

Christian W. Handke

The EU Directive on Copyrights, Technological Change and Innovation in the Phonogram Industry from a Systems of Innovations Perspective

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Creating Information Monopolies to Promote Innovation in the “*Espace Européen de la Créativité*”?

The EU Directive on Copyrights, Technological Change and Innovation in the Phonogram Industry from a Systems of Innovation Perspective

I. Introduction

Cultural industries, like the sector dedicated to the production of media content, have long been marginal in academic research¹, arguably because they do not fit pure concepts of the economical, the socio-political, nor the cultural.² This relative neglect is in stark contrast to the omnipresence of audio-visual media services in many daily lives³, and the cultural and political significance of such information imparted as media content⁴. These information services fulfil crucial functions for communication, education, inspiration, recreation and entertainment.

It also contrasts with the economic dynamism of the sector. In the last two decades, the sector has gone through a “wave of mergers and acquisitions during the 1980s and 1990s” leading to a “concentration of ownership to international corporations”.⁵ The sector is further characterised by technological change, in particular due to the diffusion and development of Information and Communication Technology (ICT) applications⁶. Meanwhile, initial efforts to conduct cultural accounting from the late 1980s onwards provided evidence that the production and distribution of information as media content accounts a) for a significant part of GNP and employment in most industrialised countries, and b) has tended to expand more rapidly than economies as a whole, i.e. has been a source of economic growth and job creation.⁷ Not least for EU policy makers, media

¹ Towse, R. (2000) *Cultural Economics, Copyright and the Cultural Industries*, pp.107/8, www.lib.bke.hu/gt/2000-4/towse.pdf

² Pratt, A.C. (1997) *Guest Editorial – Production Values: from cultural industries to the governance of culture*, in „Environment and Planning A“, vol. 29, pp.1911-1917, here p.1915

³ see e.g. Vogel, H.L. (1998) *Entertainment Industry Economics*, Cambridge University Press, p.132 and Burnett, R. (1990) *Concentration and Diversity in the International Phonogram Industry*, Gothenburg studies of Journalism and Mass Communication, p.1

⁴ see e.g. Curran, J. et al (1982) *The study of the media: theoretical approaches*, in Gurevitch, M. et al, eds., “Culture, Society and the Media”, London: Routledge, pp.11-29, here p.14

⁵ Wallis, R. (... a) *The Changing Structure of the Music Industry*, p.1, r.a.wallis@skap.se

see also e.g. Negus, K. (1996) *Popular Music in Theory*, Cambridge: Polity Press, p.40

and Burnett, R. (1996) *The global jukebox: the international music industry*, London: Routledge, p.8ff.

Smiers, J., *The abolition of copyrights: better for artists, Third World countries and the public domain*, in Towse, R., ed. (2002), *Copyright in the Cultural Industries*, Cheltenham: Elgar, pp.119-139, p.119ff.

⁶ see Wallis (... a) op cit, p.3

⁷ for a comprehensive overview see Towse (2000) op cit, pp.108-111

content came to be seen as one of *the* growth sectors in a prospective "Information Society"⁸(IS) where digital information networks unfold their benefits in the context of a globalising, competitive economy.

The transition to a new global media landscape that makes full use of ICT and would become one cornerstone of an IS, has the potential to affect competitiveness, change the global division of labour and the division of profits from cultural production. It is not entirely surprising then, that the media sector is in turmoil at the moment. Currently, even some of the triumphant international media conglomerates that emerged out of the "wave of mergers", are experiencing highly publicised difficulties.⁹ At the same time, the expected benefits of the "Information Society" have not arrived as swiftly as had sometimes been predicted.¹⁰

These challenges sustain a controversial debate on policy, in particular on the handling of intellectual property rights (IPR).¹¹ Much of this discourse has crystallised around the music industry and the regulation of copyrights.¹² With the "*Directive (...) on the harmonisation of certain aspects of copyright and related rights in the information society of 22 May 2001*"¹³ (the Directive), the EU has begun to regulate central issues of copyrights on the supra-national Union level. The explicit objective is the promotion of innovation and creativity by a stronger copyright regime throughout the EU. The main research question to be tackled here is, whether this Directive on copyrights in the IS is coherent with the objectives in the regulated sector specified by policy-makers.

⁸ see e.g. European Commission (1995) *Green Paper – Copyright and Related Rights in the Information Society*, COM(95)382, July 1995

and European Commission (1997) *Green Paper on the Regulatory Implications of the Convergence of the Telecommunications, Audiovisual and Information Technology Sectors*, COM(97)623, <http://www.europa.eu.int/ISPO/convergencecp/97623en.doc>

⁹ see e.g. Martin, P., *Victim of the media minefield*, in "Financial Times", April 25 2002, p.10 for Vivendi Universal Raupp, J., *Börsengang von Bertelsmann rückt in die Ferne*, in "Süddeutsche Zeitung", Juli 30 2002, for Bertelsmann/BMG

and anonymous, *Rettungsmission bei AOL Time Warner*, in „Frankfurter Allgemeine Zeitung“, 13 April 2002, p.22 for AOL Time Warner

¹⁰ attention has been drawn to this discrepancy between expectations of dynamic structural change and a more modest reality by Wallis, R. (...b) "*Will anything ever happen?*" *Music industry technology and business models – threats and opportunities*, r.a.wallis@skap.se

Leyshon, A. (2000) *Time-space (and digital) compression: software formats, musical networks, and the reorganisation of the music industry*, in „Environment and Planning A“, vol. 33, pp.49-77

Janson, E. and Mansell, R. (1998) *A case of electronic commerce: The On-line Music Industry _ Content, Regulation and Barriers to Development*, SPRU Working Papers, No.25

¹¹ see e.g. Towes, ed. (2002) op cit

Vaidhyanathan, S. (2001) *Copyrights and Copywrongs*, London: New York University Press

¹² see e.g. Mönkemöller, L. (2000) *Moderne Freibeuter unter uns? – Internet, MP3 und CD-R als GAU für die Musikbranche!*, in GRUR, 102. Jahrgang, München: Beck, pp.663-9

Davis, L. (2002a) *Is appropriability a "Problem" for Innovations in Digital Information Goods?*, to be published in Eliasson, G. and Wihlborg, C., eds., (forthcoming) "The Law, Economics and Technology of the Internet", p.22

¹³ *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*, Official Journal L 167, 22/06/2001, pp.10-19, http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301L0029.html

An attempt is made to answer this question on the basis of economic literature on systems of innovation (SI). The specific focus is on intermediaries in the economic sector preoccupied with the production and distribution of recorded popular music on phonograms¹⁴, and the significance of technological change and EU copyright policy for them.

I.2 Terminology

A few basic concepts dealt with in this paper need to be defined, before going deeper into the subject. This part of the paper might be used as a reference, rather than a direct contribution to the argument.

Cultural industries can be defined as those economic enterprises that are concerned with the production and distribution of "information, mass entertainment, 'low' and 'high' culture". The synonymous use of the term "*creative industries*" underlines that these products are seen to require some unique "spark of creativity, talent, or novelty". They include the arts, literature, film and music, but also much of advertising, architecture, crafts, design, or even software.¹⁵ The definition of property is central to the operation of a market. This is the function of the legal institution of copyrights. This is frequently understood to mean that the definition of property through copyrights "create" the market¹⁶, suggesting that there would be no cultural industries without copyrights. Cultural industries are therefore sometimes defined as "*copyright industries*", i.e. all those firms that produce copyrighted material.¹⁷

It follows that privately owned cultural industries, as addressed in this paper, need to be distinguished from subsidised cultural enterprises, which include many organisations in pursuit of 'high' culture such as classical music and theatre, but also public broadcasters.¹⁸ With the establishment of a pluralistic broadcasting sector, and greater scrutiny on subsidies to the arts, many of these publicly funded organisations operate more similarly to their privately owned counterparts. Nevertheless, their objectives are others or more diverse than those of profit-oriented private firms.

¹⁴ the most common phonograms are CDs, cassettes, vinyl records, minidisks or digital downloads.

The major share of revenues for phonogram producers are created by sales of "popular" and Rock music, see IFPI (2001) *The Recording Industry in Numbers*, London: IFPI

According to Toynbee, the term "popular" is not a precise sociological term but a matter of "populist sentiment", see Toynbee, J. (2000) *Making Popular Music – Musicians, Creativity and Institutions*, London: Arnold

¹⁵ Towse (2000) op cit, pp.107/114

¹⁶ see e.g. Sadler, D. (1997) *The global music business as an information industry: reinterpreting economics of culture*, in "Environment and Planning A", Vol.29, pp. 1919-1936, p.1919

Towse (2000) op cit, p.112

¹⁷ Towse (2000) op cit

¹⁸ for the difficulties of this distinction, see Towse (2000) op cit, p.108ff.