ALAI Congress 2017 in Copenhagen Copyright, to be or not to be

Responses prepared by Sebastian Felix Schwemer, Postdoc, PhD, and Jørgen Blomqvist, Honorary Professor, PhD, Centre for Information and Innovation Law, Faculty of Law, University of Copenhagen

Questionnaire

The traditional justifications for copyright and related rights

In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

The current Danish Copyright Act (ophavsretsloven) does not present any explicit justification for copyright protection. The preparatory works of the Danish Copyright Act of 1951 (as well as in the context the earlier legislation) frequently refer to the Berne Convention and implicitly to its justifications, i.e. economic incentives and moral justifications. In preparatory works to the Danish Copyright Act of 1995, the Danish Ministry of Culture refers specifically to balancing of the two societal sides of copyright: on the one hand, the economic incentive function of copyright for the right holder, and, on the other hand, the societal interest in the access to and use of copyright-protected works.

The first predecessor of a copyright act in Denmark can be traced back to 1741, a Royal Ordinance which primarily protected book publishers, but it was also the first continental-European statute to acknowledge protection of authors. It was in force for over 100 years. Before the 1950s, a distinction was made between authors' rights ("forfatterret") for writers and composers and artists' rights ("kunstnerret") for authors of works of art.

It Is also noteworthy that among the Nordic countries, there has been a long standing tradition of collaboration on copyright matters, most noteworthy the Norwegian-Danish collaboration, which led to a precedessor of the current Act in 1902, but also the recurring Nordic reform-collaboration from the 1940s to the 1990s.

Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?

There are no explicit justifications for related rights presented in the Danish Copyright Act itself. The preparatory remarks to the bill in which those rights were introduced in 1961 note as regards performers that recording and broadcasting technology had enabled a use of performances, which had not been possible before, and against which the performers could no longer protect themselves through contracts. Reference was also made to similar protection already existing in the United Kingdom, Austria and Italy, as

well as the, at the time, ongoing international work which eventually led to the adoption of the Rome Convention. As regards the protection of producers of phonograms, it is stated that such protection must be considered well founded, albeit based on other argument than those applicable for copyright protection, notably the producers' investment of capital, time, technical know-how and artistic taste. The right of remuneration for broadcasting was based on the savings, obtained by the broadcasting organizations by using the work and capital invested in the recordings by the producers. The intensive use of records in broadcasting made it natural that broadcasters contribute to the culturally valuable making of recordings with amounts in excess of what they paid for purchasing the records. Finally, it was noted that it could not be completely ruled out that the use of records in radio broadcasting under certain conditions might harm the sale of the records. Concern was also expressed that use of mechanical music (and other performances) may harm the performers' employment possibilities as well as the recruitment of young musicians.

Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?

The justifications regarding related rights, summarized in the preceding response, were used as arguments for including in the statute the protection of related rights and for instituting the right of equitable remuneration for broadcasting of commercially published phonograms. Accordingly, it seems justified to assume that they had significant impact.

Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

In the Nordic countries, justifications for copyright have from time to time been discussed in the academic discourse, for example in the 1970s where reprography and tape recording broke the technical control of reproduction, which before then had been enjoyed by publishers and producers. They may be summarized in the following points: 1) Under natural justice, the worker deserves his pay and authors deserve a reward for their time and efforts; 2) copyright strengthens the negotiating position of the author vis à vis *publishers, producers and other users; 3) the author deserves protection against mutilations of the work; 4) copyright stimulates the creation of new works by enabling that the works generate income for their authors; 5) copyright increases the security of the investments necessary for the production, exploitation and dissemination of works; and 6) copyright helps distributing the costs of making and disseminating works among all users.*

More recently, and in parallel to other countries, justifications have been revisited in the early 2000s under the impression of the emergence of the Internet and the criticism of copyright from certain academics, such as Professor Lawrence Lessig. The argument that copyright represents non-competitive goods, in the sense that additional use of a work does not take anything away from its author, overlooks that the creation of works carries costs in terms of time and money. New original works of broad interest are, indeed, a scarce resource. If access is free or only payable against the cost of the carrying media, use will increase until the popular appeal of the work is exhausted, and there will be nothing to pay back the original production costs, let alone reward the initial investment in those costs. In the same way, referring to the authors' possible

recuperation of their investment of time and creativity through "new business models" will typically be economically inefficient. It is not a given thing that, for example, a composer is most economically used at performing his or her work, or other works, instead of composing new works; or that a writer will serve as well, or better, as a public speaker than as a writer.

Economic aspects of copyright and related rights

Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.

There has not been academic research examining the economic size of copyright-based industries in Denmark. For research on the European or international level and methodology, see e.g. The Society for Economic Research on Copyright Issues (SERCI).

Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?

N/A

Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.

In 2000, for example, the Ministry of Culture published a Culture and Business Policy report on "Denmark's Creative Potential", where it calculated that the cultural industry in 1998 amounted for a turnover of 75 billion DKK and employed close to 60.000 full-time employees.

Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights

Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.

Denmark has a long-standing tradition of collective management of copyright and related rights. The most relevant organisations are Copydan (1977, Arkiv, AVU Medier, BilledKunst, Tekst og Node, Verdens TV, KulturPlus), KODA (1926, public perfoming rights of composers, songwriters and music publishers), NCB (1915, mechanical rights), GRAMEX (1963, performing artists and record companies for secondary use) and others.

Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.

A Nordic specialty is the extended collective licensing regime.

On April 10, 2016, the Collective Copyright Management Act (Lov om kollektiv forvaltning af ophasvret) entered into force. It implements Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The Directive contains inter alia an administrative part introducing a governance and transparency framework and a rules promoting multi-territorial licensing. Similar to other EU Member States, Denmark has implemented the comprensive Directive in a (new) Act separate from the Copyright Act in April 2016. The Danish lawmaker envisioned a minimum implementation, which is not going beyond what is necessary.

Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.

Denmark has implemented the exceptions provided for in the InfoSoc Directive (Temporary acts of reproduction, photocopying/photo-reproduction, private copying, reproductions by libraries, archives and museums, ephemal recordings made by broadcasters, reproduction of broadcasts by social institutions, illustrations for teaching or scientific research, use for the benefit of people with a disability, reporting by the press on current events, quotation for criticism or review, use for public security purposes, use of public speeches and public lectures, use during religious or official celebrations, use of works of architecture or sculptures in public spaces, incidental inclusion, use for advertising the exhibition or the sale of works of art, use for the purpose of caricature, parody or pastiche, use for the purpose of reconstructing a building, use for the purpose of research or private study, as well as other pre-existing exceptions of minor importance, however not the use for the demonstration or repair of equipment) and the Orphan Works Directive (Reproducing and making available of orphan works). All the different models mentioned in the question have been taken to use, although obligatory collective management is only found as an adjunct of a legal license. Contrary to most national laws, performers' and phonogram producers' right of equitable remuneration for broadcasting and other (non-interactive) communication to the public of their published phonograms is not established as a 'free standing' right of equitable remuneration but as a legal license, which constitutes an exception to a general exclusive right of broadcasting and other communication to the public.