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Input paper:

Need for New Regulation to Enhance Creativity in the Digital Age: The Cases of User-generated Content and Cultural Heritage Institutions¹

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*The opinions expressed in this work are the responsibility of the author
and do not necessarily reflect the official policy of the Council of Europe*

¹ This work builds in parts on research the author has conducted jointly with Prof. Sigrid Quack (e.g. Dobusch and Quack 2013)

In the course of growing economic importance of knowledge and of technological change related with the Internet and digitization, regulation knowledge and information goods have increasingly become an issue of transnational contestation. Particularly the role of copyright law has changed since virtually all forms of online communication and interaction requires copying and distributing content, thereby becoming copyright-related. In a way, copyright laws have become the core regulatory device for the digital information society in general and digital creative practices in particular.

At the same time, we can observe that regulatory struggles in the copyright realm date way back. Already Kant (1785) and Fichte (1793) distinguished between different functional groups affected by copyright laws, among which publisher/copyright owner, author/creator, and consumer/user represent the most important. These groups are still the ones most affected by copyright regulation, even though today copyright also covers cinematographic work and computer programs and it is possible to reproduce nearly all types of work in digital form. Balancing the interests of these groups is therefore still the main task for copyright regulators on the international and the national level.

And while technological change has always provided both opportunities for new forms of creativity and problems for pre-existing business models in the copyright realm (Wu 2010), the all-encompassing and highly dynamic impact of new digital technology on nearly all fields and types of creative activities brings with it enormous regulatory challenges. First, digitization makes it possible to distinguish between content and medium – a constellation that is of major importance for the copyrighted content industry since it sells CDs, DVDs, and books, not music, movies, or novels. From a regulation perspective, this means that new rules – be they publicly legislated or privately enforced via license agreements – tend to more directly address particular usage practices, affecting traditional knowledge brokers such as archives, libraries or museums. Second, loss- and lag-free copying of digital contents via personal computers and the Internet enable new forms of private copying and peer-to-peer distribution of content on a massive scale. The regulation challenge related to this issue is to allow for these new technologies to enfold while at the same time prevent a massive increase in copyright infringement due to piracy. Third, thanks to decreasing production and distribution costs, many more people actively engage in content creation and make their works accessible directly to the public (sometimes referred to as ‘user-generated content’), thereby often re-using and transforming pre-existing copyrighted works. How to regulate these new forms of derivative creativity and creative consumption is again a task for regulators to address.

Enhancing Creativity: New Practices, Traditional Institutions

As far as enhancing creativity is concerned, specifically the new forms of creative practices such as ‘user-generated content’ and respective new platforms and services as well as the changing roles of institutions such as libraries and archives, which traditionally function as access providers to “raw materials” for creative practices, pose questions for European regulators to answer. Digital technologies and platforms empower more people than ever to engage in creative activities and they share results with wider, potentially global audiences. Libraries and Archives could potentially provide creative inputs to these creative processes by digitizing, indexing and offering broader sets of creative works.

Regrettably, the European approach towards copyright regulation, with its fine-grained and tailored system of exceptions of limitations and its strong *droit d’auteur* tradition, struggles to adapt to this new digital frontier – at least, when compared to the US copyright system. In Europe, nearly all practices of derivative creativity such as remix, mash-up or transformative consumption as well as digitization and archiving practices are illegal if the rights have not been cleared individually with the respective rights holders.² However, clearing rights is very difficult, if not impossible, particularly in cases such as consumers sharing amateur video footage (e.g. by mobile phone cameras) that include copyrighted materials or libraries and archives digitizing and making available ‘orphan works’ (Dobusch et al. 2013).

In the US copyright system, on the contrary, the ‘fair use’ clause has a function much like the various limitations and exceptions to copyright law in continental Europe, namely, to permit certain socially

² An exception is extended collective licensing approaches practiced in some European countries such as Norway in the case of books.

desirable uses independently from the approval of the copyright owner. Unlike the limitations and exceptions listed in the EU Copyright Directive, which are always explicitly codified for each concrete case, 'fair use' represents an open-ended clause, so to speak, that is defined case by case in the courts. This openness of the fair use clause, in turn, allows for at least some experimentation and innovation that build upon new technological developments. Many new and innovative digital services such as platforms for user-generated content, the mass-digitization and indexing of books or even popular social networking platforms rely to a large degree on fair use principles when it comes to some of the core usage practices.

The advantages of allowing more liberal user uptake of copyright materials not only for freedom of creative expression but also for economic development have also been supported by recent and independent empirical studies (e.g. Erickson et al, 2013; Erickson and Kretschmer, 2014) conducted in the realm of the CREATE consortium.³ In particular, the researchers identify three problems indicative of regulatory shortcomings in European copyright law with regard to user-generated content (Kretschmer et al. 2014):

"First, while many Member States have adopted copyright exceptions for the purposes of parody, data show that European and UK user parodies continue to be removed from platforms such as YouTube at a higher rate than parodies of US material (Erickson and Kretschmer 2014). Secondly, 'machinima' creators (videographers who use third-party video game engines to create new animation storylines) have encountered legal roadblocks in their efforts to commercialise their new content, despite attracting large and viable audiences on internet platforms (Haefliger et al. 2010). Thirdly, research into fan video game production demonstrates that consumers unable to license use of original source code have sometimes re-produced new, open- source versions of old software, meeting a market demand (Mavridou and Sloan 2013)."

Modernizing European copyright regulation: recommendations

In line with these findings and the argumentation presented above, two recommendations for modernizing European copyright regulation to enhance creativity in the digital era can be drawn:

Recommendation 1: *By opening up the closed list of exceptions and limitations in Article 5 of the EU copyright directive to allow for more flexibility and by introducing a general bagatelle clause, many everyday online activities that presently infringe copyright without causing harm for the right holders would be legalized. Such a bagatelle clause would constitute a functional equivalent to the 'fair use' clause in US copyright law, while keeping the European system of limitations and exceptions in place, and could be combined with lump-sum compensation.*

With regard to cultural heritage institutions, only recently over 60 European research institutions, libraries and archives signed an open letter to the European commission,⁴ demanding a more balanced approach to copyright regulation. Specifically, the letter criticizes that "copyright protections are mandatory while copyright exceptions are optional", which leads to a "patchwork of national exceptions" that stifles innovation in general and transnational research collaboration in particular. In line with the demands of the open letter, researchers from the CREATE consortium also call for regulators to "address the challenges presented by e-lending and off-premises access to library collections" and to devise and implement "copyright policy to facilitate mass digitisation initiatives" (Kretschmer et al. 2014)

Recommendation 2: *European copyright regulators should strive to harmonize not only copyright protection but also exceptions and limitations to allow for transnational cooperation of research institutions, libraries and archives in projects of mass digitization and indexing to enable the widest possible access to Europe's library collections for the purposes of research and private study.*

³ CREATE (www.create.ac.uk) is the Centre for Copyright and New Business Models in the Creative Economy, a UK national research hub jointly funded by the AHRC (Arts & Humanities), EPSRC (Engineering & Physical Sciences) and ESRC (Economic & Social Sciences), established to investigate the relationship between Creativity, Regulation, Enterprise and Technology (=CREATE) through the lens of copyright law.

⁴ See <http://www.eifl.net/fulfill-promise-innovation-union> [accessed: June 6, 2014]

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