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The More Copyright Laws Change, the More Digital Challenges Stay the Same

*Peter K. Yu**

Introduction

I first met Professor Jan Rosén at an annual congress of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP). He is not only an elder statesman in the field of intellectual property law, but also one of the organization's earliest members – a fact he has proudly acknowledged, often with an interesting backstory. During 2009–2011, he served as ATRIP's president, hosting many of us in a highly memorable congress at Stockholm University while also leading an equally successful congress in Singapore the following year.

In the past few years, I have also worked with Professor Rosén through *The WIPO Journal*, which I edit. Since the journal's founding in fall 2009, he has served on its editorial advisory board. I have also worked with him as well as with other past ATRIP presidents on a special issue commemorating the association's 30th anniversary. It has always been a pleasure to work with him. More enjoyably, he constantly provides support and encouragement – regardless of whether you are his peer or a mere junior academic.

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Professor Rosén has contributed many important ideas to the copyright field. He not only provides unique insights into Nordic copyright law – Swedish copyright law, in particular – he has also worked tirelessly to support young scholars in the field. It is with this objective that he, along with Professor Gustavo Ghidini, launched the annual ATRIP Essay Contest – which he continues to run, with amazing success.¹ Since its establishment in 2007, the contest has featured cutting-edge scholarship from junior intellectual property scholars from around the world. For the ATRIP Intellectual Property Series, a book series published by Edward Elgar Publishing, he also edited two volumes collecting articles written by both emerging and veteran scholars.²

Although this short essay will in no way be able to capture the many contributions Professor Rosén has provided to the intellectual property field, I highlight below two areas into which his scholarship have offered unique and important insights. Specifically, I focus on topics that have been explored in his English-language publications. The first topic concerns the exhaustion of distribution rights in computer software and other digital works. The second topic covers the conflict between copyright and freedom of expression. Both topics remain timely and relevant. Indirectly, they also suggest the enduring impact of Professor Rosén's scholarship.

Exhaustion of Distribution Rights

In 1995, Professor Rosén published *Swedish Software Law: As Related Primarily to EC Directives*, immediately after Sweden joined the European Union and shortly after the adoption of Directive 91/250 on the Legal Protection of Computer Programs (Software Directive).³ This monograph explains in detail the Swedish legal

¹ Annette Kur and Jan Rosén, 'ATRIP and Publications' (2013) 4 WIPO J 269, 273–74.

² Jan Rosén (ed), *Individualism and Collectiveness in Intellectual Property Law* (Cheltenham: Edward Elgar Publishing 2012); Jan Rosén (ed), *Intellectual Property at the Crossroads of Trade* (Cheltenham: Edward Elgar Publishing 2012).

³ Jan Rosén, *Swedish Software Law: As Related Primarily to EC Directives* (Stockholm: Juristförlaget 1995).

regime for the protection of intellectual property rights in computer programs.

The first section of the book highlights the challenge of fitting computer programs into the usual category of 'literary works' – a debate that was once intense and that has raised questions about the need for a *sui generis* regime for computer software. The book then describes the copyright regime for computer programs, covering topics that range from the object and scope of protection to restricted acts and exceptions. The section concludes with a brief discussion of two sets of special issues: (1) video games, computer art and screen displays; and (2) electronic data banks and compilations. The second set of issues is especially important to those studying international copyright law: the Nordic 'catalogue rule' is not only highly distinctive, but has inspired the development of *sui generis* database protection in the European Union.

The second section of the book explores the protection of a wide variety of industrial property rights in computer programs. These rights include patents, chip protection, unfair competition, title protection, trademarks and trade secrets and know-how. The third section discusses issues relating to computer contracts, which range from sales to maintenance and from back-up and escrow to competition law. The final section explores the contractual, tortious and criminal liability in cases involving computer programs as well as the different evidentiary questions that could be raised in these cases.

Taken together, these four sections have provided a comprehensive treatise on Swedish software law. Although the book was published in the mid-1990s, it is still highly relevant today. For junior scholars, the book's structure also provides deep insight into how a complex topic can be thoroughly examined. As Professor Rosén has shown, software protection cannot be pigeon-holed into the category of either author's right or industrial right. Instead, such protection provides a paradigmatic example of what commentators have now referred to as 'overlapping rights'.⁴

In today's copyright debate, issues relating to software protection still come up repeatedly, especially in relation to digital works. One

⁴ Estelle Derclaye and Matthias Leistner, *Intellectual Property Overlaps: A European Perspective* (Oxford: Hart Publishing 2011); Neil J Wilkof and Shamnad Basheer, *Overlapping Intellectual Property Rights* (Oxford: Oxford University Press 2012).

issue that has recently caught considerable attention concerns the exhaustion of distribution rights in computer programs and other digital works. Although the first sale doctrine in copyright law allows the owner of a lawful copy of the copyrighted work to ‘sell or otherwise dispose of the possession of that copy’,⁵ that owner may not do so if the protected content is disseminated under a license, as opposed to sold as a good.

More interestingly, as far as Swedish copyright law is concerned, the first sale doctrine is not just limited to sale. As Professor Rosén’s book explains:

“[T]he exhaustion of the distribution rights in a copy of a computer program, which also includes preparatory design material, is effectuated by all kinds of *final transfers*. Hereby, not only actual sale of a copy, but also barter and gift are comprised by what is called ‘överlåtelse’ in Section 19 of the [Swedish Copyright] Act. Consequently, copies of programs given away free of charge, e.g. for marketing purposes, execute exhaustion just as sale on the basis of full economic compensation, provided of course that those acts are performed with the consent of the author or his rightholder. Therefore, this exhaustion rule comprises not only the first sale doctrine of Article 4(c) of the [Software] Directive, but goes somewhat further.”⁶

Indeed, the term ‘överlåtelse’ has raised interesting questions in not only the exhaustion context but also the licensing context. After all, the Swedish Copyright Act ‘uses the word “överlåtelse” for all kinds of transfer of rights, whether final, total or limited’.⁷

In July 2012, the Grand Chamber of the Court of Justice of the European Union (CJEU) decided the case of *UsedSoft GmbH v Oracle International Corp.*⁸ At issue were the software licenses that UsedSoft had purchased from Oracle’s customers and then resold to third parties. These licenses involved Oracle’s computer programs that had been licensed to and paid for by its customers. Concerned about

⁵ 17 USC s 109(a) (2012).

⁶ Rosén (n 3) 32.

⁷ Ibid 73.

⁸ Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* (3 July 2012).

the potential loss of revenue, Oracle challenged UsedSoft's practice by claiming that the resale of 'used' software licenses violated the rights to reproduce and distribute its copyrighted software.

Rejecting Oracle's arguments, the Grand Chamber found that 'the transfer by the copyright holder to a customer of a copy of a computer program, accompanied by the conclusion between the same parties of a user licence agreement, constitute[d] a "first sale ... of a copy of a program" within the meaning of Article 4(2) of [the Software] Directive'.⁹ As the court explained: 'It makes no difference ... whether the copy of the computer program was made available to the customer by the rightholder concerned by means of a download from the rightholder's website or by means of a material medium such as a CD-ROM or DVD'.¹⁰ The only requirement is that the original owner has 'ma[d]e the copy downloaded onto his computer unusable at the time of its resale'.¹¹

UsedSoft stood in sharp contrast to a very recent CJEU case, *Art & Allposters International BV v Stichting Pictoright*.¹² This case concerned the sale of physical canvases incorporating without authorisation the licensed copyrighted reproductions of works of famous painters, which were transferred from paper posters to canvases through an industrial process. Like *UsedSoft*, this case was about the exhaustion of the distribution right. Unlike the previous case, however, *Allposters* did not concern the Software Directive, but rather Directive 2001/29 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Infosoc Directive).

In the end, the CJEU seemed to have somewhat backtracked from its earlier position. Deciding *Allposters* less than three years after *UsedSoft*, the Court declared:

[T]he rule of exhaustion of the distribution right set out in Article 4(2) of [the Infosoc] Directive ... does not apply in a situation where a reproduction of a protected work, after having been mar-

⁹ Ibid [48].

¹⁰ Ibid [47].

¹¹ Ibid [78].

¹² Case C-419/13 *Art & Allposters International BV v Stichting Pictoright* (22 January 2015).

keted in the European Union with the copyright holder's consent, has undergone an alteration of its medium, such as the transfer of that reproduction from a paper poster onto a canvas, and is placed on the market again in its new form.¹³

Although this case involved an alteration of the medium used and covered physical goods, rather than digital works, it remains unclear what implications the ruling will have on the digital exhaustion issue, especially in controversies involving the Infosoc Directive, as opposed to the Software Directive.

The European Union is not the only jurisdiction actively addressing digital exhaustion. Similar questions have been explored in the United States. For example, '[s]everal federal courts have held that the first sale doctrine does not apply to software users who have licensed the software, because they have not acquired title to a particular copy'.¹⁴ Bruce Willis also famously lamented his inability to leave his legally purchased iTunes tracks to his children, due both to the legal distinction between a sale and a license and to the iTunes' restrictive terms of service.¹⁵

The leading US case in the digital exhaustion context is *Capitol Records, LLC v ReDigi Inc.*¹⁶ In this case, a record company sued ReDigi for copyright infringement based on its provision of a virtual marketplace for Internet users to sell pre-owned digital music. Once the music is sold, ReDigi's software will erase the resold iTunes tracks from the seller's computer while simultaneously transmitting the resold tracks to ReDigi's cloud lockers.

Of particular interest is the court's consideration of 'whether a digital music file, lawfully made and purchased, may be resold by its owner through ReDigi under the first sale doctrine'.¹⁷ The court answered in the negative:

¹³ Ibid [50].

¹⁴ Joseph P Liu, 'Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership' (2001) 42 William and Mary L Rev 1245, 1290.

¹⁵ Brandon Griggs, 'Can Bruce Willis Leave His iTunes Music to His Kids?' <http://www.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/> accessed 11 January 2015.

¹⁶ *Capitol Records, LLC v ReDigi Inc* 934 F Supp 2d 640 (SDNY 2013).

¹⁷ Ibid 648.

[T]he first sale doctrine does not protect ReDigi's distribution of Capitol's copyrighted works. This is because, as an unlawful reproduction, a digital music file sold on ReDigi is not 'lawfully made under this title.' Moreover, the statute protects only distribution by 'the owner of a *particular* copy or phonorecord ... of *that* copy or phonorecord.' Here, a ReDigi user owns the phonorecord that was created when she purchased and downloaded a song from iTunes to her hard disk. But to sell that song on ReDigi, she must produce a new phonorecord on the ReDigi server. Because it is therefore impossible for the user to sell her 'particular' phonorecord on ReDigi, the first sale statute cannot provide a defense.¹⁸

Although the court eventually found for the plaintiff record company, its ruling may not apply well to ReDigi's upgraded software and platform, which now deploys cloud lockers to avoid generating new copies in the act of sale and transfer.¹⁹

Given the rapid evolution of digital technology and the proliferation of business models seeking to take advantage of this evolution, the digital exhaustion issue is likely to continue to raise questions in the copyright debate. Professor Rosén's book was published two decades before this particular issue arose, yet his analysis of Swedish software law has provided interpretive guidance on both the scope of the EU Software Directive and the interplay between the Directive and national copyright laws.

Copyright and Freedom of Expression

The second topic that has attracted Professor Rosén's attention in his English-language publications concerns the daunting challenge of balancing the interests implicated by copyright law and the protection of freedom of expression. In 'Copyright and Freedom of Expression in Sweden – Private Law in a Constitutional Context', a chapter in a copyright law handbook, he introduces the Swedish

¹⁸ Ibid 655.

¹⁹ Péter Mezei, 'The Theory of Functional Equivalence and Digital Exhaustion – An Almost Concurring Opinion to the *UsedSoft v. Oracle* Decision' ssrn.com/abstract=2496876 accessed 11 January 2015.

experience, which he finds uniquely positioned to provide insight into how courts should address this challenge.²⁰

As Professor Rosén points out, freedom of expression is ‘constitutionally stronger in Sweden than possibly in any other country in the world’.²¹ Interestingly, the rights of authors, artists and photographers are also explicitly recognised in the Government Form (*Regeringsformen*) of 1974.²² As he observes:

It is quite striking that no other country within the EU seems to be able to demonstrate more profound constitutional support for copyright or, rather, authors’ rights, than Sweden, namely via the Government Form of 1974 ... which replaced that of 1809, where copyright’s relation to freedom of expression is actually clarified by reference to a number of norms found in the Fundamental Freedom of the Press Act ... of 1949 and the Fundamental Law on the Freedom of Expression ... of 1992, the latter being drafted for the protection of modern electronic media, broadcasting included.²³

Mass media is indeed an area in which conflicts between copyright and freedom of expression are prone to arise. A notable case involving this type of conflict is *Ashdown v. Telegraph Group Ltd.*²⁴ Decided by the Court of Appeal of England and Wales in July 2001, this case concerned the publication by the *Sunday Telegraph* of the then-unpublished minute of a secret meeting between Liberal Democrats leader Paddy Ashdown and Prime Minister Tony Blair shortly after the 1997 UK general elections.

In this case, Ashdown sued the newspaper for breach of confidence and copyright infringement. In its defence, the newspaper invoked fair dealing and public interest as well as a novel argument based on the newly enacted Human Rights Act 1998. As the news-

²⁰ Jan Rosén, ‘Copyright and Freedom of Expression in Sweden – Private Law in a Constitutional Context’ in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar Publishing 2007).

²¹ *Ibid* 355.

²² Professor Rosén, however, reminds us that ‘[t]he word “copyright” (‘upphovsrätt’) is not used in the’ Government Form. *Ibid* 365.

²³ *Ibid* 364.

²⁴ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142.

paper contended, the new statute, which incorporated into British law the protection of freedom of expression under Article 10 of the European Convention on Human Rights, established ‘a new “freedom of expression” exception to copyright law in addition to the existing statutory exceptions’.²⁵

At trial, the Chancery Division rejected the newspaper’s human rights defence (as well as its two other usual defences). As Vice-Chancellor Sir Andrew Morritt explained:

The balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself in the legislation it has enacted. There is no room for any further defences outside the code which establishes the particular species of intellectual property in question.²⁶

The court granted a summary judgment on the copyright claim, awarding Lord Ashdown both an injunction on further infringement and a choice of remedy of either damages or an account of profits.

On appeal, the Court of Appeals provided a lengthier and more nuanced analysis of the impact of the new Human Rights Act on copyright protection. As the court elaborated, intellectual property rights may sometimes conflict with human rights:

Freedom of expression protects the right both to publish information and to receive it. There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, it is the form and not the content of a document which is of interest.²⁷

²⁵ Michael D Birnhack, ‘Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act’ [2003] Entertainment L Rev 24, 26.

²⁶ Ashdown v Telegraph Group Ltd [2001] Ch 685, 696.

²⁷ Ashdown v Telegraph Group Ltd [2001] EWCA Civ at 1142.

To avoid the conflict between copyright and freedom of expression, the court stated, in dicta, that discretionary injunctive relief should be declined. As Lord Chief Justice Nicholas Phillips explained:

If a newspaper considers it necessary to copy the exact words created by another, we can see no reason in principle why the newspaper should not indemnify the author for any loss caused to him, or alternatively account to him for any profit made as a result of copying his work. Freedom of expression should not normally carry with it the right to make free use of another's work.²⁸

By making this recommendation, the Court of Appeals opened the possibility for fair remuneration, or even the creation of a human rights-based compulsory license.²⁹ Nevertheless, because the appellant did not challenge the appropriateness of injunctive relief, the court did not further review the discretion exercised by the lower court. After concluding that the newspaper had infringed on Lord Ashdown's copyright in the reproduced minute, the court dismissed the appeal.

The conflict between copyright and freedom of expression is particularly important in today's Internet age when individual users actively participate in the creative process, producing what policy makers and commentators generally refer to as 'user-generated content'. Thanks to the unprecedented ability provided by the Internet to develop this content, '[e]veryone – not just political, economic, or cultural elites – [now has] a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong'.³⁰

Given the internet's immense potential for freedom and empowerment, it is no surprise that a US judge called the media 'the most participatory form of mass speech yet developed' in the early days of

²⁸ Ibid.

²⁹ On the 'just remuneration' approach and human rights-based compulsory licenses, see Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 UC Davis L Rev 1039, 1095–1105.

³⁰ Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 New York U L Rev 1, 4–5.

the World Wide Web.³¹ In a recent report, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression also described the Internet as ‘one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies’.³²

As far as the debate on the conflict between copyright and freedom of expression is concerned, judges, legislators, policy makers and commentators have relied heavily on the built-in safeguards, limitations and exceptions within the copyright system to explain away the conflict. An oft-cited supporting statement comes from US Supreme Court Justice Sandra Day O’Connor: ‘[I]t should not be forgotten that the Framers [of the US Constitution] intended copyright itself to be the engine of free expression.’³³ This statement was made in *Harper & Row, Publishers, Inc v Nation Enterprises*, a case involving the unauthorised publication of carefully chosen quotations from President Gerald Ford’s then-unpublished memoirs.

Although Justice O’Connor’s rather conclusory statement has been frequently cited as if the support it provides would magically resolve the conflict between copyright and freedom of expression, a close inspection of the statement reveals that Justice O’Connor actually did not take any view on whether the copyright system, especially the one existing today, serves as an ‘engine of free expression’. Instead, her focus was primarily on the intent of the framers of the US Constitution – intent that may not always have a universal appeal.

More importantly, *Harper & Row* included an oft-overlooked dissent, in which Justice William Brennan responded directly to Justice O’Connor: ‘The copyright laws serve as the “engine of free expression” only when the statutory monopoly does not choke off multifarious indirect uses and consequent broad dissemination of information and ideas’.³⁴ Thus, even if we agree with Justice O’Connor

³¹ *Reno v ACLU* 929 F Supp 824, 883 (ED Pa 1996).

³² Frank La Rue, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (2011) A/HRC/17/27 at [2].

³³ *Harper & Row, Publishers, Inc v Nation Enterprises* (1985) 471 US 539, 558.

³⁴ *Ibid* 589.

that the copyright system was originally intended to serve as an engine of free expression, we still need to explore whether the existing system, along with the upward adjustments now demanded by the copyright industries, would fulfil this intended goal. We also need to evaluate whether the system and the proposed adjustments would ‘choke off multifarious indirect uses and consequent broad dissemination of information and ideas’ – a key concern of Justice Brennan.

Although Professor Rosén, like Justice O’Connor, recognises that ‘copyright is the engine of free expression’,³⁵ he is less ready to dismiss the potential conflict between copyright and freedom of expression. As he writes:

The conflict is just as overt, as one person’s right to express himself must, per definition, be limited by another person’s copyright in the very form which is used for a public speech. If someone in his public address wants to expose someone else’s expression there is inevitably a conflict between his right to express himself and the rights in what is expressed or, rather, the forms of what is expressed.³⁶

To help address this conflict, Professor Rosén invites us to explore the Swedish experience – in particular, how Swedish courts have legally resolved the tension and conflict between copyright and freedom of expression.

The approach taken by Swedish courts is not only insightful, but also brings to mind the inevitable challenge posed by the competing interests recognised in Article 27 of the Universal Declaration of Human Rights and Article 15(1) of the International Covenant on Economic, Social and Cultural Rights. Although both provisions protect the rights to ‘take part in cultural life’ and to ‘enjoy the benefits of scientific progress and its applications’, they also recognise the right to ‘the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author’.

³⁵ Rosén (n 20) 355.

³⁶ *Ibid.*

Because copyright law offers protection to these interests, the conflict between copyright and freedom of expression can be largely seen as an internal conflict within the human rights regime – at least with respect to those aspects of copyright that have human rights bases.³⁷ Thus, instead of taking a categorical approach in which fundamental rights will immediately trump private law, courts need to take a more nuanced approach to avoid the tension and conflict between copyright and freedom of expression.

This nuanced approach was the one to which Professor Rosén's discussion of the Swedish experience has guided us. As he concludes in his book chapter:

So far, the [Swedish] courts have chosen ... to try copyright cases within [a framework that] test[s] its own 'internal' build-up, its own built-in balancing of informational interests and, generally, freedom of expression. On those rare occasions when a conflict between copyright and freedom of expression and information is observable – without it being factually tested by a court capable of offering a decision that may form a precedent – the courts have chosen to reason on the possibility of non-punishment for violation of copyright, i.e. not a setting aside of basic copyright values, even in those atypical situations when the question is at all relevant. This attitude seems to offer quite congruent factual results from courts throughout Europe, to seek a solution to the conflict between copyright and freedom of expression within the former's internal construction. A tendency of this kind seems to flourish also among countries that do not offer copyright as strong a constitutional dimension as Sweden does.³⁸

³⁷ On the importance of distinguishing between the human rights and non-human rights aspects of intellectual property rights, see Peter K Yu, 'Digital Copyright Enforcement Measures and Their Human Rights Threats' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar Publishing 2015) 459–62; Peter K Yu, 'Intellectual Property and Human Rights in the Nonmultilateral Era' (2012) 64 *Florida L Rev* 1045, 1061–62.

³⁸ Rosén (n 20) 372.

Conclusion

From Stockholm University to ATRIP to the Association Littéraire et Artistique Internationale (ALAI), Professor Rosén has contributed many insightful and enduring ideas about intellectual property law. Although this short essay does not capture all of these important contributions, it seeks to show the long-lasting and continued impact of Professor Rosén's scholarship in the copyright field.

In the decades since Professor Rosén started teaching, writing and conducting research, the copyright debate has changed dramatically – through the introduction of new laws, new technologies, new business models and new social practices. Yet, deep down, the debate has changed surprisingly very little: it is still about how to strike the balance between proprietary control and authorial protection on the one hand and public access and individual self-expression on the other. As an unauthorised derivative work of Jean-Baptiste Alphonse Karr's famous epigram would declare, 'The more copyright laws change, the more digital challenges stay the same'.

Today, judges, legislators, policy makers and commentators continue to address questions Professor Rosén explored years or decades ago. That they still do so shows the continued relevance and enduring impact of his scholarship. This is indeed why we are so thankful that he has put his insights down in writing for the benefit of all of us working in the copyright field. His ideas will have a major impact for generations to come, and it is an immense privilege for me to join others in celebrating his long and fruitful career.