

Balance: resolving the conundrum between copyright and technology?

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Copyright today

- Under continuous scrutiny
- Aspirations and challenges
- Popular subject
- International
- In loop process of fighting ‘copyright loopholes’
- Active-non-effective

Binary system

- Boundaries
- “Self –definitions” – Bauman (1987)
- Semantic concomitant usage
- Binary oppositions
- (Re)emergence of balance?

Balance and its meanings

- Purpose
- Process
- Hermeneutic guide (Drassinower 34 *J. Corp. L.* 991)
- Scope
- Guiding principle
- Structure

Balance in copyright today

- TRIPS Art. 7

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Balance in copyright today

- *WIPO Copyright Treaty* (Preamble)
“...Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”

Balance in copyright today

- Info Soc Directive 2011 (recital 31)

“A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment...”

Balance in copyright today

- *Copyright for Creativity – A Declaration for Europe*
“...the exceptions to this rights create a balanced system that allow for the use of creative works to support innovation, creation, competition and the public interest. Well-crafted exceptions can serve both goals: preserving rewards and incentives for creators while also encouraging innovative reuses that benefit the public.”

Balance in copyright before today

- Balancing abstractness
- Acknowledging its existence
 - No balance at stake
 - Condition vs. guiding principle

Balance instigated by technology

- Copyright between deliberate actions and uncertainty
- Elevation of balance as orienting principle
- Academics?
- User's rights, public domain and exceptions

Balance as orienting principle?

- Values
- Contexts
- Incommensurability

Intangibility in Tangibility

- *Still (silent) application*
- *Uttered (noisy) protection*

- Idea/ Expression Dichotomy

- Value of intangibility

- Property (metaphor)

Technology as Intangibility

- Reproduction and distribution as connection, acts of exchange.
- Double intangibility
- Copyright is “technologised”

Action as preconclusion

- Edleman's view – 'author's personality in action'
- Pre-modern IP law focused in the "intangible action" whereas the modern in the "things" carrying the intangible. (Bently and Sherman, *Making the Modern Intellectual Property Law* Cambridge: University Press; pp.119-120)

Balance as dialogue

- Subject matter preceding scope (Drassinower)
- Dialogue vs. monologue

Balancing conclusion

- Superficial
- Concept of balance is “technologised”
- Conundrum between copyright and technology
- Fixed v. Fluxed
- *De lege ferenda v. De lege lata*

Thank you for your attention!

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