Copyrights in the digital environment

Alexandra Bensamoun, professor of private law, Rennes 1 University

Abstract:
Copyrights in a digital environment provide a field for regulation and for observing changes in legal rules — changes stemming from a new balance of power. The approach to this topic must be pluralist. It must mix "soft law" (for making rules more flexible but so as to involve stakeholders) and "hard law" (for moving beyond the obsolescence of legal regulations in order to make stakeholders accountable).

Shifting the balance of power

The digital environment has led to a new balance of power with implications for the value chain. Traditionally, the point of equilibrium in copyright law was reached through the actions of three parties: the "authors" of intellectual property (the focus of French law); producers or publishers (under contract with authors); and the public. The appearance of new players has jeopardized this equilibrium. Technical intermediaries on the Internet and, above all, Web platforms now come in between authors and the public, or even in between the producers/publishers under contract with authors and the public. Platforms are sometimes used for counterfeiting or even for posting unauthorized contents. Traditional norms regarding intellectual property have difficulty being applied to websites and networks.[1]

Rewriting or cowriting the rules?

Calls for changing the law have naturally arisen out of the fact that the law is no longer adapted to the digital realm. This opens two approaches, which sometimes merge: rewrite or co-write the rules?[2] The first approach leads to modifying existing laws in order to adapt them to the digital environment, by, in particular, holding parties liable. This legislative approach is longer, more procedural and harder to use. Furthermore, it can be pertinent only starting at the European scale; evidence of this comes from the closing of Google News in Spain after the passage of a new publishing law. The second approach seeks to voluntarily commit parties to actively oppose copyright infringements. This commitment takes the form of charters, codes of practices or other texts of "soft law".

[1] This article has been translated from French by Noal Mellott (Omaha Beach, France). The translation into English has, with the editor's approval, completed a few bibliographical references. All websites have been consulted in April 2019.

[2] An official "participatory" website was set up for discussion in France of a bill of law on a "digital republic", for what was announced as the "co-creation of the law". For a critical analysis, see BENSAMOUN (2017, p. 65).

Contrary to expectations, these two approaches are equally precarious. It is not easy to lay hold of the digital realm. For one thing, digital technology is a vector of progress, and public authorities do not want to restrain innovation. For another, it is a vector of freedom, and the Internet, an awesome forum for free speech. Intellectual property rights, since they entail restrictions, are presented as fatal to freedom. Finally, digital technology has given birth to powerful firms — whose initials form an acronym: GAFA(M) — sovereign firms with a bargaining (and financial) power comparable to nation-states' (BLANDIN-OBERNESSER 2016).

Regulation and pluralism

These various factors imply adopting a pluralist view about regulating intellectual property rights in a digital environment, this being part of a deeper trend for renewing the sources of the law (BENSAMOUN 2011, p. 279). Herein, "regulation" is taken in its broadest sense as referring to all sorts of "rules" and "rule-making", and not just to "regulations" which are but one of the legal instruments available (FRISON-ROCHE 2001, p. 610).

The two aforementioned approaches — soft and hard law — do not exclude but, instead, complete each other. While soft law, with its voluntary participation by players in digital technology, has considerably grown in recent years, hard law, which has a binding force on these players, has trouble being updated and rewritten.

Regulating intellectual property rights in the digital environment means acting on the balance of power, even shifting it, by involving new players to voluntarily make commitments (soft law) and by holding all players responsible under reforms to be made in hard law.

Soft law and the balance of power: Involving new stakeholders

As the approach centered on lawmaking has been criticized, the sources of rules and regulations have multiplied — overlapping sources completing and competing with each other. After turning away from the pyramidal paradigm, rule-making now takes place through a network (OST & VAN DE KERCHOVE 2002), but the sources of these rules are juridically hesitant, dubious: ethical codes, guidelines, charters, etc. Copyrights have been swept up in this trend, which, advocating the flexibility of the law, relies on a dialog between the parties. The law is no longer imposed on them but negotiated by them. This trend has revealed the inadequacy of existing laws for handling online infringements of intellectual property rights (BENSAMOUN & ZOLYNSKI 2011, p. 59).

Soft rules to stanch the sources of infringements on intellectual property rights

The "soft law" approach to copyrights was opened in the United States as early as 2007 with the "Principles for user generated content services" (SIRINELLI 2009), which stakeholders (copyright-holders and platforms with user generated contents) signed to deter infringements by using *ex ante* techniques to filter contents uploaded by users. In France, the first example of this approach was in the field of patents and trademarks in December 2009: the "Charter of the fight against counterfeiting on the Internet", signed by patent-holders and some service-providers and e-commerce platforms. This charter reinforced cooperation between these parties in view of more actively detecting "counterfeits" offered for sale, removing them from online platforms, and taking technical measures to prevent recidivism. Similarly, platforms and the holders of intellectual property rights signed a "memorandum of understanding" (*MoU*) in May 2011 at the European level.

Soft rules to stanch the flow of income to websites that violate intellectual property rights

In addition, stakeholders have to be involved in the efforts to stanch the flow of income toward Internet sites with unlawful practices. To fight against counterfeiting and piracy, the European Commission has pursued a strategy of "following the money trail".[3] The intent is to "hit in the wallet" the sites where infringements are massively committed. Many of these sites have their headquarters abroad and are nomadic. Furthermore, their main source of revenue comes from advertizing or subscriptions (via payment cards). France transposed the Commission's recommendation in March 2015 in the form of the "Charter of good practices in advertising for upholding copyrights and related rights" signed by the representatives of advertisers and the holders of intellectual property rights (music, leisure software, video games, books, films, etc.) (BENSAMOUN 2016, p. 182). Concrete actions have been conducted to share information among stakeholders in order to detect and ostracize so-called e-business "offenders". For reasons of image, advertisers have no interest in being associated with offending sites. The appointment of a monitoring committee has made this approach permanent. Another committee oversees similar arrangements for payment systems. At the European level, a "Memorandum of understanding on online advertising and intellectual property rights" was released in June 2018.

Evaluating texts of soft law

The soft law approach has several advantages. Support by the parties concerned means that soft rules will be effective. In this case, rules are no longer vertical but horizontal. Drafted by stakeholders, they are closer to needs in practices. Though sectoral, they may, if necessary, reach over borders. However this efficiency should not prevent us from objectively evaluating these codes of conduct, guidelines, charters, etc.

When evaluating texts of soft law, questions arise about their legitimacy and effectiveness. Negotiated rules are rules that concentrate power. Stakeholders make the rules for themselves, their hands not tied by any democratic process. Moreover, the procedures they set up are often opaque, this opacity vouchsafing efficiency. This process casts doubt on the legitimacy of these soft rules. The parties involved have neither the competence nor the authority that would allow them to claim legitimacy.

Nonetheless, public authorities (national or supranational) have validated this approach and even encourage it. These texts of soft law are very often signed in a solemn, official setting. The texts for fighting against infringements on intellectual property rights have been drafted at the bidding (more or less a threat) of officials. Public authorities delegate, we might say, to private parties the power of rule-making. This privatization can be a cause of concern since it means that the state is withdrawing from intervention.

[3] Part of this strategy was, too, the adoption of the charters announced in: European Commission (2015) Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Towards a modern, more European copyright framework", 9 December 2015, COM(2015) 626 Final.

Finally, we can be dubious about the effectiveness of rules that lack binding force. Does this mean that they provide no grounds for court actions? Although most of these soft texts forbear from any binding force over the application of the commitments made by signatories, this characterization is not necessarily that of the parties themselves. Gentlemen's agreements,[4] unilateral contracts or engagements (GHESTIN *et al*. 2018), even quasi contracts founded on a recipient's legitimate belief… several formulas have been proposed to provide juridical grounds for this body of soft law. Recall the now extinct formula in French law of the "good family father": the diffusion of virtuous behaviors might lead to standards that could serve as a reference for judges, and this would make the text of soft law binding.

Hard law and shifting the balance of power: Holding new stakeholders responsible

Copyrights and e-commerce

Applying (or challenging) copyrights in the digital environment comes down to an opposition between two EU directives.

First of all, the so-called "InfoSoc" directive[5] regulates the application of copyright law on the Internet and is now considered to be "common law".[6] This directive binds the public, the users of copyrighted material, to respect the author's monopoly, specifically an author's rights over the reproduction and communication of copyrighted material. Any use of copyrighted material falls, in principle (apart from a few exceptions), under this protection.

However the so-called e-commerce directive[7] by, in a way, suspending this opposability for certain parties, provides for a "conditional" liability of, in particular, web hosting services (Article 14). This suspension is based on the threesome (borrowing from M. Vivant) of "knowledge, power, inertia". These services cannot be held liable for the posting of unlawful contents unless they are aware of the unlawfulness of the contents (notification) and they have the power to delete the contents but have not done so. In the absence of legislation providing otherwise, the platforms with user uploaded contents (UCC) have been able to benefit from this preferential treatment.

---

[4] Cass. com., 23 January 2007, n°05-13.189: *Bull*. IV, n°12; *D*. 2007, p. 442, obs. Delpech X; *RTD civ*. 2007, p. 340, obs. Mestre J. & Fages B.; *RDC* 2007/3, p. 697, note Laithier Y.M.; *CCE* 2007, comm. 54, obs. Caron C. See, too, the examples cited by Oppetit (1979, p. 107).

[5] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[6] Court of Justice of the European Union (CJEU), 22 December 2010, affair C-393/09, point 44: "*it is appropriate to ascertain whether the graphic user interface of a computer program can be protected by the ordinary law of copyright by virtue of Directive 2001/29*". Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0393.

[7] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0031.

Internet and the value chain

Business models have obviously changed since the adoption of the e-commerce directive. Its preferential treatment removes the burden of responsibility from the parties who profit from using copyrighted material (the profits coming mainly from advertisements related to their activities). Furthermore, competition is, in fact, distorted between those who pay royalties (subscription platforms like Spotify or Deezer) and those who think they are not subject to copyright law (UUC platforms like YouTube or Viméo). The former turn over from 70% to 80% of their sales from streaming or downloading to the music industry, whereas the latter only pay 20% to copyright-holders (FARCHY & MOREAU 2016).

This shift of the value added by copyrighted material from copyright-holders to platforms has spurred thought in Europe about this transfer of value or "value gap": "*creative works are one of the main sources nourishing the digital economy and information technology players such as search engines, social media and platforms for user-generated content, but virtually all the value generated by creative works is transferred to those digital intermediaries, which refuse to pay authors or negotiate extremely low levels of remuneration.*"[8] This is the subject of Article 13 (and Recital 38) of a proposed directive on copyright law in a single digital market, which has two aspects (BENSAMOUN 2018). First of all, make copyright law, once again, applicable to the platforms that both communicate to the public copyrighted material uploaded by their users and actively promote the copyrighted material or optimize its presentation. This implies licenses with copyright-holders. Secondly, force such hosting services to undertake actions for upholding intellectual property rights.

For the future…

In 2019, the proposed directive will still be under discussion. Several versions are circulating. According to some European MPs, lobbying has seldom been so intense on a text that, ultimately, has as its primary objective to protect works of culture (LAPOUSTERLE 2009). Without knowing what will remain in the final directive, one thing is for sure: the stakes in regulating intellectual property rights have become fundamental in the digital environment.

[8] Quoted from the European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (2014/2256(INI)) available at http://www.europarl.europa.eu/doceo/document/TA-8-2015-0273_EN.html.

References

BENSAMOUN A. (2011) "Les mutations de la norme en droit d'auteur (réflexion sur les sources)" in N. MARTIAL-BRAZ, J.F. RIFFARD & M BEHAR-TOUCHAIS (editors), *Les mutations de la norme. Le renouvellement des sources du droit* (Paris: Economica Études Juridiques).

BENSAMOUN A. (2016) "Droit souple et lutte contre la contrefaçon en ligne", *Dalloz IP/IT*, 182.

BENSAMOUN A. (2017) "Réflexion méthodologique sur la norme. L'exemple de la 'République numérique'" in F. GAULLIER (editor) *Liber Amicorum en l'honneur de Gilles Vercken* (Paris: Cabinet Vercken et Gaullier).

BENSAMOUN A. (2018) "Le *value gap* ou le partage de la valeur dans la proposition de directive sur le droit d'auteur dans le marché unique numérique", *Entertainment | Droit, Médias, Art*, 4, pp. 278-287.

BENSAMOUN A. & ZOLYNSKI C. (2011) "La lutte contre la contrefaçon sur Internet: les sources de l'implication des prestataires techniques", *Revue Lamy droit de l'immatériel*, 75.2011, pp. 59-65.

BLANDIN-OBERNESSER A. (2016) Editor of *Droits et souveraineté numérique en Europe* (Brussels: Bruylant).

FARCHY J. & MOREAU F. (2016) *L'économie numérique de la distribution des œuvres et le financement de la création*, September, report to the Conseil Supérieur de la Propriété Littéraire et Artistique (Paris: CSPLA) available via http://la-rem.eu/wp-content/uploads/2017/03/Economie-nume%CC%81rique-financement-de-la-cre%CC%81ation.pdf.

FRISON-ROCHE M.A. (2001) "Le droit de la régulation", *Recueil Dalloz*, 7, p. 610.

GHESTIN J., BARBIER H. & BERGÉ J.S. (2018) *Introduction générale. Droit objectif et droits subjectifs, sources du droit* (Paris: LGDJ) 5th. edition.

LAPOUSTERLE J. (2009) *L'influence des groupes de pression sur l'élaboration des normes* (Paris: Dalloz Nouvelle Bibliothèque de Thèses).

OPPETIT B. (1979) "L'engagement d'honneur", *Recueil Dalloz*, p. 107 ff.

OST F. & VAN DE KERCHOVE M. (2002) *De la pyramide au réseau? Pour une théorie dialectique du droit* (Brussels: Publications des Facultés Universitaires Saint Louis).

SIRINELLI P. (2009) "La responsabilité des prestataires de l'Internet. L'exemple des sites contributifs", *Revue Lamy droit de l'immatériel*, 49 (supplement) pp. 78-83.