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Information Law and E-books: the E-book as a new Medium of Communication

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For the first time in history, ebooks sells have exceed books sells in USA[1]. In Europe, for various reasons, the result is different but the main idea remains the same: ebooks are not anymore just a new phenomenon but have become a reality of the publishing economy. The legal issues associated with ebooks are usually divided in two categories: discussions related to the price of the ebook and its relationship with competition law and consumer protection and also discussion about the manifest difficulties of the application of copyright law in this domain as in so much other domains related to the new technologies. However, this article aims to adopt a more global approach and asks simply: how does digital technology change books?

There is no easy answer to that question, especially since everybody agrees that the technology will continue to evolve grandly in this domain. However, we could distinguish two main flows of answers: the cynical and the enthusiastic. The cynical argue that ebook will never achieve to replace books[2]. The feeling is different, the experience differs too. Ebooks just add a part of danger for the human rights. The enthusiastic ones at the opposite have already decided that books, renamed as paper books now, are a reliquary of the past, doomed to be replaced by this new, improved medium of communication[3]. These two reactions can also be observed more specifically at a legal level. Cynical legalists would highlight the new dangers that this technology brought in our life, and the most eminent of these dangers of course is the privacy issue. Enthusiast legalists would reply with a demonstration of the superiority of Ebooks on their paper cousins, for example, with a better control of the exclusive rights of the copyright right holder.

Indeed, it has become "cliché" to compare books and eBooks. Just to cite the obvious, we should refer to the most interesting differences: book is a low tech technology which exists in various forms (parchment, scrolls, codex, until the Gutenberg bible) since the invention of paper[4] and will probably continue to exist for a long time, while Ebook is very technological related, which means that access to the content is subordinated to the use of a temporary interface, doomed to disappear or be updated every few years. Books are sold where EBooks are licensed. And, of course, EBook possesses some advanced features of use related to its digital form.

Our purpose will be, therefore, to demonstrate that EBooks are ontologically different from Books, as new, inedited, legal issues arise. First we will analyze from a legal point of view this complex artifact that is an EBook (I). Then, we will discuss the dangers for privacy caused by the reader devices cunning attention to the reader (II). And, finally, we will have an insight at the

interactivity proposed on EBooks: as present and probably future new features of the devices permits an enhanced level of communication, Are the EBooks a part of this "web2.0" society (III)? And which are the legal consequences?

1. The EBook, a Complex Artifact

1.1. The Software Component of the EBook

The EBooks are not only about text and layout. They possess some new features which means that at the same time they need some more components and first of all, the EBook by definition needs a reader platform. We should not forget that the form of a medium embeds itself in the message, creating a symbiotic relationship by which the medium influences the way the message is perceived, as resumed by the famous citation "the medium is the message" [5]. Therefore, the interaction between the file and the reader platform cannot be ignored in the discussion about the legal aspects of EBooks since also some EBooks are built specifically for some readers and some readers also add new function to the reading activity. In consequence, the reader device is not just metaphorically a pair of glasses for the book but it holds an active part to the access to the information, to the reader's experience and it, therefore, becomes a part of the EBook.

The reader platform's software receives a protection as an original work of mind, through Copyright law. Indeed, as a principle, software cannot be patented[6] even if the topic remains highly controverted. By consequence, the reader's software legal framework is ruled by copyright law and that means that software will be protected under the condition that is original. However, in accordance with the principle of non-protection of the ideas, the algorithms which will rule by example the interlining of paragraphs or the automatic hyphenation won't be protected. In the same way, the simple "look and feel" of the software (for example an animation that virtually flips the pages) cannot be protected by copyright law[7].

1.2. The Font Component.

A typeface is a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements. A font is the computer file or program that is used to represent or create the typeface. The actual most evident link between the EBook and the reader is the font's choice done by the device. It has to be specifically designed to adapt easily to sizes changes, to be clear in circumstances of low contrast (one of the biggest problem of reader devices). In a few words, the typeface represents a crucial part of the EBook, since it has to be pleasant, practical and somehow invisible.

Could a font or/and a typeface be protected legally? Three kinds of protection could apply: the trademark protection, which protects only the name of the font and has de facto really no interest; the design protection, which protects a graphical specificity of a font, but requires substantial costs in order to ensure a protection which will be in any case very temporary; and the copyright protection, which is free since no registration is required, but at the same time very uncertain, as it will be up to the judge to decide a posteriori if a typeface is original or not. It has to be mentioned that the copyright protection of typeface is forbidden in the USA[8].

For the fonts, the tendency is to assimilate them to software and, therefore, to apply the Software protection provided by copyright law. For example, in the US case of Adobe vs. Southern Software Inc. (SSI)[9], it seems that SSI had used FontMonger to copy and rename fonts from Adobe and others. They thought they were safe from prosecution because, though they had directly copied the points that define the shapes from Adobe's fonts, they had moved all the points just slightly so they were not technically identical. Nevertheless, they have been condemned: "Adobe has shown that font editors make creative choices as to what points to select based on the image in front of them on the computer screen. The code is determined directly

from the selection of the points. Thus, any copying of the points is copying of literal expression that is, in essence, copying of the computer code itself".

1.3. The Design of the Reader

The design of the EBook reader can also be considered as original and be protected by copyright law, but more often the most specific and direct protection of Design creations will be pursued. In the war between new tech manufacturers on the field of smartphones, tablets, readers, ultra netbooks, the differences between the products tend to disappear and the models tend to be more and more similar. The European legislation defines the design as "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation"[10]. Basically, three conditions are needed: the design has to be novel, -that is if no identical design has been made available to the public-, and must have an individual character, -that is the "informed user" would find it different from other designs which are available to the public-, and, typically, the design has to be registered. At the opposite, no protection will be available if the design is wholly determined by the technical function of the design. The concept of novelty, at a legal level, is a very pragmatic concept: if one ergonomic style imposes by itself, the judges won't judge it "novel".

The most characteristic example of this "design patent war" is the world legal struggle between Apple and Samsung concerning the iPad and the Galaxy similarities[11]. However, the legal basis of rulings founded on design infringement is at least uncertain. The all idea of PCs embedded in the shape of light touchscreen devices was very ingenious but ideas cannot be protected. Thus, we could believe that the actual market of reader devices does not offer so much novelty and individuality to ensure a definite protection through Design Patent.

1.4. Patented Components of the Reader

The invention patent protection has for purpose to give a temporary monopoly of production to the inventor of a new method. Each jurisdiction decides solely if the criterion of an invention patent application are filed and in the past, especially in the United States, the patent protection has been largely used to protect “methods” which in fact should have been declined as software. Patents in the domain of E-publishing are of course legitimate when, for example, they aim to protect a revolutionary method of electronic printing, a true paper feeling screen or a method of automatically detection of the person’s attention. However, the readers’ device industry does not avoid the classic exploitation in this field and abuses need to be severely controlled by the relevant organisms of protection. For example, Microsoft has filed in USA an invention patent application for the "Virtual Page Turn", while Apple tries to protect it as a design patent[12]. Microsoft is seeking to patent the animation of a page-flip when a user makes the appropriate gesture on an ebook's touchscreen. In the same way, Yahoo also has filed an application for two different patents aimed at serving customers advertisements within eBooks.

1.5. EBooks and the fragmentation of formats

The lack of a universally recognized standard is certainly perceived as an obstacle to the full deployment of the EBook industry. Indeed, we have the epub 1, 2 and 3 format, mobi, pdf, ect… It would be pertinent to talk about a format war between manufacturers/publishers for obvious economic reasons. It won’t be the first time, as we can retrace format wars from the 19e century[13] with innumerous examples in the domain of video recording, memory storage or device connection.

However, proprietary formats aim not only to control the market, but also to control the EBook use. The main idea is that the EBook, as a digital artifact and contrary to books, can be effortless copied thousands of times in a ridiculous amount of time. How to fight against piracy in these conditions? Property formats often comport features to restrain printing, copying, universal access to the text of the EBook. These features known as DRM are, needless to say, very unpopular. Indeed, the side effect of this extensive use of DRMS is to link the EBook to a particular device and/or system. In this domain, a lot would seek a difficult equilibrium between the interdiction of cartels, consumer protection and copyright law enforcement. However, the specific format of an Ebook is protected and the act of format shifting is deemed as an infringement of copyright law.

In conclusion to this first section, we observe that the EBook's protection raises new and interrelated legal issues since the nature of EBooks is this of a complex artifact. But also the most critical issues are related to the Ebook's daily use and the protection of the user's privacy.

2. EBooks and privacy

2.1. The context

It would have been very difficult to imagine only a few years ago that the basic action of reading a book could put in danger our Privacy. Nowadays, Privacy has been raised as the first issue of the reading activity and activists such as the Free Frontier Foundation have published entire guide about the Privacy risks of using an EBook reader[14]. Obviously, the action of reading a specific book reveals a lot on someone's personality. The reading activity usually lasts more than a movie, offers more immersion than music, but at the same time, it used to be the more intimate and discrete connection with a work of mind. For EBooks, this intimacy persists only in appearance, since personal data about the reader's library, the downloaded books, the number of

pages read, the past transactions are kept in control. The extreme value of these personal data cannot be denied, but personal data which are revealed by the books we read do not only refer to what people want to declare about themselves but also to the all inner world of philosophical, political and religious interests and feelings.

Of course, this “Big brother” attention aims to be beneficial: in case of loss or a crash of the eBook reader, the companies providing the ebooks are able to upload again all the library to a new device. It is also clear that this attention leads to major breakthrough in direct marketing: customized answers to research customized proposal of book of interest, etc. Potentially, at a time where marketing experts had stop a long time ago to convince, but to seduce, the uses of these in terms of marketing in order to develop a customer relationship would be endless.

2.2. The legal framework

The European legal framework about data protection[15] is well known and applies without difficulty to EBooks: the principles of transparency of the reader’s personal data processing, of free access the stored personal data, the rights of rectification and deletion. The data subject may object at any time to the processing of personal data for the purpose of direct marketing (art. 14). Also, personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data. Since most of the digital libraries are located in the USA, this protection plays a substantial role in the context of E-Books publication.

This actual legal framework was created before the biggest changes of Information society. A new draft legal framework is therefor in preparation, in order to fill the gaps of the protection.

On 25 January 2012, the European Commission proposed a draft legislative[16] reform to establish a unified European data protection law. A detailed analysis of the changes and evolution of the personal data protection at a European level would exceed obviously the scope of this paper. Specifically about EBooks, an important point of this draft is that the data protection regime will apply also to all US companies processing data of European residents. On the other side, the Regulation will make a safe transfer of data outside of the EU (including the procession of data in clouds) easier in the event that the parties involved commit themselves to binding corporate rules.

Since the EBook publishers by definition use a system of distribution based on the e-commerce, they are especially vulnerable to hacker's attacks. The draft European legislation aims to extend a new obligation, which nowadays exists only for the ISP providers : the data breach notification to the final users. It is especially important in the context of EBooks, since the fear of a condemnation (and more the fear of the bad publicity of the condemnation) will preventively encourage the major actors in this sector to invest more in the protection of their personal data databases.

2.3. Sensitive data

Personal data related to the sexual life of the reader, her religious beliefs, and het ethnic origin benefit from a special regime that is stricter from this of the "simple" personal data. Typically, in most EU countries the data collector needs an authorization from the competent national organization in order to collect sensitive data. Then, the question that has to be posed is the following: are the data collected by the reader devices and, therefore, by the publishers sensitive data? The answer should be negative. Indeed, it is not because somebody likes the black American literature of the XXe century that she is black. Moreover, someone who reads Muslim

books of prayer is not necessarily Muslim: she can just be interested to these books by curiosity, esthetical or comparative motivations. In other words, even if someone's readings determine a lot about someone's personality, it does not mean that the readings are her personality.

In conclusion to this second part, the EBooks create certainly some major issues related to Privacy, but none that cannot be resolved by reference to the existing (and future) data protection legislation.

3. EBooks and web 2.0

3.1. Margin scribblings, highlighted passages and sticky notes.

The most spectacular ontological differences between the paper books and the EBooks concern the incorporation of some web2.0 components. Some features of interactivity have been incorporated in the EBooks with the side effect the publisher to become from a legal point of view a service provider whose liability could be discussed.

For example, a very interesting proposed feature is to highlight a passage of a book and to share it with the rest of the community. Could it be possible to use this function in a malicious way? The Google legal saga of the past years could be very useful in order to interpret the legal framework of the EBooks editors. When Google had added the function of automatic completion of research, they had not, probably, thought of the consequences, until someone sued them since her name was automatically attached with defamatory content. By now, Google has been sued for its autocomplete function in France[17], Italy[18], Germany[19], USA[20] and Japan[21]. The main point of the legal argumentation of the plaintiffs is that the automatic character of the feature does not protect Google, since it is always possible to add some control.

Also, taking small series of words out of their context could be also discussed from the perspective of copyright law. The moral right, at first, protects the author against any violation of

the integrity of her work if it harms her reputation. The economic right, then, forbids the reproduction of the works. The famous Infopaq case[22] had ruled that even an 11 words excerpt can constitute a reproduction. This activity could be legally justified only by reference to the short citation/fair use exception.

3.2. Comments

Obviously, comments are the most sensitive domain from a legal point of view. At the moment that comments are shared, the publisher's activity transforms in a plain web2.0 activity. We could distinguish two forms of comments: the customer reviews and the inline comments. The second aspect is not really developed today yet but it could be proposed in a near future as an experience of shared reading. The first aspect, anyway, is well spread and while eBooks possess an integrated online bookstore, everyone has access to these comments. The question of the legal liability upon these comments arises.

Since we are talking about mere information, a wide range of legal aspects could be discussed here: false information which causes public troubles, deceitful information on the book, personal critics for the author, copyright law infringement, trademarks infringement, etc… Could the vicarious liability of the EBook editor company be proofed? To protect itself, The company will, therefore, need to invoke the protection offered to host providers and will benefit from a safe harbor. In the USA, this safe harbor has been created by the Digital Millennium Copyright Act (DMCA) of 1998, and in EU, by the Electronic Commerce directive[23]. While the companies offer web2.0 features, this will be considered as mere hosting activities and their liability is restricted. Concretely, the provider has to prove that she has no knowledge of the presence of the comment and that she possesses a mechanism of deletion while obtaining the knowledge of the presence of the comment.

However, as the recent CJUE case Google and Google France vs. Louis Vuitton[24] demonstrated, this safe harbor should not be held as a wild card to the service providers and it concretely requires acts of a neutral intermediary service provider to be of a mere technical, automatic and passive nature in order to qualify for exemption. That means that at the moment that the EBook editor intervenes to change the order, to manipulate the comments or to add viral marketing comments, the protection offered by the safe harbor will be automatically lost.

In conclusion, the EBooks could be defined as the paradigm of the digital revolution: new artifacts appear in our daily life, creating new challenges in order to achieve an equilibrium between the protection of investment and consumers rights, provoking new issues, especially in the field of Privacy protection, and disrupting the traditional passive role of the protagonists whose liability will be more frequently assumed. The main idea of this paper was, by juxtaposing the various legal frameworks applying to the different components of the EBooks, to demonstrate the complexity and the originality of the topic. EBooks are clearly no more - if they were ever - just books in electronic forms, but constitute a new domain of research which should have as a priority to find ways to conjugate these various legal frameworks in an harmonious way.

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