

An aerial, wide-angle photograph of a city, likely Berlin, showing a dense urban landscape with various buildings and green spaces. The image is overlaid with a grid of small red dots and the text "#DigiKon15" in a large, white, sans-serif font, slanted diagonally across the left side. The background is a bright blue sky with wispy white clouds.

#DigiKon15

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ALL PRACTICE IS GREY: ON THE REAL STATE OF DIGITAL COPYRIGHT

Leonhard Dobusch

The dreadful state of copyright law in the digital age can be nicely illustrated by a thought experiment. If one thinks back to 1980, it is hard to imagine how one could have committed a copyright violation with a book, an LP or a reel of film. Lending the book to a friend, duplicating parts – or even the whole book – on a photocopier, or staging a reading were all possible without clarifying rights. While copyright was already a complex matter at that time, until the internet it played little role in most people's everyday lives.¹

Today everything is different. Anyone who uses a smartphone to video everyday experiences and share them with friends in a personal blog will hardly be able to avoid violating copyright. A couple of seconds of music or a poster in the background will suffice if "making publicly available" in the internet violates copyright. Many of the most creative digital artforms, such as remix and mashup, are almost impossible to disseminate by legal means, still less to commercialise. The use of even the briefest music or video sequence must be legally clarified, and in most cases this is much too complicated and expensive. Libraries, museums and archives battle with similar problems, preventing them from digitising their holdings.

Apart from shorter copyright periods, there would be two other sensible approaches to solving this problem. Firstly, a European harmonisation and expansion of the catalogue of copyright limitations and exceptions would be sensible. The introduction of a *de minimis* or remix exemption modelled on the fair use clause in US copyright, combined with the forms of flat-fee reimbursement established in Europe, would enable new forms of recreational and remix creativity. Even for commercial publication of remixes and mashups all that would be required is to notify the relevant copyright collecting society (as is already the case for cover versions), in place of the complicated and expensive process of clarifying rights. Secondly, the establishment of a European register of works would simplify clarification of rights and restrict ongoing copyright protection (after an initial period) to cases where works are in fact still in commercial circulation.

¹ The idea of this thought experiment needs to be attributed to James Boyle, who described a similar scenario in his book „The Public Domain: Enclosing the Commons of the Mind“ (2008, Yale University Press).

But a register of works, like a shortening of copyright periods, would stand in contradiction to international treaties like the Berne Convention and is therefore regarded as unrealistic. The same applies to the introduction of an open fair-use exception at the European level: in view of the hardened fronts, the required European harmonisation of exceptions can be regarded as equally unrealistic, at least in the short term.

However, a glance at the real state of copyright, the law in action, paints a different picture. In fact, in certain spheres such as music, film and books practical access to content has become enormously more easy during the past ten years. On YouTube one finds not only the current chart hits, but endless old and otherwise no longer available songs and video clips. Google Books in turn has made it possible to search the full texts of an ever-growing body of digitised print publications and in this way makes cultural heritage available once again, in a broader context.

What remains problematic however is the publication of works created using other works (such as music), in particular when parts of several works are mixed. But at least for applications such as mobile phone videos with backing music a solution is now available. In YouTube's digital audio library users can now verify before uploading whether, how and in which regions a song may be used in a video clip.

The precondition for clarifying rights via YouTube is ironically precisely what is regarded as unrealistic at the legislative level: a digital register of works and a one-stop shop for clearance. Rights-holders who monetise their content on YouTube (by means of advertising) or wish to have it blocked must register it in YouTube's Content ID database. An algorithm then checks whether uploaded content is registered in the database and, if it is, allows the rights-holders to decide how to proceed. YouTube thus demonstrates that a combination of registration with central and, up to a point, blanket clearance is not only practicable, but can in fact generate new revenue streams, especially for works whose conventional exploitation cycle has expired.

So is a reform of copyright in fact superfluous? By no means. Even setting aside the fact that Content ID offers no solution for remixes and mashups, Google's approach is associated with many restrictions: The rights are clarified only for use on YouTube, not more generally, and there is no legal security because rights-holders may revoke at any time. The system also lacks transparency for artists, while smaller labels have no negotiating power vis-à-vis Google. A legislated solution with flat-fee remuneration negotiated by the copyright collecting societies would be more transparent and transferable to other platforms.

Paradoxically it is precisely Google, the internet behemoth criticised by politicians, artists and rights-holders alike, that can live best with the rigid and outdated copyright system – and in fact make money from it. Most of the others, lacking Google's resources and market dominance, belong to those who lose most through the current state of copyright law. It is therefore time to bring the law more closely into line with lived practice in the internet, for the good of users and artists alike.



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