matter concerned».

18 Article 6(4) subparagraph 4: «The provisions of the first [cited above in the preceding footnote] and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them».

19 See supra note 12.
factors outside copyright law such as, for instance, constitutional rights) to correct a potential imbalance resulting in a specific case from application of copyright regulations and are also – more generally – reluctant to decide on major policy issues in the absence of guidance from the legislature.\textsuperscript{20} As emphasized by Christoph Graber, such policy decisions must be made by the legislature and not by the courts. This approach was recently confirmed in a German decision in which the Bundesgerichtshof (BGH, Federal Supreme Court) stated that the balance of interests between copyright protection and copyright exceptions must be made within – and by application of – copyright law and not by reference to external factors such as constitutional rights (including freedom of expression).\textsuperscript{21} In other words, the principle is of certain primacy of the protection of property interests of copyright owners (it being noted that copyright is a property right) over the protection of free speech. As stated by the 9\textsuperscript{th} Circuit, «[t]he First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office».\textsuperscript{22} As adapted to the digital copyright environment, this means that the First Amendment is not a license to access and use a protected content without the consent of the copyright owner.

It should, however, be pointed out that free speech arguments have already been invoked for fighting against allegedly excessive protection resulting from the new legal protection against circumvention of technological protection measures. By way of an example, a lively debate took place in the United States at the time when one of the first court cases dealing with the DMCA was decided. In that case, the defendants argued – without success – that the on-line distribution of a computer code (DeCSS\textsuperscript{23}) which permitted to circumvent the technological protection measures of DVDs and thus violated the anti-circumvention provisions of the DMCA was protected by free speech (\textit{i.e.} by the First Amendment).\textsuperscript{24} This argument was, however, rejected by the courts.

Irrespective of this, and as stressed by Christoph Beat Graber, the violation of human rights can be claimed only in the case of governmental interference (such as copyright regulations). Consequently, arguments derived from a

\textsuperscript{20} This view is not shared in the legal literature; for a broader application of human rights and constitutional rights as a factor limiting the scope and reach of copyright law, see CHRISTOPHE GEIGER, Droit d'auteur et droit du public à l'information, Paris 2004.


\textsuperscript{22} \textit{Dietemann v. Time Inc.}, 449 F.2d 245, 249 (9th Cir. 1971).

\textsuperscript{23} CSS being Content Scrambling System.

\textsuperscript{24} See the decision of the 2\textsuperscript{nd} Circuit of November 28, 2001, \textit{Universal City Studios Inc. v. Corley}, 273 F.3d 429 (2d Cir. 2001), available at www.eff.org/IP/Video/MPAA_DVD_cases/?f=20011128\_ny\_appeal\_decision.html (last visited February 1, 2005).
potential violation of human rights could only be invoked against the application of legislative acts in order to try to obtain access to protected content. By contrast, no violation of human rights could be claimed against technological measures preventing access to content which would not be protected by copyright because of the absence of governmental interference. In this perspective, it is clear that the legal protection against circumvention of technological protection measures, as introduced in copyright statutes, which have (indirectly) created a right of access, is limited to the protection of works and content protected by copyright law. This means that such a copyright specific protection system does not apply to content which would not be protected by copyright law (for instance, because it has fallen into the public domain). However, other general legal protection mechanisms could still apply to protect access to digital content irrespective of whether such content is protected or not by copyright law. Such is most particularly the case of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce in the Internal Market, which creates a certain right of access to the beneficiaries of the protection. Such legal protection could thus be conceived as a governmental action and interference and could consequently potentially give rise to claims of human rights violations.

In spite of this, there appears to be very limited room for granting access to copyright protected content based on constitutional arguments deriving from freedom of expression and/or freedom of information. In this context, it should be noted that the German, French and Austrian court decisions commented by Graber relate essentially to the issue of unauthorized (and potentially infringing) use of protected content by third parties (such use going allegedly beyond the limits of copyright exceptions, such as the exception for quotation), and do not relate to the issue of unauthorized access to the relevant work. To this extent, these court decisions do not address the very legal issue of access to protected works which is faced in the on-line digital environment. It is indeed quite recently that the conflict between access to information (and not use of information) and copyright policies was raised.

In view of this situation de lege lata, the question is to define what the potential legislative methods for granting access to a protected content de lege ferenda could be.

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3. Potential Solutions for Granting Access to Content

Christoph Beat Graber mentions that the new right of access to protected content could be inspired by the rules of access existing in public broadcasting law (among other proposals), i.e. the European Convention on Transfrontier Television (adopted by the Council of Europe) and the European Community's Television Directive under the so-called «major event rules». Both of these instruments provide indeed for a right of public access to the broadcasting of certain important events (e.g. sports events). Under such circumstances, these events must be publicly broadcasted and made broadly accessible (in contrast to being exclusively broadcasted on private pay-TV channels). It has been proposed that these regulations could be adopted as models for other categories of valuable content, such as «scientific source material» and «works of art» to which access should be granted. In spite of its appeal, such a proposition might prove quite problematic to implement, at least in the cultural sector, as it will be difficult for a legislative, regulatory or judicial body to define which works (or categories of works) should be considered sufficiently important as to justify public access to them. Such an undertaking would most likely be considered a demonstration of cultural dirigisme, not compatible with democratic thinking (nor with freedom of expression). Even by assuming that such a project might be conceivable at a national or regional level, its feasibility at the global level appears quite hypothetical. Consequently, such a proposal may not offer the best approach to solve the issue at stake.


29 HUGENHOLTZ, at p. 89.

30 HUGENHOLTZ, at p. 89 («If legislatures were to contemplate legal measures to cure the negative effects of the wide-scale application of trusted systems, and to safeguard the public domain, comparable legislation outside the field of broadcasting law might be considered, for example, a right of access to (socially, culturally or economically) 'important' scientific source material, works of art, etc.»).

31 One can furthermore imagine that works of art which might potentially be considered as 'global values' will be available from a multiple source of information, so that it is quite likely that fair access to them will be granted in any case without any need for a legislative intervention, see the complete works of Shakespeare at: http://the-tech.mit.edu/Shakespeare/.
In any case, it should be emphasized that any solution should not be limited to content protected by copyright. The issue of access will indeed apply to all types of content in the digital environment, whether or not the content at issue is protected by copyright law.\(^{32}\) The claim of fair access to the general public might actually appear even stronger for public domain materials or for «thin copyright works»,\(^ {33}\) as the legitimacy of the position of the content provider appears weaker, given that it does not rely on any (or at least not on a strong enough) intellectual property right. For instance, this issue of fair access might arise in the case of a database of old public domain photographs. The question then will be whether the database producer could impose any kind of technological and contractual access and use restrictions upon users?

Considered from a broader perspective, the need to find a solution to the issue of fair access to content protected by DRMs should be analysed jointly with the need to promote a broad public access to the Internet and to digital content that has been one of the key principles of the political agenda for the regulation of the information society.\(^ {34}\) In this context, it is quite obvious that obtaining a connection to the Internet without being able to access some of its most valuable content (\textit{i.e.} that protected by DRMs) would be quite useless. It is therefore only by granting fair access to valuable content that the digital divide between the ‘infrich’ and the ‘infopoort’ might be avoided.\(^ {35}\) In this perspective, collecting societies might have a significant function in avoiding such a divide.

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\(^{32}\) KENNETH W. DAM, Self-Help in the Digital Jungle, in COOPER DREYFUSS/LEENHEER ZIMMERMANN/FIRST (eds.), Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society, Oxford/New York 2001, at p. 103 and p. 117 («In one important sense, an analysis of self-help issues as copyright issues present much too narrow a framework. Perhaps the academic writing revolves around copyright and fair use because copyright doctrine is widely taught and understood. But with self-help systems, content is going to be charged for whether or not the content provider has any intellectual property rights in the content»).

\(^{33}\) Ginsburg, at p. 19.

\(^{34}\) See Recital 2 of the Directive on Electronic Commerce which provides that «[T]he development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, \textit{provided that everyone has access to the Internet}» (emphasis added by the author).

4. Collecting Societies and DRMs

The key importance of collecting societies in today’s copyright system is obvious. As noted by Graber, collecting societies allow an efficient management of copyright for the benefit of both users and rightholders. The future of collecting societies is however difficult to predict: the widespread use of DRMs is viewed as a threat to the activities and functions of collecting societies. With DRMs, the rightholders can indeed negotiate directly in an automatic processing system with their users and can also be paid directly. From this perspective, collecting societies would not have as vital a function as they used to have. However, the concern has also been expressed that DRMs would only be available to and used by a minority of powerful rightholders, and not by the majority of rightholders for which the system of collective rights management would still be critical in order to protect their interests. Consequently, it is unlikely that collecting societies will lose their importance in the predictable future. Collective societies would actually also have an interest in using DRM solutions which would give them the ability to control and monitor the use of their works, apply different fees depending on the place of use of the works and allocate the royalties earned to the local rights owners in various jurisdictions. DRM solutions could thus be very useful to collecting societies, and not only to individual rightholders. From the perspective of users, collective societies may have the advantages of offering reasonable tariffs and conditions for the use of works, such tariffs and conditions being generally subject to negotiations between the interested parties and then approved by a governmental authority. In addition, even though collective societies may not be formally obliged to contract with a potential user wishing to use a work – there is no obligation to contract under Swiss law, even though such an obligation may exist under other legal regimes, such as is the case in Germany (as noted by Graber) –, they still in practice generally accept to authorise such use (against payment of a fee). Collective societies are thus less likely to be felt as blocking access to content in contrast to individual rightholders (who may be more tempted to refuse such grant of access or impose unreasonable financial terms for such use). Collecting societies could thus be considered as fostering access and as

37 See ALFRED MEYER, DRMS können Verwertungsgesellschaften nicht ersetzen, mediadex 2004, p. 67. See also supra the contribution of Alfred Meyer to the present volume.
38 KÜNZI, at p. 797.
contributing to bridging the gap between ‘inforich’ and ‘infopoor’ (this could, for instance, be achieved by the adoption of tariffs adapted to each of these types of users and implemented by way of a price discrimination system based on DRMs).

Other advantages of collective management of rights have also been discussed. The opinion has in particular been expressed that collective rights management could be an appropriate answer to the overextension of the scope of copyright protection in the digital world, provided, however, that collective management solutions would be made compulsory to all authors.

On the other hand, the risk has been identified that copyright owners could potentially obtain a double remuneration if standard levies continue to be payable by users on blank data carriers (which are used to save protected content), on a lump sum basis (such fees being payable via collecting societies) and if cumulatively individual fees are charged by copyright owners to the users on the basis of DRMs (pay per use). In that case, rightholders would obtain a double remuneration, one being paid to a collecting society and the other to them directly via DRMs. This situation would be unfair to the users and may lead to the need to define the relationships existing between the various potential remuneration systems for copyright owners (i.e. shall such regimes coexist?).

In any case, as noted by Graber, the system of collecting societies aims at defining and maintaining a balance between rightholders and users. It is, however, important to emphasize that control mechanisms are needed to make sure that such balance is maintained. It is indeed a reality that collective rights societies naturally tend to protect the position of rights owners against the one of users of protected works. Judicial remedies are thus sometimes needed to limit the activities of collecting societies. For instance, in a recent case, the Swiss Supreme Court held that a collecting society could not validly extend the scope of protection of copyright law (by claiming the payment of a fee for the use of copyright protected works which was within the scope of an exception to copyright protection).

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40 On price discrimination for information products made available on the Internet, see CARL SHAPIRO/HAL VARIAN, Information Rules, Boston 1999, at pp. 37 seq.

41 GEIGER, at pp. 333 seq.

42 GEIGER, at p. 334.


44 ATF (Arrêts du Tribunal fédéral) 127 III 26.
The interrelation between collecting societies and DRMs is, however, still at a very early age. It is thus very difficult to predict how it will evolve, even more so because of the continuously changing technological environment. In spite of this uncertainty, it seems quite unlikely that the long and rich tradition and valuable know-how of collecting societies will be abandoned merely as a result of the use of DRMs. In any case, even though the technological evolution is obviously hard to forecast, it is important to start the debate about these issues today.