

Enforcing Copyright Online in Scandinavia: Economic Consequences of Nuances in National Implementations of International Law

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Abstract

This paper investigates how nuances in national copyright law affect the efficiency of online copyright enforcement in the Scandinavian countries. The particular type of enforcement studied is copyright holders' ability to have websites facilitating piracy blocked by broadband ISPs. A comparative institutional analysis identifies differences in the implementation of EU's Infosoc-directive and suggests that these have created significant variance in the efficiency of copyright protection between the countries.

Keywords: Copyright, piracy, enforcement

Funding: This study was conducted with financial support from the Research Council of Norway [project number 247602].

Introduction

International law establishes global or transnational standards, with the objective to achieve more uniform national laws in specific areas, such as for copyrights.¹ In the EU's Infosoc-directive adaptations to digital technology set out by the World Intellectual Property Organization (WIPO) were implemented² and becoming a part of EU-law and EEA-states regulation. As long as a member state's implementation meets a directive's objectives, it has flexibility in how to implement it. Consequently, there were variances in the implementation that resulted in nuances in the EU- and EEA member states national copyright laws.

Variances in implementation of EU-regulations contribute to differences in copyright protection, including the efficiency of online copyright enforcement from one country to another.

Most works protected under copyright has a distinguishing characteristic of a public good. While the cost of creating a work is high, the cost of reproduction is low. Generally, therefore, the copyright holder cannot sell copies at marginal cost without incurring a loss. Copyright protection grants the copyright owner the right to prevent others from making copies, and it therefore trades off the costs of limiting access to a work at marginal cost against the benefits of providing incentives to create the work in the first place. Without it there would be market failure (Landes & Posner, 1989; Towse, 1999).

Technological developments, and particularly the digitization of the media, has further reduced the cost of copying and increased the scale and scope of piracy (De Vany & Walls, 2007; Margolis, 1987). As the marginal cost of copying is approaching zero efficient enforcement grows more important as a potential piracy deterrent. Improving efficiency

¹ Here 'copyrights' refers to both authors' rights and related or neighboring rights.

² Wipo's Copyright Treaty (WCT) and Wipo's Performance and Phonogram Treaty (WPPT) aim to adapt the Bern and Roma conventions to the digital era.

extends the scope of effective copyright protection since enforcement costs affect the value of copyrights, and thus also incentives both to exploit existing works and to create new works. Inefficiency raises the enforcement threshold, leaving it as a viable option only for the more valuable works. When rights holders' enforcement costs surpass the value they can expect to appropriate through exploitation, copyright is no longer providing excludability and it is thus ineffective as an economic incentive to create. When works lose the excludability provided through copyright in a world with otherwise zero reproduction costs, they also turn from marketable to non-marketable public goods, which are ill suited for private supply (Adams & McCormick, 1993; Gaustad, 2002).

Therefore, implementation of international copyright law in ways that create nuances in national law and enforcement matters. By comparing the implementation of EU's Infosoc-directive in the Scandinavian countries, we seek to illustrate the consequences of national nuances. The particular type of enforcement studied is copyright holders' ability to have websites facilitating piracy blocked by broadband ISPs.

There is a high degree of uniformity in the underlying procedural law in Norway, Sweden and Denmark due to a long tradition of Nordic cooperation in the legislative field. Therefore, the effects of nuances in the relevant substantive laws for enforcing copyright online may more easily be related to national implementations of the EU InfoSoc-directive. The flexibility provided for each country as to how the directive's objectives were implemented into national law has created nuances between the countries that seem to cause significant differences in enforcement efficiency despite the underlying uniformity. For instance, the first ruling to block an online piracy site was reached by a Danish court in 2006, while Norwegian and Swedish courts only followed in 2015 and 2017, respectively, despite several earlier attempts and otherwise similar patterns of internet use.

Discussing enforcement efficiency demands a definition of efficiency. Drawing on New Institutional Economics and economic analysis of law, we may say that efficiency is improved with the elimination of waste (Williamson, 1975, 1985), and more specifically by minimizing the sum of error costs and direct costs (Posner, 1973). Here error costs are primarily understood as the social costs when a judicial system fails to carry out the correct level of copyright protection assigned to it. Direct costs are those of operating the copyright dispute-resolution machinery and include costs related to litigants', lawyers' and judges' time. The two types of costs are highly interdependent and should be analyzed simultaneously. For instance, a stricter standard of proof is likely to reduce error costs, but increase direct costs. Yet, if direct costs become prohibitively high for litigants, right holders might resist bringing cases to courts, and error costs will incur both in relation to the individual cases not receiving a court decision and in relation to the value of a possible lost precedent.

The cost inquiries required to determine efficiency are not simple. Estimating error costs may yield only crude approximations, and measuring direct costs, which in principle should be easier, may also be difficult as sufficient information may not be readily available. Therefore, we do not attempt to estimate absolute levels of efficiency. Instead we apply comparative institutional analysis to determine relative levels of efficiency. We identify nuances between the national laws, and with relative measures of error and direct costs efficiency may be compared across the countries.

The high degree of uniformity between the three Scandinavian countries in both substantive and procedural law, allows us to carry out a comparative case study with a most similar system design (Yin, 2014), making it easier to link differences in our independent variables (nuances in copyright law) to our dependent variables (direct and error costs).

Preliminary results suggest that stricter standards in Norwegian law (with regards to both proof and process) generate relatively higher direct costs, and that few court cases combined

with a high number of reported violations and a low clearance rate indicate higher error costs in Norway than in Sweden and Denmark.

The rest of the paper is organized as follows: First, we discuss our theoretical framework, reviewing new institutional economics and economic analysis of law. Then we turn to comparative institutional analysis as a method, before presenting findings from our legal analysis as well as some preliminary empirical evidence. Finally follows discussions and concluding remarks.

New institutional economics and economic analysis of law

New Institutional Economics (NIE), and particularly Transaction Cost Economics (TCE), assumes a world of positive transaction cost, proposes that economic institutions have the primary purpose of economizing on transaction costs, and explains differences in economic organization accordingly (Klein, Crawford, & Alchian, 1978; Williamson, 1975, 1985).

Copyright holders and users face transaction cost both ex ante (e.g. negotiation and contracting costs) and ex post (e.g. monitoring and enforcement costs). Contracting choices are made to minimize these transaction costs. For instance, composers and users of their works may minimize their ex ante and ex post transaction costs by pooling a large number of small transaction through collective rights organizations instead of having composers contract individually for each work with each user (Handke, 2014; Handke & Towse, 2007).

NIE is concerned with economic efficiency by reducing the costs of running the economic system at two levels: an institutional environment level, where the formal rules of the game are defined, and a governance level, concerned with the play of the game (Williamson, 2000). Comparative contracting analysis belongs to the latter, while comparative studies of copyright law belongs to the first. However, the two are closely interconnected. First, the institutional

level imposes constraints on the governance level, as when costly court ordering induces transaction parties to settle disputes directly through private ordering. Second, there are feedback effect the other way, as when copyright law is adjusted to digital technology to mitigate copyright holders' monitoring and enforcement costs, which otherwise would become overwhelming.

NIE occupies much common ground with economic analysis of law (Williamson, 1996).

Within the policy analysis branch of law and economics efficiency is typically the evaluative criterion, defined by Posner (1973) as minimizing error and direct costs. Error costs generally refers to the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it, and may be regarded as the product of two factors: the probability of error and the cost if error occurs. Direct costs are generally defined as the costs of operating the legal dispute-resolution machinery.

Clearly, NIE's transaction costs and Posner's error and direct costs are closely related concepts. The property rights branch of NIE, which primarily operates on the institutional level, even defines transaction costs as the costs of establishing and maintaining property rights (Allen, 2000). We may therefore refer to both direct costs and error costs as transaction costs. In this context, error costs are best understood as transaction opportunity costs, denoting a loss of value or a lost opportunity to create value. When cases are not heard by courts due to prohibitively high direct costs, or for other reasons, two types of error costs occur: First, no decision is made concerning the individual case, and, second, no precedent is created for situation similar to the one decided upon by the courts in the individual case. Due to its public good character, the latter type can be of significant value (Landes & Posner, 1979). Both the private and public elements represent a lost opportunity to create value.

In both NIE and economic analysis of law the legal system is treated as part of the larger economic system, and efficiency is achieved by reducing “the costs of running the system”, which corresponds to Kenneth Arrow’s definition of transaction costs (1969, p.48).

Comparative institutional analysis

To study the efficiency of Scandinavian legal systems concerning copyright protection we apply comparative institutional analysis. The institutions subject to our analysis are those defining the formal rules of copyright protection: Each country’s relevant substantive and procedural laws as well as jurisprudence, thus including the case law or the legal decisions that have developed in the field within each jurisdiction.

The first step of our analysis is to identify nuances in these institutions related to differences in the implementation of the Infosoc directive. A key objective of the directive was to establish a certain level of copyright protection. The level of protection is dependent on the scope of monopoly granted copyright holders and its enforcement, and the relation between the two elements is best understood as multiplicative. Consequently, meeting the directive’s objectives for the scope of copyrights has little value unless a certain level of enforcement is also implemented. Our analysis emphasizes enforcement rules related to internet transmissions, as these seem most relevant to copyright piracy, and rules regulating complicity of intermediaries such as ISPs, as there are central in site-blocking cases.

The next step is to investigate indicators of transaction costs in the form of direct and error costs. Indicators of direct costs include the number of processes required to initiate and run a case, the strictness defined for the burden of proof, ambiguous rules, as well as other measures of resources required to enforce copyrights. For error costs we consider

discrepancies between the number of cases reported to the police, the shares dropped and resolved, as well as the amount of cases heard by courts.

And finally, comparative transaction costs analyses under alternative legal systems signal the relative efficiency of each system.

Findings: Legal analysis and empirical evidence

Our legal analysis reveal that each of the Scandinavian countries implemented the Infosoc-directive were differently in a number of areas.

Danish law extended the scope of copyright in an area vital for blocking-cases, which may explain why the first ruling to block was reached by Danish courts about one decade before similar rulings by Norwegian and Swedish courts. Under Danish law temporary copies stored by intermediaries must be created from legal sources only. In Norwegian law, on the other hand, temporary copies from illegal sources are prohibited only if the transmission is evidently illegal and if the use of such copies significantly damages rights holders' economic interests.

Complicity is also treated differently in each country. Swedish and Danish law considers intermediaries complicit if they provide subscribers access to servers containing unauthorized content. Complicity is considered based on factual actions. Norwegian law, on the other hand, applies a stricter criminal law approach. Requirements include a causal relationship between the complicit and main actions, and that the complicit action is deemed illegal also in a fuller view.

The burden of proof is set higher in Norwegian law than in Swedish and Danish law. Rights holders must substantiate a large scale of evident copyright infringement with strong preponderance. As the burden of evidence lays on the rights holders, they must document

both legal and illegal content on the piracy sites they seek to block. In practice, this requires rights holders continuously to monitor content consumption. To collect required proof is thus both time consuming and costly.

To initiate a blocking-case, a number of administrative steps are required for rights holders in all three countries. First they must obtain personal data linked to IP-addresses by applying to the national communications authority for an exception to standard privacy laws, which is granted if the authority assess that the case offset consequences for broadband subscribers of revealing the data. Provided an exception is granted, the next required step is to obtain a separate court ruling granting a similar exception. Then, with the permissions to link IP-addresses to subscriber data, evidence can be collected to initiate a case.

Finally, Norwegian rulings are non-dynamic, which means that a new case must be heard by the courts if a blocked site moves to a new domain. Danish courts, on the other hand, have ruled that a blocking contains potential future domains for the same site. Norwegian rights holders have requested the same in several cases, but these requests have been turned down.

A more thorough presentation of the comparative legal analysis is provided elsewhere (Eidsvold-Tøien & Viken, Forthcoming).

Preliminary empirical evidence suggests that the number of cases heard by Norwegian courts are significantly lower than in Denmark, and also lower than in Sweden. In the period 2014-2018, five cases were heard out of which one was heard by the Supreme Court. It was larger, commercial rights owners, sometimes in collaboration with smaller partners, which brought the cases to courts. This may also indicates that substantial resources were required.

Furthermore, preliminary data for the criminal law track shows a similar picture. Of the cases reported to the police, 72 percent were dropped and only a minor share of the rest were resolved.

Discussion and concluding remarks

Our comparative institutional analysis suggests that differences between the Scandinavian countries in their implementation of EU's Infosoc-directive into national law has resulted in significant variance in the efficiency of copyright protection. The Norwegian copyright institutions seems the least efficient, and considering the consequences of the implementation, it is unclear if the objective of the directive has been adapted sufficiently efficient into national law. A narrower scope for copyrights, stricter definition of complicity, higher burden of proof and non-dynamic rulings all contribute to higher direct costs. Furthermore, while preliminary and sketchy, empirical evidence also suggests error costs in the forms of cases not heard and dropped.

Borrowing TCE-concepts from the governance level to the institutional level of analysis, one may argue that the Norwegian implementation represents a maladaptation in its obligation to EU through Norway's EEA-agreement with EU, to implement the Infosoc-directive. The loss of value resulting from this maladaptation can be understood as a maladaptation cost, a transaction cost of the opportunity cost kind, which to a significant degree is carried by Norwegian rights holders.

References

- Adams, R.D., & McCormick, K. (1993). The Traditional Distinction Between Public and Private Goods Needs to be Extended, Not Abandoned. *Journal of Theoretical Politics*, 5(1), 109-116

- Allen, D.W. (2000). Transaction Costs. In B. Bouckaart & G. De Geest (Eds.), *Encyclopedia of Law and Economics* (pp. 893-925). Cheltenham UK: Edward Elgar.
- Arrow, K. (1969). The Organization of Economic Activity: Issues Pertinent to the Choice of Market versus Nonmarket Allocation. In s. C. U.S. Joint Economic Committee, 1st Session (Ed.), *The Analysis and Evaluation of Public Expenditure: The PPB System* (Vol. 1, pp. 59-73). Washington, D.C.: U.S. Government Printing Office.
- De Vany, A.S., & Walls, W.D. (2007). Estimating the effects of movie piracy on box-office revenue. *Review of Industrial Organization*, 30(4), 291-301
- Eidsvold-Tøien, I., & Viken, M. (Forthcoming). Hvor effektive er de norske opphavsrettslige håndhevsregler? *NIR : Nordiskt immateriellt rättskydd*
- Gaustad, T. (2002). The Problem of Excludability for Media and Entertainment Products in New Electronic Market Channels. *Electronic Markets*, 12(4), 248-251
- Handke, C. (2014). Collective Administration. In R. Watt (Ed.), *Handbook on the Economics of Copyright: A Guide for Students and Teachers* (pp. 179-206). Cheltenham UK: Edward Elgar.
- Handke, C., & Towse, R. (2007). Economics of Copyright Collecting Societies. *International Review of Intellectual Property and Competition Law*, 38(8), 937-957
- Klein, B., Crawford, R.G., & Alchian, A.A. (1978). Vertical Integration, Appropriable Rents, and the Competitive Contracting Process. *Journal of Law & Economics*, 21(2), 297-326
- Landes, W.M., & Posner, R.A. (1979). Adjudication as a Private Good. *Journal of Legal Studies*, 8(2), 235-284
- Landes, W.M., & Posner, R.A. (1989). An economic analysis of copyright law. *The Journal of Legal Studies*, 18(2), 325-363

- Margolis, S.E. (1987). Two Definitions of Efficiency in Law and Economics. *The Journal of Legal Studies*, 16(2), 471-482
- Posner, R.A. (1973). Economic Approach to Legal Procedure and Judicial Administration. *Journal of Legal Studies*, 2(2), 399-458
- Towse, R. (1999). Copyright, risk and the artist: An economic approach to policy for artists. *International Journal of Cultural Policy*, 6(1), 91-107
- Williamson, O.E. (1975). *Markets and Hierarchies: Analysis and Antitrust Implications*. New York: Free Press.
- Williamson, O.E. (1985). *The Economic Institutions of Capitalism*. New York: The Free Press.
- Williamson, O.E. (1996). *The Mechanisms of Governance*. New York: Oxford University Press.
- Williamson, O.E. (2000). The New Institutional Economics: Taking Stock, Looking Ahead. *Journal of Economic Literature*, 38(3), 595-613
- Yin, R.K. (2014). *Case study research: design and methods* (5th ed.). Los Angeles, Calif: SAGE.