Human Rights Law Might not be the Answer: Response to Article 19's Principles on Copyright

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On 23 April Article 19 published its Principles on Copyright and Freedom of Expression in the Digital Age. Anne Barron of the LSE Department of Law argues that while the Principles translate international human rights norms into useful arguments against the further erosion of Internet freedom by beefed-up copyrights, they may also pre-empt more radical options for re-thinking the relationship between copyright and communication.

For most of its 300-year history, the modern copyright system's implications for freedom of expression have escaped critical scrutiny.

That changed with the advent of the Internet as a medium of many-to-many communication in the 1990s. The internet seems to have made the right to impart and receive information and ideas practicable as never before; yet the increasingly bloated copyrights wielded by the information industries seem to many to be largely responsible for crushing this potential. Consequently, 'Free Speech' has now become a resonant rallying cry for copyright's critics.

The industries' latest strategy – to strengthen and diversify the mechanisms by which copyrights are enforced – has heightened the tension in this area in more ways than one. 'Graduated response' regimes such as that provided for by the UK's Digital Economy Act 2010 and the blocking injunctions such as those recently issued in the UK enlist broadband providers as the content providers' partners in advancing the enforcement agenda. But lawful communication will inevitably be monitored, and may also be restrained, by ISPs acting under the pressure that powerful rights-owners can exert. Little wonder, then, that thousands took to the streets of Europe last year to protest against ACTA, the new treaty on IP enforcement that urges the spread of these mechanisms; and these demonstrations undoubtedly contributed to ACTA's wholesale rejection by the European Parliament in July 2012.

Now an initiative led by Article 19 – a London-based NGO taking its name from the free expression clause of the Universal Declaration of Human Rights – has turned the rallying cry into a manifesto. Article 19's 'Principles on Copyright and Freedom of Expression in the Digital Age' purport to translate international human rights norms – particularly those relating to free speech – into a recipe for stemming the 'alarming expansion of copyright claims' that has accompanied the rise in Internet use.

Article 19's Principles

Some of the Principles are difficult to argue against. One is Principle 8, which states that disconnecting people from the Internet would never be a legitimate response to online infringement, because it would inevitably amount to a disproportionate restriction on their freedom of expression. Another is Principle 9, which states that the filtering and removal of allegedly infringing content, and the blocking of websites enabling access to such content, should be strictly controlled.

However, not all of the Principles are self-evident. Anyone who seriously contends that, say, the UK Government will be persuaded to revise the copyright term downwards to the lifetime of the author on the ground that international human rights law demands it (Principle 5) is whistling in the wind. It's not that the arguments enunciated by the Principles are wrong; it's that human rights instruments, by their nature, are highly malleable; and the 'balancing' of rights that they invariably require leaves plenty of discretion to legislators and judges to decide how to weigh values such as freedom of expression and due process against the property rights of copyright owners.

Are fundamental human rights instruments the right instruments?

It follows that in spite of the certitude with which the Principles are enunciated, international human rights law doesn't in fact yield knock-down arguments against the power that comes with IP ownership; political battles still have to be fought and won. Moreover, it is questionable whether the human rights regime is the best ground on which to fight these battles. One reason is that the regime could conceivably be invoked to bolster copyright protection rather than to undermine it (Article 17(2) of the EU Charter on Fundamental Rights – insisting that 'intellectual property shall be

protected' – springs to mind). Ironically, copyright could emerge strengthened, rather than weakened, from the project of reading it through a human rights lens.

A further and more fundamental problem is that human rights discourse can become something of a trap: those who put it to work to achieve practical goals are inevitably obliged to accept its founding assumptions. While these can enable new ways of contesting existing legal arrangements, they can also limit what it is possible to imagine by way of alternatives. In the context of the struggle for copyright reform, the notion that copyright expansion is a human rights issue unsettles the dominant conception that it is *only* an economic issue: that the only debate worth having is whether bigger copyrights are better for business. Yet taking human rights too seriously also inclines one to accept that expressive freedom and intellectual property are indeed 'fundamental' – and opposed – rights, which must somehow be reconciled if legitimate reform is to be achieved.

Article 19 accepts precisely this. It demands only that new limits be imposed on copyright to protect the expressive freedom of *users* of copyright material, while being content to leave a stripped-down copyright system in place to protect the intellectual property of *authors*. But are authors not speakers too? Is the flow of information and ideas not served by the existence of legal arrangements that enable authors to earn a living from what they produce? And why assume that these arrangements must take the form of an intellectual property regime, albeit one that is less expansive than that currently in place?

Now, more than ever, creative thinking is called for about creators' rights

There is only a brief reference in the Article 19 Principles to the interests and needs attaching to authorship. Principle 13.2 states that 'creators have a legitimate expectation of a legal framework which encourages their ability to seek remuneration for their work and which also respects and promotes the right to freedom of expression'. Principle 13.3 urges States to encourage initiatives such as Creative Commons, 'whereby creators waive some of their rights in their works'. Nothing is said about how the 'legitimate expectation' of payment can be met in a context where authors – some of the most precarious workers around – are being encouraged to 'waive' existing rights. No propositions are advanced as to what system of authorial rights might deliver adequate remuneration to authors while also securing what (I have elsewhere argued) is *truly* fundamental to both the creation and the reception of ideas: namely, the communicative freedom that sustains the public sphere.

This freedom entails responsibilities as well as rights, including especially the responsibility to cultivate one's own capacities for critical and independent thinking and to respect those capacities in others. Crucially, it does not entail the responsibility to respect others' intellectual property, or the right to acquire intellectual property for oneself. However, communicative freedom certainly does require to be enabled in material ways, not least by adequate remuneration for authors, and spaces – such as the Internet – in which critical-reflective interaction can freely occur.

In so far as Article 19's Principles seek to defend Internet freedom against the immediate threats that copyright expansionism poses to it, they are valuable and important. But fresh insights are urgently needed about the legal arrangements that would advance communicative freedom in the richer sense just outlined. These are not emerging from courtrooms or parliaments (or even from the headquarters of human rights NGOs!) so much as from social movements – including especially the hacker movement that gave rise to the free software phenomenon from which Creative Commons itself derives. Hackers are experimenting with new formulations of both freedom and property – re-thinking how both creative autonomy and economic security could be possible for authors in the new economy that the Internet has helped to produce. They are also engaged in imaginative efforts to re-mix trade mark rights, moral rights, 'copyleft' licences and informal hacker norms into a new array of authors' rights that could advance these ideals more effectively than conventional copyrights. The experiments are unfinished and beset by contradictions, but they are arguably more responsive to the exigencies of the 'digital age' than the lofty notions enunciated in international human rights law.