Teil 4 – Dogmatische „Wildwüchse“

2ter Diskutant – Prof. Alain Strowel

Ich danke Prof. Hilty und Dr. Geiger für die Einladung: Ich bin sehr zufrieden hier zu sein. Das erlaubt mir die neue Brut von der deutschen Lehre zu treffen und ich hoffe wir können uns auch später in einer Kneipe treffen, das kann auch sehr interessant sein.

As you can hear, my ability to speak German is limited. I could speak my mother tongue, but I prefer to speak English as you will have your daily dose of French later this morning.

So, what to start with? Let us have a look at the titles of the conference and of this session: “Interessenausgleich im Urheberrecht” and “Th. 4. Dogmatische Wildwüchse”. That prompts me to say something on the balance of interests behind copyright law. This first topic also allows me to comment on other presentations. In a second part, I will make a few other comments, a little bit “wilder”, if I may say so - but the topic “Wildwüchse” is probably an invitation to be wild, isn’t it?

We know about the difficulty to have a well-balanced copyright system, and many speakers have stressed that we have too many items protected by copyright, that we have too much protection because we have a lot of new rights, and that we have difficulties with the application of the statutory exceptions to copyright. We didn’t speak so much about the rationale of copyright protection. I think we have two kinds of models in order to better balance copyright with other interests. The view supported by Kamiel Koelman is a forward-looking approach that takes into account the impact of copyright in relation with an information policy. In that case, the right balancing is to be done with competition requirements. The other way of balancing the various interests that is proposed by Christophe Geiger is more backward-looking; it requires to have a look of the justifications of copyright because those justifications might help in finding the right balance. The consequence of this analysis is that you have to balance copyright with other interests and in particular with fundamental rights. I think that on this issue, there is a good balancing already enshrined within copyright law, while more should be done to ensure a good balance between copyright protection and competition. Copyright has a lot of resources itself to deal with fundamental rights issues. More than we might think.

The proposals of Kamiel Koelman and Christophe Geiger are thus fine, they both outline a nice program, but I have a more practical concern: what to do with those rather theoretical proposals? I’m not so sure you can easily implement in clear rules the new balancing proposed by the previous speakers because if we want to balance copyright with fundamental rights and competition concerns, we are confronted with something that is much more complex. Rather than trying to import the requirement of free speech within copyright, I think that quite often it is better -in the interest of free speech- to use the copyright resources and I will speak about that later. That was the first part of my intervention.

For the second part of my speech, I will be a bit wilder, because I think you are already falling asleep. I tried yesterday to find the French translation of “dogmatische Wildwüchse”. It is not that easy, but hopefully we have the online “grand dictionnaire terminologique de l’office québecois de la langue française” -et j’en profite pour remercier nos amis du Québec!- qui propose “excrescence” ou “dogmatic wild

growth" comme traductions en anglais du « Wildwüchse » allemande. "Dogmatische Wildwüchse" could eventually be translated as "excroissance dogmatique" in French. The translation is not easy. Now if we think of copyright, how can we be wild and dogmatic at the same time? At first sight, something that is "wild" cannot be "dogmatic", and the expression has thus something paradoxical. But let us try.

I would like to present and to propose "commandments": that sounds really dogmatic, and it is not everyday that I can speak about the commandments of copyright, in the same way a priest would do.

"You shall refuse religious thinking": that is, of course, the first dogma I propose. We know about the religious thinking surrounding copyright. Many speakers, including Christophe Geiger, have rightly stressed this bias, but let us remind of the fact that there might be a religious thinking about fundamental rights as well. Indeed, freedom of expression is quite often used by economic operators -let us think of broadcasters- just to veil more mundane interests.

Now, the second commandment: "You shall consider history". If you look at the history of copyright, it becomes clear that copyright was never about "les beaux arts", that it always concerned the "kleine Münze". Information works have always been at the centre of copyright. Therefore we should be prudent before stressing that copyright is moving in the wrong direction, that it now bars the access to information. From the beginning, copyright was used to protect "feeble creatures" incorporating a lot of information (and "sweat of the brow") rather than works showing a high level of artistic creativity.

The third commandment might be: "You shall not blame copyright for all miseries". I would agree that the sui-generis right introduced to protect databases is probably not well delineated so far, but we should not blame copyright for an over-protection of databases. The related rights or "Leistungsschutzrechte" probably raise more issues than our old copyright - let me say that they are closer to hell! (That is the wild touch of this part of my presentation).

The fourth commandment: "You shall be careful with excommunication". For instance, some speakers have insisted that standards should be excluded from copyright protection. But what is a standard? It is a huge issue that I cannot tackle today. I would be tempted to say that standards need some kind of IP protection, maybe copyright in certain instances, probably patent in most cases. It is not because something is successful and becomes like a de facto standard or a least a successful work on the market that it should be excluded. We should thus remain careful with the sanction of excommunication.

Fifth commandment: "You shall not believe too much in economic theories". That was the message of many speakers we heard yesterday. It is indeed such a mess when you have to distinguish the primary and the secondary market of a product! I think we do not have to learn too much from the economists on this. Kamiel Koelman was rightly expressing the view that economics does not bring so much clarity in our old (competition and IP) law.

Sixth commandment: "You shall avoid thinking by dichotomy". As you hear, my presentation is like a kind of preach. Technological protection measures are often opposed to private copying. In practice, you have to please your clients and you have to allow them to perform some kind of use, some kind of private copying, so I don't

think you have to oppose technological protection measures and private copying. Both go together and technological protection measures are not there to organise a "lock-up", while private copying is there to ensure access. Quite often, we are in between and technological protection measures go along with access.

Seventh commandment: "You should pay more attention to the remedies". The discussion we had yesterday was about sanctions. Are copyright exceptions to be considered as rights or just as permissions? I am not sure the topic is really relevant because there might be no right associated with the exceptions, and nevertheless there might be a standing and the possibility of asking a judge to grant a remedy? So, in many cases, it does not really matter whether the copyright exception grants a right or whether it is just a permission.

Eighth commandment: "You shall not forget the perverse effects". I have to speak about perversity as I have adopted the wild and dogmatic position of a priest today. Let us consider for a moment that there are good reasons to oppose the protection of technological protection measures. But we should not be naïve:

other means of protecting those technological protection measures exist such as unfair competition, and we also have the 1998 Directive protecting conditional access, but without any carve-out in favour of the beneficiaries of copyright exceptions. Is the risk of imbalance not greater if those forms of protection are used? If you want to exclude the protection of technological protection measures from the realm of copyright, fine, but be aware that there might be what I would call perverse effects as other areas of law which will be mobilised will not have the build-in limitations that copyright law has achieved, including on the protection of technological protection measures.

Ninth commandment: "You shall beware of a copy/paste culture". I always agree, but only partly with what Bernt Hugenholtz says. Yesterday, he was referring to the Zapruder case decided by the US Supreme Court which involves the right to use the sequence of the film made by someone who happened to film President J.F. Kennedy when he was shot dead. It is an interesting case as it is a good example where idea and expression tend to merge. But I am not sure that there are so many cases of full merger between idea and expression. I might appear traditionalist now - remember: I am preaching for some wild dogmas today- but I think that in certain cases it is not to bad to have some constraints for the creative process. Therefore I am not sure that it is always the best thing to be allowed to "copy and paste". Of course, creation is a matter of imitation, but imitation is not necessarily an issue of copy/paste.

Tenths (and last) commandment: "You shall forget about your copyright heaven or hell". There are other issues which have more far-reaching consequences. We can object to the protection of information by copyright but we should not forget that people on the market will use other means to protect what they consider as valuable, like for instance confidentiality and contracts. If contracts and secrecy are used, the scope of protection might extend further and in such case, it will be difficult to find a balance such as the one created by copyright exceptions. I am not sure that is what we really want. So "You shall forget about your copyright heaven/hell … and remain on earth". Amen (a wild one).

Prof. Reto M. Hilty
Herzlichen Dank, Alain, für dieses erfrischende Gegenstatement. Was gesagt wurde, war wahrscheinlich aus manchem Herzen hier in diesem Raum gesprochen, und darauf werden wir schon Antworten kriegen.

Ich darf jetzt Herrn Metzger bitten.