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The Lawyer's Perspective

Good Afternoon,

First of all let me thank the organisers of this conference for giving me the opportunity to tell you something about the lawyer's perspective of the discussion about *Open Access to Digital Archives*. I have discussed shortly with Oliver Rathkolb, what he thinks, a lawyer's position on this topic would be, but he encouraged me to put in the ideas, a lawyer really has on this question. So I will do my best to do this.

As you are surely aware, a lawyer seldom has his own position. Lawyers are the representatives of their clients, their interests, their opinions, their troubles and their money. So it may be difficult to find a genuine position of the lawyers themselves. This lack of truthfulness culminates in the famous joke about lawyers, you may have already heard sometimes: How does someone recognize, if a lawyer lies? His lips are moving ….

But, there seems to be one single item, where a position of lawyers clearly appears in the field of the political discussion on copyright: Copyright law is quite a sharp weapon in the hands of lawyers. More than in most of the other areas of practical law, copyright is something, where lawyers have efficient means to enforce the interests of their clients. The Austrian Copyright Act also as most other national copyright legislatives is granting to the holder or owner of the copyright a bundle of legal claims and legal possibilities to put these claims across.

Let me give you an example:

If somebody notices that his works, which are protected by the copyright law, are used for example in a public accessible digital archive without his consent, he is entitled to sue for a cease and desist order. He may sue not only the producer of this digital archive, but also the company this person works for. If the access to this digital archive is enabled through the internet, he may demand the provider to give him all necessary contact details of the violator, who is the customer of the internet service provider, and he may sue the provider himself for cease and desist, if he does not cooperate with him. The copyright owner is entitled to demand omission, removal of all infringing databases, adequate consideration, damage claims and publication of the judgement. To secure the claim for cease and desist, the lawyer will file an application for a preliminary injunction, which immediately denies any usage of the work protected by the copyright. If the violator is not willing to obey such a preliminary injunction, daily fines of up to 100.000 Euros can be imposed on the opponent.

Ladies and gentlemen, now you have a glance about the joy a lawyer may have to enforce the copyright claims of his client! This joy grounds also on the fact, that copyright claims according to the Austrian lawyer's fee rates have a minimal value of 36.000 Euros, so that even if the opponent raises both hands after the first legal steps the lawyer undertakes, the lawyer`s fee will be at least 3.000 Euros. It is quite a fine business, this copyright law!

If the client tells me, that he knows, his works are used without his consent, but he cannot identify the violator, the Copyright Act gives us more possibilities than in other cases: We may go to the tribunal for criminal offences and ask the judge for an order to search the house and offices of the suspects, to monitor their phone calls, to confiscate their computers and internet servers, or, to make a long story short: We have the same rights as a public attorney, because violating copyrights is a criminal act. You may theoretically even go to jail for such a violation.

You may ask me, why copyright is such a well-protected right, in comparison to other rights. I think there are two reasons of different cause for this:

First, copyright is an immaterial right, nothing you can grab by hand or put in your pockets. As works protected by the copyright can also – especially in times of modern technology –easily be reproduced, a clear and efficient protection by the law is necessary, to secure the interests of those who produce these works, the authors, the designers, the painters, the songwriters, the photographers, and all the other ones who work in our society producing art.

The other reason is without any doubt the fact, that usage and exploitation of copyrights is big business for the entertainment industry. This industry has clear and comprehensible interests, mainly the interest that its cash investments, its profits and its share holder values remain untouched and invulnerable. This explains some of the recent legislation acts in copyright, eg. the enforcement directive, which gave the holders of copyrights some more means to push through their interests.

The possible inconsistence between these two main objectives of copyright law escorts copyright law since its beginnings: Remember, the origin of copyright itself was in the 15th century when book printers in London demanded for a legal regulation of the *right to copy* their books. In contradiction to this first origin during the 18th and 19th century the conception of copyright as an author` s right, namely represented by the French designation *le droit d' auteur* took place in continental Europe. These two different conceptions of copyright as a right of the industry (expressed mainly in Anglo-American legislations) or copyright as an author's right (expressed mainly in continental European legislations) are until today the main discussion lines, along which the development of modern copyright legislation is curling up.

So if you ask me for the lawyer's perspective on open access to digital archives, my mind is divided in three parts:

1. First, free access to digital archives could mean fewer cases and therefore less money for copyright lawyers, this is an annoying perspective!

2. Second, and more seriously, free access to digital archives shall not mean, that producers of copyright protected works, such as authors or photographers, loose their legitimate claim for payments for the usage of their works. Copyright shall ever be a mean to distribute money to those, who work as creative producers in our society.

3. Third, the question, how to organise the transfer and access to knowledge, is a political question and not a legal one. Therefore, the discussion about this relevant political topic should be organised and held in a political way. Lawyers have the duty to enforce the legal rights, not to create them. This does not mean that lawyers have no political

opinion themselves, but in our role as representatives we have the duty and obligation to take the view only of our clients.

But, to give you at last my personal view, not only because of the fact that lawyers love copyright claims, I am of the strong opinion that any way to socialise access to knowledge should not be organised by weakening the position of authors and other producers of works protected by the copyright. In the chain of exploitation of works, the author and producer of the works has in the large majority of cases the weakest position. A reasonable balance of interests has therefore to take care of these facts and has to see not only the public interests of access to knowledge, but also the public interest of granting an adequate fee to those, who produce this knowledge.

Thank you very much for your attention.