On the Theoretical Foundations of the Principle of Free Flow of Information as Applied to Copyright

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1 Criticism of Current Copyright Reforms and the Need to Shed Light on Shifts in the Copyright Paradigm

There is an increasing concern that the reform of copyright law threatens the delicate balance in copyright law. Already with the advent of the WIPO Copyright Treaty (WCT) prominent legal observers such as Paul Goldstein pointed out the risks of incorporating alien elements in the copyright law (in this case the legal protection of technological measures), as such elements are bound to disturb the existing copyright balance.[1] Today one can easily observe a rising concern that copyright is tipping too much in favor of copyright holders to the detriment of public and non-commercial private interests.

Inadvertently Goldstein's article points out an important feature of the copyright system; *changes in one part of the system have infallible consequences on other parts of the system*. As a consequence, *adding or changing a feature of the copyright system requires careful evaluation of its effects on the system as a whole*.

Today, few legal scholars question the legal protection of digital rights management systems (DRM) as such,[2] but rather express their concern that the new rules on DRM are poorly drafted and therefore disturb the copyright balance. Instead of protesting against this new "alien" element in copyright law, legal scholars turns towards the question of how this new element can be incorporated within the copyright system without causing irreparable damage to the copyright balance. Most criticism of existing or future rules on the legal protection of DRM points out that the new rules do not sufficiently take into consideration the interests of end-users or important policy considerations such as free speech, protection of privacy or the promotion of technological development.[3]

However, the criticism still struggles to find common philosophical grounds for such criticism. Whereas criticism against copyright expansion in the Nordic countries has been quite scarce, such criticism is on the rise. Somewhat symptomatic for the discussion has been that the more "traditionally" oriented copyright researchers to a large extent has refrained from criticizing the reform

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1 Goldstein, Paul, *Copyright and Its Substitutes*, Wisconsin Law Review, Nr 5/1997, p. 865-871. Goldstein opposes the incorporation of the protection of technological measures within the framework of international copyright law (i.e. the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), especially as the articles on the protection of technological measures does not include a prohibition to encrypt non-copyrightable subject matter.

2 This may be due to the fact that it is too late to object to the legal protection of DRM as such, as it is already enacted in international treaties and implemented into many national laws. Another reason may be that many scholars, including myself, believes the legal protection of DRM is necessary in order to adjust copyright to the information society.

3 Vinje, Thomas, *Copyright imperilled?* E.I.P.R. 4/1999, p. 192-207, Hugenholtz, P. Bernt, *Code as Code, Or the End of Intellectual Property as We Know It*, 6 MJ 3, 1999, p. 308-318, Samuelson, Pamela, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*. Berkeley Technology Law Journal, Spring 1999.

publicly,[4] whereas younger researchers or researchers from other fields than copyright have been more critical.[5] Constitutional aspects are clearly gaining momentum. In an open letter from the Finnish Parliament to the Ministry of Education in 2003, the Ministry was requested to take constitutional aspects into consideration when drafting the new bill. This is a clear indication that the criticism based on civil rights aspects is becoming recognized also by the parliament.

References to civil rights have usually not been well understood by the traditional copyright community.[6] In the current copyright bill (Nr. 28/2004) the constitutional argumentation was added to a separate chapter of the explanatory memorandum. The Ministry totally missed the point of discussing what implications the suggested rules would have from a constitutional law perspective.[7] Instead of weighing and balancing fundamental rights (which are, in legal terms, principles), references to them were used one-sidedly and merely as additional justification for the new rules.[8]

The current criticism of copyright reform and the copyright expansion[9] needs a persuasive common platform. Civil rights are no doubt a rather compelling starting point for the necessary weighing and balancing of rights. Recognizing

4 The absence of criticism from researchers belonging to the "traditional" school may not be so surprising taking into consideration that traditional copyright research in Finland (and also to a large extent in Sweden and Norway) has been focused on legal dogmatic and not so much on the more theoretical and fundamental aspects of copyright law and policy. This is not to say that "traditionalists" have totally refrained from any criticism, but their research method gives them little means of profound criticism of copyright policy.

5 Rather interestingly much of the critic has come from experts in constitutional law like Kaarlo Tuori or Juha Lavapuro. Among "junior" researchers to have criticized the current copyright policy are Tuomas Mylly and Mikko Välimäki, see Mylly, Tuomas, *Tekijänoikeuden ideologiat ja myytit* (Copyright ideologies and myths), Lakimies 2/2003, p. 228-254 and Välimäki, Mikko, *Ajatuksia tekijänoikeuslain uudistmaiseksi* (Considerations for the reform of copyright), Lakimies 2/2004, p. 255-273.

6 Maybe the idea-expression dichotomy has been thought to suffice in order to safeguard informational interests.

7 The importance of constitutional argumentation has clearly become more important in Finland in the past decade. The main reason for this is Finland's accession to the European Human Rights Convention in 1990, the reform of constitutional rights in 1995 and the enactment of the new Constitution in 2000.

8 In Pekka Länsineva's words this could be referred to as abuse of constitutional argumentation, or "under-constitutionalism" (alikonstitutionalisoitumien), see Länsineva, Pekka, *Perusoikeuskeskustelun kriittiset pisteet?* (The critical points of the discourse on fundamental rights), Lakimies 2/2004, p. 274-285, where he discusses the quality of constitutional argumentation.

9 Hugenholtz, P. Bernt, *Fierce Creatures. Copyright Exemptions: Towards Extinction?* IFLA/IMPRIMATUR Conference Proceednings 30-31 Oct 1997, Amsterdam. Still, Viveca, *Upphovsrättens expansion. (The expansion of copyright)*, NIR 1/2003, p. 44-56.

that copyright law may have important effects on the fundamental rights of both rights holders and users is an important step forward.[10]

However, discussing the civil rights implications of copyright law does not in itself give sufficient information on the right balance between different interests. Theories external to law may therefore provide additional information on which to base a copyright policy. This is where theories such as law & economics based property and incentive theories[11] or information economy theories[12] come into play.

In addition to law & economics or other regulative theory, an important aspect of policy discourses is setting out the scene and formulating a viable paradigm for the policy discourse. Conventional copyright paradigms are for instance based on narratives such as the "romantic author" or the "piracy" paradigms.[13]

To put it simply the romantic author narrative describes a lonely author that is on the mercy of the "big bad guys", i.e. publishers, record companies and the like. In this narrative the need to protect the interests of the author through legislative means is evident.

In the piracy paradigm copyright entrepreneurs are seen to need protection against unethical competition or free-riding from fellow entrepreneurs. This narrative has resulted in much research on the relation between the "monopoly right" of copyright and free competition.

The problem with current copyright reform is that *copyright law* has been adapted to changes in the information and communication technology without considering the need to update also the conventional *paradigms* to the realities of the information society.

Shifts in the copyright paradigm therefore need to be addressed in order to understand why the assumptions underlying these conventional paradigms are incomplete and need to be modernized so to embrace the recent changes in our information environment.

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10 When Tuori discusses the possibility for over-constitutionalism (ylikonstitutionalisoituminen), he assumes that fundamental rights are included in each area of law. Tuori, Kaarlo, *Tuomarivaltio – uhka vai myytti.* Lakimies 2003, p. 915-943. However, intellectual property law, and especially copyright law, does not have a tradition of constitutional argumentation in Finland. This conclusion can easily be made from the fact that the Ministry in the copyright bill (Nr. 177/2002) simply states that the copyright exemptions are exceptions to the general rule and therefore they shall be given a narrow interpretation. Contrary to the doctrine in many other countries, not the least Norway, contracts diminishing the scope of copyright exemptions are usually considered valid in Finland.

11 Especially in the US there is a long tradition of law & economics based argumentation. This argumentation has to a large extent focused on property and incentive theories. See for instance Landes, W. - Posner, R, *An Economic Analysis of Copyright Law*, Journal of Legal Studies nr XVIII/1989, p. 325-363.

12 Shapiro, Carl – Varian, Hal R., *Information Rules. A Strategic Guide to the Network Economy*. Harvard Business School Press, Boston, Massachusetts 1999.

13 On the narratives of copyright, especially the use of the piracy paradigm to defend the expansion of copyright, see Halbert, Debora J., *Intellectual Property in The Information Age. The Politics of Expanding Ownership Rights.* Quorum Books. Westport, Connecticut, London 1999.

2 Theoretical Foundations of the Free Flow of Information

In several earlier articles I have tried to bring forward different aspects of the principle of Free Flow of Information.[14] I shall here make an attempt to make some conclusions about the theoretical foundations of the principle and in what sense it can be seen as a critic of conventional (Finnish) copyright doctrine and especially of certain trends in the current copyright policy.

2.1 A Liberalist Approach

Speaking about Free Flow of Information clearly indicates a liberalist approach. In what sense is it then liberal? Isn't it correct to say that the classical copyright doctrine can be said to address the problems of free markets and fair competition as it provides for the incentives necessary for private markets for information products (content)?

Copyright is an important part of our private law, and there is no doubt that copyright offers instruments for safeguarding an information market that is free from public censorship. However, copyright should not allow private censorship either.

Copyright provides the necessary incentives for private production of content and protection against unfair competition in the content industry. The default rules included in copyright law reduce the need to contract and thereby reduce the transaction costs for copyright licensing.

The liberalist approach of the Free Flow of Information does not discard these features inherent in copyright law, but criticizes the way current copyright policy disregards the liberalistic roots of copyright.

In the expansive copyright policy of today, the protection of the private property right of copyright seems to be an end in itself. The current copyright reform focuses on measures for strengthening the application (and expansion) of copyright in the information society. Little concern is given to the fact that copyright expands into areas outside the original scope of copyright and into areas for non-commercial use and increasingly interferes with the freedom of users to communicate and use information in other non-commercial ways.

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14 Still, Viveca, *Informationens fria rörlighet ur upphovsrättsligt perspektiv.* Oikeus 1/2000, p. 65-81. This article was the first attempt to formulate the principle of free flow of information. Still, Viveca, *Copyright in a Networked World – A Barrier to the Free Flow of Information?* in Proceedings of the International Conference KnowRight 2000 and Info Ethics 2000, Vienna 25th-29th September 2000. Eds. K. Brunnstein, P. P. Sint. Österreichische Computer Gesellshaft 2000, p. 23-32. In this article I point out that there are three trends in current copyright policy that increases the tension between copyright and free flow of information; a maximalistic view of copyright protection, the lack of recognized end-user rights and the increased possiblitites offered by digital rights management systems to control every aspect of the use of information. In Still, Viveca, *Upphovsrättens expansion.* NIR 1/2003, p. 44-56 trends of expansion of copyright law is discussed. In Still, Viveca, *Upphovsrätten i informationssamhället – ett hinder för informationens fria rörlighet?* Nordisk årsbok i rättsinformatik, Jure, Stockholm 2003, p. 163-176, the effect on the free flow of information of certain rules of the copyright bill (Nr. 177/2002) is analyzed.

The maximalist approach of the current copyright policy considers copyright as being the main rule and seeks to reduce copyright restrictions, whether general restrictions or specific copyright exemptions. The maximalist approach generally seems to consider the copyright exemptions as a necessary evil which is due only to practical copyright enforcement problems.[15] *From a free flow of information perspective, copyright is an exception to the freedom to use and communicate content and therefore needs specific justification.* The liberalistic view underlying the principle of free flow of information thereby heavily relies on the traditional liberalistic tradition in private law.

2.2 A Socially Aware and a Socially Fair Approach

The EC directive (2001/29/EC) on copyright and related rights in the information society includes three important new features to be enacted in the national copyright law of each member state; a new right of communication to the public intended to accommodate internet use, restrictions on the copyright exemptions available (the so-called à la carte list of exemptions which may not be exceeded) and the legal protection of digital rights management systems (consisting of technological measures and rights management information).

The copyright directive recognizes the new risks imposed by the digital environment; the ease by which content can be reproduced and communicated to the public. Unfortunately the analysis of the copyright environment focuses only on the risk imposed by changes in information and communication technology on the content producers. *The effects of copyright on the communication environment do not seem to be as important.*

The Free Flow of Information implies that the information environment as a whole should be considered when elaborating a copyright policy. Changes in social patterns and technology should be equally considered both from a point of view of preserving and protecting copyright in the digital environment and of forming a copyright policy that is well adapted to the new social communication patterns of the information society.[16]

A practical example of the way in which current copyright policy neglects changes in modern communication structures is article 14 of the current copyright bill (Nr. 28/2004). The article concerns the right to use copyrighted works for educational reasons. It might seem self-evident that copyright by and large relies on the use of content. Before the digital revolution, content in the form of books were extensively used in the classroom without "interference" by copyright. The use of content did not require reproduction of books. Instead, the content was communicated in a non-material way, through speech. The use of content in education was looked upon as essentially non-rival to the commercial

15 The theories of expansive vs. restrictive copyright policies has been discussed in Still, Viveca, *Informationens fria rörlighet ur upphovsrättsligt perspektiv.* Oikeus 1/2000, p. 65-81.

16 This is not to say that changes in communication and content production in the information society only implies needs to reduce copyright protection. The legal protection of DRM can be regarded as an expansion of copyright protection. Such an expansion may be justified when considering the new business opportunities in the information society.

use protected by copyright. The importance given to education can be seen in the provision on compulsory licensing for collections made for educational purposes, which allows even commercial publishers to make collections for educational purposes without prior consent of the authors.[17] The most important collective licensing provision with regards to educational use is for photocopying, which can be considered to interfere to some extent with the markets for books.[18]

Let us now step into the virtual classroom. The new section 14 in the copyright bill (Nr. 28/2004) seems to allow a broad use of copyrighted content in education, as it gives the right to reproduce and communicate content. At first sight this seems to be an improvement, as it would clearly be within the scope of the collective license to scan a document and insert it into a power point presentation for the class[19] as well as allow most uses needed for virtual education.

What then makes the activities of the virtual classroom so different from traditional education that they should be ruled by the exclusive rights of the author? In what ways does "virtual classroom use" hurt the interests of authors?

It seems to be self-evident that authors want as much money as possible (who wouldn't?) and that they would prefer to be able to control how, when and in what contexts their works are used and discussed. However, it is far from clear that copyright should be used as a means for transferring welfare from the public to certain private actors. Neither should copyright allow private censorship by letting copyright owners control public discourse at their will.

At the same time it seems to be clear that educational use in the digital environment may hurt the interests of the author. This is true especially where copyrighted works are made available on public internet sites or where entire works are made available and are downloadable from closed educational sites.

However, a closer look at section 14 reveals some flaws. The most serious problem is that the provision does not include the right to adapt works. In principle it is therefore forbidden, without the prior consent of the author, to make and bring to the virtual classroom for instance arrangements of musical compositions. This severely inhibits the development of distance education, as it would be illegal to use many of the current e-learning applications that enable adding or modifying content, if the ratified content is made available within an e-learning environment.[20]

Section 14 of the Copyright Bill (Nr. 28/2004) also includes a new right for the author to exclude use, regardless of the collective license. As there are no

17 Section 18 in the Finnish Copyright Act. Compulsory licenses are extremely rare in Nordic copyright laws, as almost all provisions limiting commercial licensing is based on collective licensing.

18 Section 13 in the Finnish Copyright Act.

19 According to current doctrine, this would require a commercial license, whereas photocopying the document and showing it on an episcope or an overhead machine would fall under the collective license for photocopying.

20 There are, for instance, many applications allowing adding comments to texts.

restrictions on this right to exclude use, it may be used whenever the author likes and for whatever reason.[21]

The author's right to exclude use basically destructs the whole collective licensing system as we know it today. The idea of collective licensing was, except for providing a solution to transaction cost problems, to facilitate and promote socially beneficial use regardless of copyright. The idea was to provide a win-win situation by compensating authors for the use of their work (which is then thought to give incentives to create new works) and at the same time safeguard the free use of works.

Whereas the right to exclude use makes sense in principle (as the idea of copyright is to provide the author with a right to exclude use and thereby the possibility to negotiate a price for the use of works), it is rather problematic that there are no compensating strategies safeguarding non-commercial and socially beneficial and essential uses such as educational use. The principle of free flow of information may provide a fruitful point of departure when designing copyright policy. Trying to maximize the production and use of content should be favored instead of maximizing the income of those copyright owners that are members of collective societies. Simply put, the welfare of all should be more important than the welfare of the few.[22]

In addition, it seems clear that the proposed right to exclude use would distort the power structure to the detriment of educational use, as the copyright owner would have the power to decide what content is available for use in education.

The principle of free flow of information draws attention to a copyright framework balancing the interest of preserving and promoting commercial information markets with the interest of promoting productive use and important social interests such as education and science, democracy and cultural diversity. In addition to understanding and bringing forward the values underlying copyright law, *the real circumstances of the information environment and the consequences of copyright law needs to be considered.*

2.3 Combining Civil Rights with Law & Economics

Civil rights argumentation seems to have become more common within the copyright discourse. Civil rights argumentation seems to be a natural and necessary point of departure for discussing copyright (as well as many other pieces of legislation).[23]

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21 As the right to exclude use is not limited in any way, it is possible that the author denies the use of a work in the middle of a course and after the teacher and the school has put down considerable time, energy and money on creating a good course pack. The author may also deny use in order to negotiate a more profitable special license for "valuable" content, i.e. content that is difficult to replace.

22 Whereas most people are producers of content, there are only a few – those member of collective societies – that would receive financial benefits through the collective licensing systems.

23 On the "constitutionalisation of law" and the increasing importance of civil rights argumentation also within private law, see e.g. Länsineva,op cit and Pöyhönen, Juha, *Uusi varallisuusoikeus*. Lakimiesliiton kustannus, Helsinki 2000.

Referring to the above mentioned statement, that the proposed new right to exclude use regardless of the existence of a collective copyright license distorts the power balance to the benefit of copyright owners, one of the functions of constitutional argumentation can be put forward; *constitutional argumentation can be used to protect civil rights from abuses of private power.*

As *Länsineva* points out, private power (backed up by the legal system) may have similar effects as public power, and private parties need similar protection from abuse of private power as from abuse of public power.[24] More commonly this theory is known as the *Drittwirkung* of the fundamental human rights. The *Drittwirkung*-doctrine has its origin in the case law of the European Court of Human Rights. Within the European human rights doctrine it is considered that human rights should be preserved not only in vertical relations, i.e. to protect individuals from the power of the state, but also in horizontal relations. This gives the member states of the European Convention of Human Rights a duty to protect citizens from abuses of power by other citizens.

From this point of view civil rights argumentation needs to consider how private power based on copyright may affect the civil rights of the citizens. Changes in the power structure arising both from changes in the copyright law and its "operating environment" therefore needs to be scrutinized in order to reveal possibilities of abuses of rights.

What are then the major trends in copyright law and its operating environment that may affect the balance of power between private parties? In my earlier articles I have pointed out some of the most important ones;

> 1) The protection of technological measures and rights management information not only implies a more efficient protection of copyright, but actually makes it possible to effectively control the use of content in a totally new way. When comparing with the *possibility to actually detect, monitor, govern, prevent or block use* within the conventional copyright paradigm, the changes seem immense. Within the conventional copyright paradigm there is no possibility to control physical copies of the work and breaches of copyright are not easily detected. *In addition, digital rights management systems make it possible to define new rights previously unrecognized by copyright law.*[25]
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> 2) *The digital environment makes it possible to contract where contracting previously was impossible*. The concept of superdistribution is a good example of inventive contracting structures. Superdistribution enables contracting both within business-to-business, bussiness-to-consumers and consumers-to consumers business models. Superdistribution systems enable extensive granular licensing throughout the whole value chain and life cycle of the content. It is highly compatible and makes it possible to license different kinds of works for

24 Ibidem, p. 276.

25 Several rights languages have been developed and reveal new rights structures, see for instance the Xerox Rights Language, which is a propriatory rights language and Open Digital Rights Language, which was developed as a non-propriatory rights language.

different media.[26] Compared to the conventional copyright paradigm the possibility of contracting increases tremendously. But whereas contracting in the conventional copyright paradigm is done case by case and is based on negotiations, digital contracting is an automatic mass transaction system, where individual negotiation is rare or non-existent.[27] Automatic contracting does normally only give the user the right to either accept or reject the terms of the contract, not a possibility to negotiate the terms. It is clear that the power to set the terms increases the power of copyright owners to the detriment of the user.

3) In the digital environment any use of a copyrighted work triggers the copyright law. In the conventional copyright paradigm, communication of content is often done orally or in a way specifically excluded from the copyright framework[28]. This is no longer the case in the digital environment. Therefore copyright tends to cover almost all kinds of use and communication within the digital environment. This implies that the space for non-regulated (free) use that is self-evident in the non-digital environment is disappearing. In other words, instead of most uses being outside the scope of copyright in the conventional copyright paradigm, almost every use of copyrighted works is within the scope of copyright in the digital era.

4) The idea of copyright protection referring only to commercial use (as opposed to non-commercial or private use) is disappearing from the copyright doctrine. To an increasing extent any use of a work is considered to have commercial implications. This is so simply because making a copy or communicating a work to the public triggers the right to compensation, and therefore all such use has commercial implications for the rights holder entitled to compensation under the copyright regime! It is clear that this shift strengthens the bargaining power of the copyright owner.

5) Copyright law is still based on the conventional copyright paradigm, according to which the users are the content industry and authors and performers need protection against the abuse of power of the "big players". Today, the "users" are to a greater extent so called end-users, that is consumers or companies, public bodies or organizations comparable to consumers. This change in the copyright paradigm distorts the whole system and therefore the copyright law ends up protecting the stronger party (authors and other copyright holders) instead of the weaker party (consumers or actors comparable to consumers).

More commonly *civil rights argumentation is used to describe the fundamental values underlying a legal institution and especially to reveal competing values*

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26 Cox, Brad, *Superdistribution. Objects as Property on the Electronic Frontier*. Addison-Wesley Publishing Company. Reading, Massachusetts 1996. Whereas superdistribution systems seems to enable highly effective licensing and new business models, there are still some technical problems to overcome. Effective superdistribution systems require compatibility and interoperability between systems. However, there are many obstacles for standardization of superdistribution systems. Rosenblatt, Bill et al., *Digital Rights Management: Business and Technology*. MBT Books, New York 2001, p. 103-137.

27 Of course there may be flexible systems where some kind of negotiation is possible. Such systems may be based on automatic auctioning.

28 The exhaustion of rights doctrine efficiently circumscribes the right of the copyright owner to control the use and dissemination of works.

or rights that need to be balanced. Usually civil rights are described as *principles*, which may and need to be balanced against each other, as opposed to *rules*, which either are or are not applicable. Therefore, whereas copyright can be seen as protecting the right to private property, arrangements which reduce the scope of this right do not necessarily imply a *breach* of the private property right, but can be seen as a result of *balancing* the fundamental right to private property with other fundamental rights such as the right to free speech, the right to a fair trial or protection of privacy. These rights reveal different fundamental informational interests in content that all need to be balanced.

From a civil rights perspective it seems to be clear that the property rights of the copyright owner do not prevail over other informational interests, but need to be balanced against these interests. However, this is where the problems start. What is then the right balance? And how do collective rights and goods fit within the civil rights framework?

These are questions without any exact answers. At a theoretical level the right balance of rights prevail when all rights are optimized.[29] This is one of the major connection points between the civil rights argumentation and law & economics. Optimization is much about effectiveness. Law & economics gives the framework for evaluating the relation between effectiveness and different legal solutions. Questions dealt with by law & economics are for instance (a) to what extent the economic justification of private property can be applied to intellectual property (the applicability of "the tragedy of the commons"-theory), (b) the effect of the incentive theory on the proper scope of legal protection of IPR, (c) effects of transaction costs on the legal solutions within copyright legislation,(d) the proper balance between free competition and copyright monopoly, (e) how to internalize externalities caused by copyright protection or (f) how to reduce the gap between the information rich and the information poor both in international relations (the gap between the rich and the poor countries) and within different national populations (the problem of social exclusion).

Combining economic argumentation with civil rights arguments reflects the idea of justice as fairness as proposed by John Rawls in his theory of justice.[30] There is no doubt that my own thinking about fairness and the premises for the legal regulation of copyright have strongly been influenced by Rawls. Considering Rawls theories it is clear that the sole aim of copyright regulation can not be to increase the rights of the copyright owners without considering the effects on the public (i.e. other persons). Rawls theory also clarifies the relation between civil rights and economic efficiency and explains the need for considering both, as economic efficiency tells little about the underlying values and the evaluation of how the values can be optimized requires thinking in terms of efficiency.[31]

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29 However, what makes the evaluation of the correct balance more difficult is that an increase in one person's rights or freedoms may not necessarily result in a decrease in another person's rights or freedoms.

30 Rawls, John, *En teori om rättvisa*. Translated by Annika Persson. Daidalos, Uddevalla 1999.

31 Rawls is clearly no proponent of utilitarianism, i.e. economic efficiency is not a core value but merely an optimization tool.

The principle of free flow of information heavily relies on the combination of civil rights argumentation and law & economics argumentation. Considering that the focus point is on information, theories of the information economy are at the center. However, the principle of free flow of information is not only about the promotion of private information markets, but also about the free flow of public information.[32]

2.4 Information Policy as the Framework for Copyright Policy

The principle of free flow of information intends to draw attention to the position of copyright within the broader legal framework. Whereas copyright is normally considered to be a part of the law of property within the legal systematic, the principle of free flow of information draws attention to the fact that copyright has an increasingly important role in our information policy. Generally speaking the regulation of the use (and abuse) of information is becoming increasingly important.[33]

From a copyright perspective the increasing pressure to see copyright as a part of information law arises not only from the increasing importance of information and content as part of the production structure of the society, i.e. the change from an industrial society to an information (and service) society. In addition, the increasing importance of information and communication technologies for use in learning, work, communication and other aspects of social life triggers the need to consider the impact of these changes also on the copyright regulation.

Seeing copyright as a part of information law brings this piece of legislation into a new context. Not only does it reveal the tension between copyright ownership and other informational interests, but it also reveals that copyright has effects outside the property law paradigm. Copyright does not only regulate private property rights to content but also has effects on other informational interests and draws attention to the important position of copyright as a part of the information policy of society.

Putting copyright within an information law paradigm is actually nothing new. As a matter of fact there are many traces of information law aspects within the copyright paradigm. These traces are most clearly shown in some of the copyright exemptions, such as the quotation right,[34] which reflects the need to

32 Pöysti, Tuomas, *Tehokkuus, informaatio, ja eurooppalainen oikeusalue*, Forum Iuris, Helsinki 1999, p. 355 describes the basis for a European area of free movement of information.

33 An insight into the Finnish discussion of the increasing importance of informational regulation, see for instance the articles in Oikeus 2000:1, where several authors discusses the implication of informational regulation in different legal fields.

34 Section 22 in the Finnish Copyright Act (No. 404/1961).

accommodate copyright to the principle of free speech, and the exclusion of public documents, such as legal acts, from copyright protection.[35]

However, putting copyright within an information law paradigm gives the opportunity to reflect over the possible informational ratios underlying exemptions that do not as clearly refer to informational civil rights such as the right to free speech, transparency of public administration or the right to fair trial.[36] Such exemptions are the *exhaustion of rights* and the *right to private copying*. These exemptions are often described as being the result of a pure impossibility to control the distribution of copies or the acts of private persons. However, it makes sense to consider also these exemptions as having an informational aspect. If private copying would be forbidden, it would certainly affect access to information. In addition, the blank tape levy seems to be a suitable compromise between these informational interests and the interest to remuneration by the copyright owner. The blank tape levy furthermore comprises the idea that private copying is not necessarily a substitute to copyright.[37]

Considering that copyright includes so many informational elements it is amazing that some lawyers still ignore the role of copyright within a larger information law framework, where the regulation and interpretation of copyright needs to be in conformity with other principles of information law. Instead they only see copyright as an independent piece of legislation where principles of regulation and interpretation need not be based on other than copyright-internal arguments.[38]

The principle of free flow of information is explicitly a principle of information law, not only a principle of copyright law. A good example of the broader application of the principle of free flow of information is to be found in the European directive (95/46/EC) on the protection of personal information. The principle of free flow of information within the data protection legislation expresses the idea that certain quality requirements need to be set on the collection and processing of personal information. These requirements are designed to provide for the necessary protection of personal integrity in order to ensure the free flow of information within the EC (and globally).

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35 Section 9 in the Finnish Copyright Act (No 404/1961). Guibault, Lucie M.C.R., *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright*. Kluwer Law International, The Hague, London Boston 2002, p. 31 ff. acknowledges the importance of informational freedom as an important basis for copyright restrictions.

36 According to section 25 d of the Finnish Copyright Act copyrighted works may be freely used for the purpose of judicial proceedings or to gain knowledge of public documents.

37 As pointed out in many articles, the claimed losses of sales due to private copying or pirate copies seem to be based on the assumption that the consumers would have bought a commercial copy. See for instance Välimäki, op cit, p. 273.

38 This tension took interesting proportions in an ALAI conference in New York a few years ago, when professor Thomas Hoeren proposed that copyright should be evaluated based on its position in a larger information law framework. The subsequent speakers clearly stated that they were copyright lawyers, not information lawyers. They seemed to think that it was inappropriate to put copyright within an information law framework.

The application of the principle of free flow of information within the copyright framework focuses in a similar fashion on legal solutions enabling the free flow of information within the EC and globally. Within the copyright paradigm the focus is on finding legal structures to enhance the production, use and dissemination of information (content) in society.

2.5 An Instrumental Approach to Information

The free flow of information is based on an instrumental view of information. Whereas the idea-expression dichotomy is usually seen as a rather important distinction within the copyright paradigm, there is little to actually support such a distinction at a theoretical level. This is not to say that the idea-expression dichotomy would be without meaning in the copyright system. On the contrary, it remains a cornerstone of copyright doctrine. However, one should refrain from overemphasizing its practical implications. This is because the concept of expression within copyright law pertains to style and special features, not only exact expression, thereby extending copyright protection in the direction of protection of ideas. Additionally, one can hardly imagine communicating ideas without the ideas being formed into expressions. *Every expression contains an idea, and any restriction on the free flow of expressions also implies a restriction on the communication of ideas.* Therefore the free flow of information concerns both ideas and expressions.

Furthermore, information is treated as an object that may or may not be a prerequisite for gaining knowledge. Information in this sense covers all types of protected works, including computer programs and databases, whatever its informational content is. Information may or may not have a commercial value and it may or may not be a part of a decision-making process.

However, it is assumed that information is essential for social life. The free flow of information may be a prerequisite for democratic processes, human interaction and the prosperity of cultures. The importance of access to information is clearly acknowledged in the international arena.[39]

As described in the picture below, the free flow of information is a prerequisite for promoting the innovative capacity of society, for preserving cultural diversity, promoting democracy and transparency as well as increasing productivity in the information society and the knowledge resources on which to base further innovation and productivity. All these values are interlinked, and all of them affect distribution of power as well as social, cultural and economic welfare. The idea of this picture is to clarify the importance of information in society.

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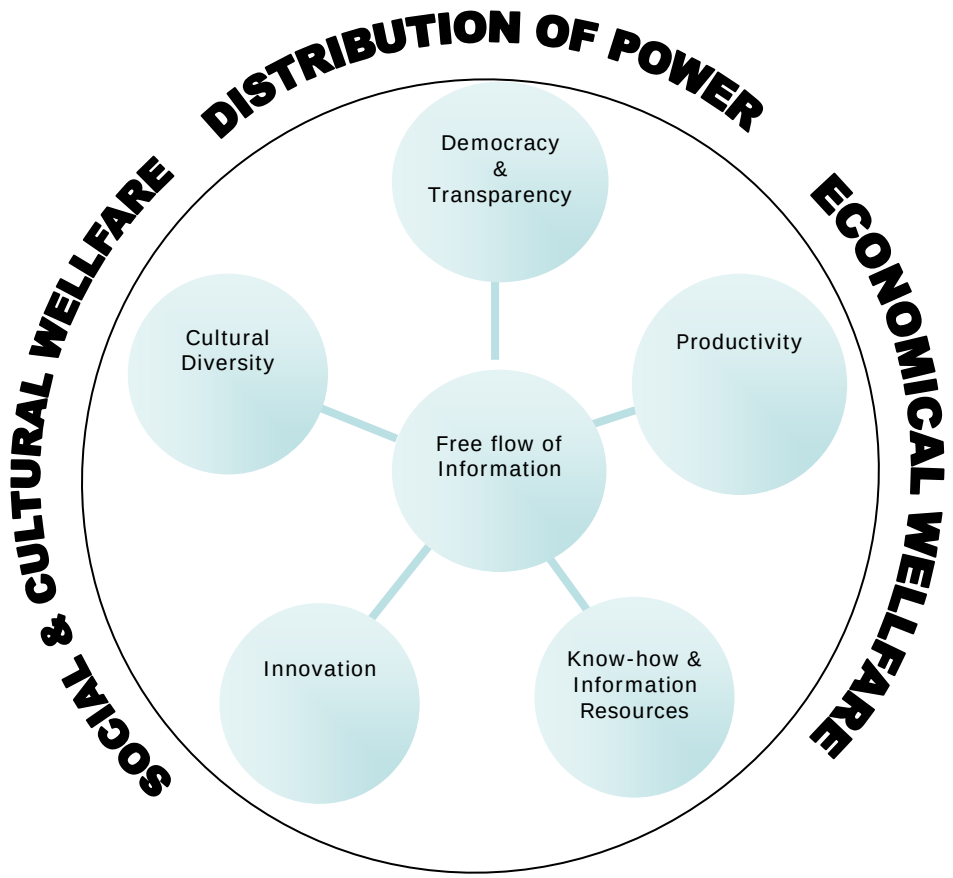
39 See UNESCO Communication and Information Sector, founded in 1990 at http://portal.unesco.org/ci/ev.php?URL_ID=DO_TOPIC&URL_SECTION=201&reload=1075246723", last visited 10 June 2004. Its mission is to promote the free flow of ideas through words and pictures. The directive on conditional access (98/84/EC) seems to be based on and acnowedge an instrumental view of information, see e.g. p 2 and 3 of the preamble.



The social impact of free flow of information

To conclude, the principle of free flow of information includes both factual and normative aspects, which are considered to be interrelated; promoting the free flow of information requires the promotion of a free flow of informational objects (expressions) as well as legal structures that provides a reasonable framework for such a free flow of information.[40]

2.6 An Additional Theory Justifying and Restricting Copyright

Competition law is today the most important legal theory restricting the application of copyright law. Copyright is commonly recognized as being a monopoly right, excluding competitors from the market. Competition law requires copyright to reduce the monopoly right of copyright owners as much as possible. However, many legal observers believe that the possibility to restrict

40 The value basis of the free flow of informaiton has been discussed more in-depth in Still, Viveca, *Upphovsrätten i informationsssamhället – ett hinder för informationens fria rörlighet?* Nordisk årsbok I rättsinformatik (NÅR) 2003, Jure Stockholm 2004 p 163-176.

copyright on the basis of competition law is overrated. The reason for this is that intellectual property protection is an accepted exception from the principle of free competition. In practice no breach of competition law is *à priori* considered to take place when making use of the rights conferred by intellectual property law.[41] In fact, safeguarding free competition could and should be considered when drafting intellectual property law.

Competition law only addresses the problem of competitive markets. This very limited approach does not in any way explain the need for copyright exemptions like the quotation right or the need to safeguard education or the right to fair trial. Neither does consumer law, another piece of legislation that sometimes may affect the application of copyright law.[42] That is why additional legal doctrines need to be considered. Information law brings forward new aspects that makes it possible to analyze both the rationale of copyright and especially help us explore the boundaries to copyright protection as restricted by this body of law.

Free flow of information is as important a principle within information law as free competition within competition law. It is designed to give us an *à priori* rule intended to restrict the possibilities for copyright abuse. Whereas the principle of free competition brings forward the idea of a free market and is strongly based on ideas of capitalism and liberalist economic theories, the principle of free flow of information is based on the idea of that information enhances democracy and transparency, innovation and productivity, education and cultural diversity.

The free-riding theory by which copyright protection has been justified, heavily lays on ideas emanating from competition law such as fair competition and free markets. In very much the same manner the idea that copyright is designed to assure a functioning information market free from state censorship (the democracy objective) or the idea of copyright giving incentives for the production and dissemination of cultural and informational goods to the benefit of culture and science (the cultural and productive use objective), the principle of free flow of information heavily leans on the idea that information production and dissemination is beneficial for society and should be promoted.

And finally, in the very same manner as simplifications of competition law is used in order to both justify and restrict the application of copyright through legislative or interpretational measures, just as well the principle of free flow of information provides us with a simple justification of copyright protection and a simple maxim to keep in mind when exploring the right balance between copyright and the free flow of information (and alternative legislative solutions);

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41 Govaere, Inge, *The Use and Abuse of Intellectual Property Rights in E.C.* Law. Sweet & Maxwell, London 1996, p 300. However, Govaere does not altogether exclude the idea of competition law having some effect on the scope of intellectual property law.

42 The need to address concerns of competition or consumer law or any other legal body is very well illustrated by the following case: According to Finnish copyright law libraries may not freely lend audiovisual works, and the library therefore had to license the lending rights of the video tapes. However, it later turned out that technological measures included in most video players of today destroy the tape. However, as the licensor was unwilling to give them permission to make copies in order to preserve the material, and in the absence of a compulsory exemption giving users a right to make backup copies, the library can not in practice lend the video tapes to the public.

Keeping in mind the importance of information in society, any restrictions on the free flow of information need to be explicitly justified!

2.7 Free Flow of Information is not Opposed to the Idea of Copyright

In my understanding, the principle of free flow of information is not necessarily opposed to the idea of copyright. On the contrary, copyright can be said to promote free flow of information to the extent that copyright protection actually promotes the production and dissemination of content to the benefit of a private market of information[43] (that is free from state censorship) and to the benefit of cultural diversity.

My understanding of the principle of free flow of information therefore differs from the conceptions put forward by some legal scholars, who consider the principle of free flow of information (or information freedom) to be in contradiction with the monopoly right of copyright.[44] Hence the principle of free flow of information is neutral vis-à-vis copyright as such. However, I fully agree that the principle of free flow of information justifies many of the copyright exemptions, and that there is *à priori* a tension between the free flow of information and the idea of private ownership of information.

3 Concluding Remarks

The principle of free flow of information should influence both regulation and interpretation of copyright. However, it is easy to agree with those who think it is extremely difficult to change the traditional view of copyright in the Nordic countries; i.e. that copyright is designed to protect the interests of the author.[45] Modern legislation in Finland usually contains a first section where the general purpose of the law is stated. Section 1 of the Finnish Copyright Act merely lays down the general principle that the one who creates a work has copyright to the work. However, it seems clear that this is not, and could not be, a statement of the purpose of the law, as it would be contradictory with the starting point of our legal system, which is to promote the general good. The protection of the interests of certain parties is secondary to the general good and has to be contained within the boundaries of the general good.

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43 When comparing different ways of disseminating information, market mechanisms are probably among the most efficient. From this perspective, the establishment of a private market for information would be beneficial for society.

44 Saarenpää, Ahti; *Informaatio-oikeus*. Encyclopedia Iuridica Fennica VIII, p. 210 and Guibault, op cit, p. 32, where the principle of free flow of information is described as being opposed to copyright and underlying many of the copyright exemptions. Pöysti is not so explicit on this matter, but it seems like he would accept the idea that copyright can both prevent and promote the free flow of information, Pöysti, op cit.

45 See Välimäki op. cit., who also suggests that copyright should be reformed so as to include a section on the general purpose of the law in the beginning of the law.

How then use the principle of free flow of information? In the same fashion as other principles are used, the principle of free flow of information is designed to give light to legal rules and to guide both regulation and interpretation.

When looking at copyright law through the lens of information law, and in particular through the optimization lens of the principle of free flow of information, features which obstructs the free flow of information can be distinguished. These features may vary from evaluations of the importance of preserving copyright exemptions to hidden risks in the copyright system.

Returning to our starting point and the current critic of the impact of technological measures, some points may be raised on the basis of the ideas put forward in this article;

- Technological measures as such need not necessarily be an obstacle to the free flow of information. On the contrary, knowing that they can retain some control over the use of the work, and especially with regards to the new business logic and incentives provided by the possibility of superdistribution, there is reason to believe that the application of DRM actually provides new incentives for the production of content. When considered from the point of view of the liberalist and instrumental aspects of the principle of free flow of information explained above, technological measures strengthens the commercial logic, providing efficient market mechanisms through which content can be efficiently produced, marketed and diffused.

- The claim that the principle of free flow of information promotes a socially aware and a socially fair approach implies that we should acknowledge not only the interests of users but also the new economic interests of copyright holders. What is the harm on society of the possibility to differentiate products (which is facilitated through DRM) and protect content from being distorted and modified? Probably none. On the other hand, changes in our information and communication environment caused by the extensive use of computers and communication networks have been largely ignored or discussed very one-sidedly.[46]

- The changes described in the copyright paradigm in chapter 2.3 above, require thorough insights into all the implications of the use of DRM. The current copyright reform seems to focus only on the need to protect DRM in order to provide for an efficient protection of copyright in the digital environment. This view is far too narrow, as the changes in the copyright paradigm require an evaluation of also all its negative impacts on the free flow of information. There has, for instance, been surprisingly little discussion about how DRM could be used to diminish the risks of the users of copyrighted works and whether one way of balancing the interests between copyright holders and users would be to require copyright holders to apply

46 The discussion of the impact of changes in the information and communication environment has been focused only on its possible negative impact on the interests of copyright holders. The need to accumulate copyright to the new interests of the users has usually not been considered.

some protection to their works. A balanced approach is hardly one where all the risks are allocated on the users (which in many instances have a very limited commercial interest in the use) without providing them any freedom of use. Considering the possibility to "circumvent" or contract around user rights, there should be an open discussion of the need to safeguard user rights[47] in the modern copyright paradigm.

- In the future the application of DRM may give reason to reconsider the models for compensation of copyright owners. The increase of the possibility to contract and its effect on copyright levies and collective licensing agreement (or compulsory licensing) should be taken into account. The application of DRM seems to promise a future where the transaction costs of licensing diminish and where the need for multiple licensing schemes (sometimes implying also multiple compensation) may be reduced. In addition, with the increasing possibility to license and monitor use, compensation schemes foreseen by copyright law need to address the issue of how to safeguard productive and non-commercial (for instance educational) use.

47 On top of the recognized user rights new rights might be needed. A new right, that would seem to be required in order to care also for the interests of the users, is the right to make backup-copies.