Mashing-up Culture

Proceedings from the COUNTER workshop Mashing-up Culture Uppsala University, May 13-14, 2009

Title: Mashing-up Culture: The Rise of User-generated Content

Eds.: Eva Hemmungs Wirtén and Maria Ryman

Abstract: These are the proceedings of the first COUNTER workshop "Mashing-up Culture: The Rise of User-generated Content", Uppsala University, May 13-14, 2009. COUNTER is a European research project exploring the consumption of counterfeit and pirated goods. Sampling, remixing, mash-ups and appropriation are part of the digital creative milieu of the twenty-first century. Sites such as YouTube and deviantART have offered new outlets for creativity and become hubs for innovative forms of collaboration, thus playing their part in challenging modernist notions of what it means to be a creator as well as a consumer. Drawing on this general background, the ten papers presented in these proceedings are examining areas such as: Sampling, mash-ups, and appropriation; Creativity and collaborative practices; Creative Industries and intellectual property; Copyright, Cultural Heritage and Cultural Policy; and Formal and informal regulations of intellectual property. The ten authors are all contributing to an international and interdisciplinary scientific discussion on the *mash-up*. Mash-ups and user-generated content are social and cultural phenomena which in these papers are put into various contexts, from legal ones, over technology, to the nation as a framework.

Keywords: Proceedings (COUNTER Counterfeiting and Piracy Research), Copyright—Adaptions, User-created content

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Foreword

Many contemporary cultural practices appear born digital. *Mashing-up*, "taking a digital media file containing any or all of text, graphics, audio, video and animation drawn from pre-existing sources, to create a new derivative work," or *sampling,* "the act of taking a portion, or sample, of one sound recording and reusing it as an instrument or a different sound recording of a song," are two cases in point. Both are nonetheless examples of *appropriation*, an activity with a long and illustrious history. And as befits a proceedings of this kind, "the use of borrowed elements in the creation of new work", as well as the two first definitions stems from a digital source: www.wikipedia.org.

Sampling, remixing, mash-ups and appropriation are part of the digital creative milieu of the twenty-first century. Sites such as YouTube, Flickr and deviantART have offered new outlets for creativity and become hubs for innovative forms of collaboration, thus playing their part in challenging modernist notions of what it means to be a creator as well as a consumer. User-generated content has drawn upon the reuse of existing texts as well as new creations, bringing forward possibilities for new audiences and meanings while also raising questions about how digital texts are controlled through copyright and how intellectual property is managed.

These are only some of the questions addressed by the COUNTER workshop Mashing-up Culture: The Rise of User-generated Content - which takes place at Uppsala University on May 13th-14th, 2009. This workshop is the first event organised by the FP7 funded European research project COUNTER www.counter2010.org and it brings together an international and interdisciplinary group of participants to explore the socio-economic

and cultural impacts of the consumption of counterfeit goods, file sharing, and the rise and importance of user-generated content.

On behalf of the COUNTER-project and as workshop chair, it is my great pleasure to welcome all the participants in the Mashing-Up Culture workshop to Uppsala University.

Professor Eva Hemmungs Wirtén

COUNTER: Counterfeiting and Piracy Research

COUNTER is a European research project exploring the consumption of counterfeit and pirated leisure goods. It is a 24 month project running until the end of March 2010. Funded by the European Commission's Framework 7 programme, the COUNTER research project is designed to collect data, generate knowledge and disseminate findings on the European landscape for the consumption of counterfeit consumer goods. It proposes a research project that explores:

- Frequency and distribution of counterfeits
- Consumer attitudes to counterfeit and pirated goods
- Legal and ethical frameworks for intellectual property
- Policy options for engaging with the consumers of counterfeits
- The use of copyrighted goods in the creation of new cultural artefacts
- Impacts of counterfeiting and control of intellectual property

COUNTER will collect data on consumer behaviour, policy development, and stakeholder engagement. Together, these will allow COUNTER's research to integrate demand-consumption side issues with policy implications.

Further details on the organisation of COUNTER's research are available at http://counter2010.org/research.

The project brings together a team of European researchers from the UK, Austria, Sweden, Italy, Slovenia in order to develop a multi-

disciplinary and multi-method approach to counterfeit goods and intellectual property that draws upon the strengths of economics, sociology, law, psychology, and management and information science. By developing an innovative research framework, the project will generate new policy and industry relevant knowledge and develop a research agenda which can be developed and implemented and inform future research. The COUNTER research team is made up of the following researchers:

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Mashing-up Culture: Workshop Programme

Mashing-up Culture: The Rise of User-generated Content, a two-day workshop, at Uppsala University in Sweden on May 13-14, 2009.

WEDNESDAY MAY 13
Venue: University building
Lecture Hall X
14.15: Welcome by Professor Eva Hemmungs Wirtén, Uppsala University

14.15-15.30 **KEYNOTE** by Professor Niva Elkin-Koren Director, Haifa Center of Law & Technology, Faculty of Law, University of Haifa:
"Copyright and Its Limits in the Age of User-Generated Content"

15.30-16.00 COFFEE (served outside Lecture Hall IV)

Lecture Hall IV
16.00-17.30 **COUNTER Research Presentations:**

16.00-16.20 Overview of COUNTER by coordinating University of Central Lancashire
Jo Bryce (Coordinator), Neil Horton

16.30-16.50 Bocconi University
"Managing Intellectual Property in the Web 2.0: A Survey of the Online Distribution System"
Maria Lillà Montagnini, Maurizio Borghi, Indranath Gupta

17.00-17.20 Vienna University of Economics and Business
"Pros and Cons of IP from the Music Industry Perspective"
Elfriede Penz, Eva Hofmann

17.30 Guided tour of the University building, Cathedral and Museum Gustavianum

19.30 Buffet dinner served at Museum Gustavianum

THURSDAY MAY 14
Workshop Venue: The Orangery, The Linnaeus Garden

09.15-09.45 Trudy Barber, Ed Woodroffe, Hilary Cooke, School of Creative Arts, Film and Media, University of Portsmouth:
"CDPT Mash-up 360. A Cauldron of Creativity: Outcomes from the University of Portsmouth Event"

09.45-10.15 Marina P. Markellou, Intellectual Property Attorney, LLM in Intellectual Property from the University of Montpellier, and currently scholar of the Hellenic Scholarships Foundation:
"From Copyright to Copyleft and from Copyleft to Copywrong or 'If Hitler Had Been a Hippy How Happy Would We Be?'"

10.15-10.45 Ashutoh Potdar, performance artist, writer, and critic. Programme Executive, India Foundation for the Arts, Bangalore:
"User-generated Contents and Urban Middle Class"

10.45-11.00 COFFEE

11.00-11.30 Andres Guadamuz, SCRIPT Law and Technology Centre, University of Edinburgh:

"If You Build It, They Won't Come: Placing User-generated Content in Context of Commercial Copyright Policy"

11.30-12.00 Puneet Kishor, Nelson Institute for Environmental Studies, University of Wisconsin-Madison:
"Public Policy: Mashing-up Technology and Law"

12.00-12.30 Sigrid Quack, Leonhard Dobusch, Max Planck Institute for the Studies of Socities, Cologne:
"The Copyright Dispute: A Transnational Regulatory Struggle"

12.30-13.30 LUNCH

13.30-14.00 Finola Kerrigan, Department of Management, King's College London:
"Revisiting the Role of Critical Reviews in Film Marketing"

14.00-14.30 Christine Riefa, Brunel Law School, Brunel University (West London):
"Liability of Online Auction Sites for Infringing 'User-generated Content': Have IP Owners Lost the Battle but Not the War?"

14.30-15.00 Thanos K. Tsingos, Attorney at law and LLM in Information Technology, Media and E-Commerce from the Faculty of Law, University of Essex:
"User-generated Content and Intellectual Property Rights: Rules Governing an Internet Service Provider's Liability in Europe and USA"

15.00-15.30 COFFEE

15.30-17.30 Summing up and panel discussion

19.30 Farewell Dinner at Uppsala Konsert and Kongress. Musical guests: Sopranos

Copyright and Its Limits in the Age of User-generated Content

Niva Elkin-Koren

This is a preliminary draft for the purpose of the Mashing-up Culture workshop, May 13-14, 2009. Please do not distribute.
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Abstract

The Web 2.0 brings individuals to the forefront of creative processes, where users generate their own content and share it with communities of their choosing. The rise of User-generated Content (UGC) is often understood as a process of disintermediation and the decline of commercial media. Yet, old intermediaries are making way to new intermediaries, social media platforms, which allow users to share their content with one another and to collaborate in producing new creative works. The shift from industrial production of content to UGC facilitated by social media platforms destabilizes some of the fundamental premises of copyright law and poses new challenges for the governance of works in the online environment. I argue that the rise of UGC forces us to reconsider the fundamental structure of copyright which is based on exclusivity and central control, and move towards a legal framework which enables collaboration.

1. Introduction

In recent years, users are taking an ever increasing role in the production and diffusion of culture and political discourse. When *Time Magazine* selected *You* as the person of the year in 2006, it expressed a sentiment shared by many that individual users acquired a central role in the online environment. The Web 2.0 brought individuals to the forefront of creative processes, where Internet users generate their own content and share it with communities of their choosing. The availability of Internet access at low cost enable the distributing of creative materials to a large audience, thus increasing their potential impact. User-generated-Content (UGC) flourishes: bloggers post news and analysis, independent musicians distribute their recordings on MySpace, and amateur photographers post their photos on Flickr and distribute their homemade videos on YouTube. UGC is facilitated by social media platforms. These platforms allow users to share their content with one another and to collaborate in producing new works. Platforms coordinate and facilitate access to UGC, via search engines (e.g., Google and Yahoo), distribution platforms (e.g., YouTube and Flickr), social networks (e.g., MySpace and Friendster), and virtual worlds (e.g., Second Life).

UGC, which is emerging alongside the industrial production of content, is transforming the mechanisms for producing and sharing

cultural goods. The shift from industrial production of content to an environment where some content is produced by users destabilizes some of the fundamental premises of copyright law. This legal regime, which was designed to serve the needs of the culture industry, may play a different role in the UGC environment and may carry different consequences when exercised by users-authors. The key players in the UGC environment, Prosumers (producer-consumer, a term coined by Alvin Toffler 1980) and social media platforms, have distinct stakes and interests, which are different than those involved in mass production of content. Users in an UGC environment actively engage in creating cultural flows. In sharp contrast to the consuming audience of the old media, Prosumers have distinctive interests in appropriating and sharing creative works. At the same time, however, new modes of production enhance the commercial pressures on individual users as they become an independent unit of production. Conflicting desires to share and control content may come into play. Moreover, unlike the content industry, social media platforms do not engage in mass production and distribution of content. They are not dependent on exclusive control over creative works. Quite the contrary, social media platforms often seek to promote open access and free exchange of information to attract more users to their social networks. Copyright law, which enables the commercialization of creative works, finds itself at the center of these processes.

This paper explores the challenges posed by the UGC environment to the copyright regime. I argue that the rise of UGC requires us to reconsider the fundamental structure of copyright which is based on exclusivity and central control, and move towards a legal framework which enables collaboration. After briefly introducing UGC, Part 3 and 4 take a closer look at social media platforms and Prosumers and discuss various aspects which are challenging the tenets of copyright law. Part 3 describes the rise of social media platforms as facilitators of UGC. It analyzes the interest of these new intermediaries and argues that their stakes in copyright is very different than those of the old media. Part 4 offers an analysis of key UGC features: that it reflects a wide range of creative activities, from an independent original creation to the appropriation of pre-existing

works; it is non-professional but not simply amateur; it is generated by individual users but it is sometimes the output of collaborative efforts, and it is non-profit but at the same time it might be vulnerable to commercial pressures. These features, I argue in Part 5, may have some important implications for governing access to creative works in the UGC environment.

2. What is UGC?

UGC is often associated with the buzzword Web 2.0, which refers to social networks, social media sites, collaborative initiatives and a variety of works created, remixed and exchanged by individual users (Halbert 2009). Even though these terms only became popular in the beginning of the 2000's, the phenomenon was there all along. The interactivity of digital networks, which enables individual users to directly connect with one another, is at least as old as the Internet itself. Indeed, back in the 1990's, the technical interface of the online environment was not as colorful and audiovisual as it is today, but the fundamental ingredients which reshuffled the production and distribution of creative works were already there: the means of producing and communicating content to the mass became available to every user connected to the Net, at a low cost.

Digital networks brought individual users to the forefront of cultural creation. Individuals have always created content: they told stories, they played music in family gatherings, they took pictures and made poetry and sculptures. But the ability to share creative works with a wide range of users, beyond the close circle of friends and family, was rather limited. Physical distribution was costly and required an expensive infrastructure which was owned by publishers, broadcasters, and the printing press. The introduction of digital networks dissolved the monopoly of the old intermediaries over the means of distribution to the mass. Using mailing lists, uploading clips to YouTube, or simply posting a comment on a blog, users are now able to reach out to a wide audience at almost no cost. Digital networks further lower the cost of coordinating joint efforts, thus

enabling users to join forces in creating new collaborative works (Benkler 2006). Consequently, individual users and groups of users are playing a much bigger role in generating and distributing new types of content, such as Wikipedia and Linux, which is the output of a collaborative effort by large crowds.

It is difficult to offer a strict definition of UGC. The term covers a wide range of creative activities: from simply expressing a political opinion on one's blog, to posting a book review on Amazon.com. It is created by professionals and amateurs, and it could be freely distributed or sometimes charged for. In this paper I focus on the ramifications of the shift from industrial production of content to UGC. Copyright law was designed to provide incentives for producing content by mass media and the content industry. This legal regime may carry different consequences in the UGC environment. Therefore, for the purpose of my current inquiry it is sufficient to define UGC in contrast to content which is produced by the mass media and the content industry. This contrasting approach may help to focus our attention on the role of copyright law in the UGC environment.

3. Old and New Intermediaries

UGC and Old Media

The ascendancy of UGC raises high expectations regarding its potential for democratizing public discourse and making it more participatory. The high hopes invoked by the Internet in its early days were linked to the new opportunities for each and every user to post her self-made content, and share it with users around the world without any editorial intervention. Many commentators focused on the new opportunities created by the digital environment for individual participation in politics, cultural creation, and communities of choice (Elkin-Koren 1996, 2002; Litman 2004; Cohen 2005). Some have

seen in online discourse early evidence of the rise of a more authentic voice which could bypass the hegemony of the media over news and culture production (Benkler 2006). A major concern regarding the capacity of the mass media to facilitate public discourse was the dominance of commercial interests in shaping such discourse. Content produced by profit maximizing publishers and broadcasters often serves the interests of owners and advertisers (Baker 1997, 2007). Another concern is the implications of the business models on the quality of content that is made available to the public. To maximize profits, broadcasters and publishers are seeking high ratings and therefore tend to select content that targets the lowest-common-denominator. The concern is that news publishers are printing the news which sells the most, and broadcasters produce the shows which attract the highest rating. As content become another means of producing audiences to advertisers, it is designed not simply to cater consumers' demand, but also to shape consumers' preferences. Such content might also be biased towards encouraging sales and creating a buying mood.

Against this background, UGC is viewed as offering an alternative to commercial media. The robust distribution network allows individual users to make content available worldwide, thereby creating alternative channels of communication and unmediated exchange among users. The shift from the "one-to-many" model of the old media, into the "many-to-many" exchange, transforms cultural production. Once users can directly communicate with one another, they are less dependent on traditional intermediaries: mass media, book publishers and commercial distributors. This could also affect the quality of cultural artifacts. When users can freely express themselves without any commercial filtering, expression is likely to reflect a more authentic voice. Disintermediation could be leveling expressive power (Shirky 2008). New voices are likely to increase diversity in political speech and cultural expressions, allowing more users to identify their own voice in cultural flows, and thereby strengthening the ties between users and their communities (Elkin-Koren 2002).

Not only the number of participants, but also the nature of participation and engagement in cultural processes is changing. A user,

who can independently share her content with a large audience, by simply posting it online, is likely to be more engaged in conveying a message and creating a meaning than passive consumers. Even users who do not take an active part in the many formats of online culture production may experience culture differently: knowing that they could participate, even if they chose not to, may engage them more deeply in the message and content. Consequently, a public sphere made of UGC, when compared to it being dominated by the mass media, is likely to be more diversified, reflecting more voices, attuned to the concerns of a wider population and more resistant to corruption by money (Benkler 2006). By offering an alternative which competes over the limited attention of users, UGC may weaken the dominance of mass media as the focal point of the public sphere.

The view that UGC offers a desirable alternative to mass media presumes that a direct, decentralized, non-commercial exchange of content could decrease the biases created by economic forces. Thus, the promise of UGC rests on two premises: First, that it emerges in a distributed, disintermediated environment, outside the hold of commercial mass media. Second, it is presumed that UGC is nonprofit and could therefore liberate culture and political speech from commercial biases and the distorting impact of markets. These presumptions are further discussed below.

Social Media Platforms: The Rise of New Intermediaries

In a recent case of the U.S. Court of Appeals, Judge Kozinsky described the new online environment as consisting of two major players – individual users and new intermediaries:

> "The Internet has opened new channels of communication and self-expression… Countless individuals use message boards, date matching sites, interactive social networks, blog hosting services and video sharing websites to make themselves and their ideas visible to the

> world. While such intermediaries enable the user-driven digital age, they also create new legal problems."

What appears to be a dis-intermediated environment is in fact highly dependent upon commercial and non-commercial online platforms. Old type intermediaries are making way to new intermediaries, commercial and non-profit online platforms which are making UGC available. Platforms perform a wide range of functions: from technical enabling to social facilitation. Platforms coordinate and facilitate access to UGC, via search engines (e.g., Google and Yahoo!), hosting facilities (e.g., YouTube and Flickr), social networks (e.g., MySpace and Friendster, Facebook, Orkut, Bebo), and virtual worlds (e.g., Second Life). Social media platforms facilitate exchange and collaboration; enabling users to communicate with friends and colleagues and also to connect with new people and establish online communities.

Online platforms may suffer from some of the ills of the old media. One issue is concentration. UGC platforms have shown a high level of growth and consolidation. Since much of the cost of producing a platform (design, technological innovation) are unrelated to the number of users to which the service is provided, the average cost of providing a service for each additional user may fall as the number of users increases. Economies of scale reduce the level of competition. Cost of entry is rapidly rising, as the Internet continues to grow and as competition becomes more sophisticated (Grimmelman 2007). A strong network effect gives advantages to large-scale intermediaries, such as the Google search engine and global social networks, such as Facebook and Twitter, which attract most of the traffic of users on a global scale (OECD 2007; Sullivan 2009).

Competition is further weakened as platforms converge and crosslink to one another, giving users an added value by enabling them to link their output in one social media as input on partnering social media. Such convergence creates new barriers to entry, and makes it even harder for new applications to penetrate the market. Another issue which affects the level of competition among platforms is stickiness, which depends on users' switching costs. If users are able to transfer valuable assets, such as personal contacts, social

graphs, personal histories and original content to another facility, they could more easily switch their social media platform. If these assets cannot be transferred to another platform, users might find themselves locked in a particular platform.

The UGC environment is therefore not entirely diffused. It is facilitated by platforms, often for-profit, which are supporting, hosting, searching, aggregating, filtering and diffusing UGC. Economies of scale, the rising cost of large scale exposure and the need to operate globally, across international borders, lead to domination by a small number of mega platforms.

The UGC environment is not entirely non-commercial either. Platforms must sustain themselves economically. Commercial platforms seek to maximize profits, but even platforms which are non-profit, such as Wikipedia, need a sustainable economic structure. Indeed, platforms do not bear the cost of producing content, which is generated by users. Still they bear the cost of maintenance and updates, managing the online community, online marketing, and protection against potential legal liability. These costs are substantially lower than the cost of producing and distributing content by the mass media, and are often covered by philanthropic contributions.

Platforms are making use of a wide range of business models which affect information flows and shape the relationships between users and platforms. The common source of income of many social media platforms is advertising. Revenues from advertising depend on the ability of social media platforms to attract users. This should sound familiar. Advertising supported radio and television are also generating revenues by attracting viewers and selling their captive audiences to advertisers. New platforms, like old intermediaries, monetize on users' attention.

One critical difference between old media and social media, however, is that content in the latter is generated by the users themselves. Users generate and distribute their own content while simultaneously consuming content and services provided through the facility. Users generate original content or simply perform editorial functions; they provide eyeballs to advertisers and produce data for marketers. The platform's economic value arises from a network of connected users who create value. It generates revenues by maintaining an engaged

community of creative participants. In fact, social media is attracting users not simply by offering access to the content created by their peers, but also by producing a social context. There is no value in the platform other than the users who actively engage in it. From the platforms' perspective the community of users constitute its main generating asset and the stronger it becomes the higher the value for the enterprise. This multilevel relationship: platform-user-social network, call for different considerations when applying copyright to the UGC environment.

4. The Many Faces of UGC

Before I turn to discuss the consequences of applying copyright in the UGC environment, and identify the ways in which copyright law shapes the behavior of the different players, let us take a closer look at the users who are generating content. UGC is often described by reference to several attributes of users: that they are amateurs, that they simply exploit preexisting works, that users are individuals working alone, and that UGC is non-commercial. These features have some implications for key copyright concepts such as creativity and authorship, and may also challenge some of the underlying assumptions of the copyright rationale. I will therefore now turn to critically examine each of these features in the discussion below.

Professional v. Amateur

UGC is often described as content created by non-professionals amateurs (Hetcher 2008). A 2007 report by the OECD on UGC defines it as follows:

> ":i) content made publicly available over the Internet, ii) which reflects a certain amount of creative effort, and iii) which is created outside of professional routines and practices." (OECD 2007).

Content which is created outside professional routines and practices, however, is not necessarily amateur content. UGC may be produced by professionals, outside the scope of their employment agreement. A typical example is the thousands of software developers who hold regular jobs in high-tech companies, and contribute, after hours, to a whole variety of open source projects. Moreover, some companies encourage their employees to actively engage in UGC communities and to contribute to some collaborative projects. The output of these employees is simply mixed with contributions of other users, and it is neither claimed by the company nor is it branded by it.

One way to distinguish professional content from amateur content is by the higher quality. But when professional content is distributed by professionals outside the scope of their employment, this distinction may no longer make sense. How are we to distinguish between pictures posted on Flickr taken by a professional photographer and an amateur? The two pictures could be of similar quality, they could be posted for sale, or made available for free, and they might be subject to similar terms of use, restricting any commercial use, or setting no restrictions whatsoever.

The definition of professionalism may also rest on professional standards: A professional work is created by professionals, whose work and actions must comply with the norms and standards established by her profession. The ability of users to produce and distribute their content online is challenging the boundaries of some professions. A common example is the blurring distinction between traditional journalism and blogging, between news reporting by the media and news which are reported by participants in online news forums. Bloggers may not be professionals, but one may no longer need to be a professional journalist in order to report the news (Shirky 2008, 66).

The distinction between professional and amateur work also relies on a fundamental dichotomy between wage-work and leisure. Work is what people do for a salary and leisure is what they do for fun. Yet, users are producing online valuable content by activities that we tend to define as leisure, such as commenting on pictures or books,

chatting and playing in virtual worlds (Terranova 2004). Reviews of books and movies, for instance, are routinely shared by users as a matter of social practice. When such reviews are posted online, they become economically valuable for platforms, such as Amazon.com, which are using it to generate added value for its customers (Howe 2008). The fact that Amazon extracts an economic value from users-generated reviews does not turn this practice into work, and does not constitute labor relations among the parties (Elkin-Koren 2009a).

The distinction between professional and amateur content is blurring. To a large extent this dichotomy was based on a monopoly of publishers over the means of producing and mass distributing content. When everyone can produce high quality content by using basic means (i.e., a cell-phone camera, a keyboard, Internet connection), and can also make it publicly available worldwide, the dichotomy between professional and non-professional content may no longer hold (Halbert 2009).

The collapse of a professional structure creates a vacuum in terms of governing access to UGC. Amateur content is not produced within an industrial structure and it is not linked to any particular business model. It is often created for fun and exchanged, for free, within a social framework. Rarely any consideration is given to defining the terms of use and designing a licensing strategy. Individual users often lack the fee structure and the organizational infrastructure which are necessary to maintain a licensing system.

Exploiters v. Creators

UGC has taken many shapes and forms. Creative works generated by users reflect a continuum of users' originality, ranging from the preparation of an entirely new work, through the preparation of a derivative work and down to the posting of an identical replica in a new context. Some users are creating new works out of thin air: bloggers who write original postings on the daily news, users who took pictures of the London underground-bombing using their mo-

bile phones, or an original video clip of an orchestrated performance of a fountain made of Mentos & Diet Coke.

A common form of UGC is appropriating cultural products to express a new meaning: adapting movie scenes and fictional characters, parodying brands, or modifying the words or style of popular songs. The popularity of adapting pre-existing works grows as digital formats enable users to mix and match: cut and paste text, embed a video clip, use a song as soundtrack for a homemade video, edit a photo by using Photoshop, or remixing digital music. Users' creativity is often reflected in mashing new vocal tracks with a video clip or combining the rhythm track of one song with the vocal tracks of another. This is often referred to as a shift to a Remix or Mashup culture (Lessig 2004). Originality in such instances might be manifested in the transformative use.

Commercial players are also taking advantage of the new online capabilities, by copying and redistributing materials produced by users (Petersen, 2008). For instance, online aggregators and screen scrapers may create new value by searching, copying and retrieving users' travel reviews, or political opinions, and generating indexes, directories, or useful guides (O'Reilly 2007). Authorship in this context may expand from the originator of the work to cover also appropriators and aggregators who create new content or present new meaning by using pre-existing materials.

UGC is often portrayed as the output of users who are exploiting the efforts made by the original creators, the real authors. It is perceived as excessively exploiting the works produced by others: uploading a protected work to YouTube or copying an original picture to one's personal blog. Users are accused of free riding the efforts made by others, and are "largely parasitic on media coverage, with little original report." (Netanel 2008, 113). The view of UGC as appropriation presumes that it is somewhat inferior to works created by professional artists or artifacts produced by the culture industry. Halbert argues that the term itself, "user-generated-content", implies the lack of originality. It "implies that somehow those who are not professional cultural producers generate content by being users instead of originators. The term implies that professionally generated content for money is the origin (and possibly original) that users then appro-

priate or at the very least displace. The user remains passive in this accounting of creativity." (Halbert 2009).

No new standards of originality, however, are necessary for accommodating UGC, and the new types of creativity it introduces, under copyright law. The underlying assumption of copyright law is that the process of creating cultural works is incremental, and that each new work builds upon existing works. Therefore, users, who transform preexisting materials, should be viewed as contributing to the productive endeavor promoted by copyright, by adding something original to preexisting works. Transformative uses are encouraged by copyright doctrine, primarily under the fair use doctrine. Moreover, in recent years there is a growing recognition of the role of non-transformative uses of creative works in promoting copyright goals (Cohen 2005; Litman 2007; Elkin-Koren 2007). Simply using creative works, even without transforming it, is arguably an integral part of the cultural flow. From this perspective, a non-transformative use of works, such as posting it online, could be a form of self-expression and political participation. Inevitably this may involve the use of brands, fictional characters (i.e., Harry Potter, Barbie) pictures and popular music which become an integral part of our cultural language (Tushnet 2004; Klein 2000). The dominance of popular/commercial cultural artifacts in our everyday life makes them constitutive of our cultural language. It creates visual symbols and expressive metaphors which are commonly shared, and in some cases their use becomes a necessity for the purpose of self-expression.

Where new forms of creativity so heavily depend on the use of pre-existing materials, access to cultural works becomes essential. Users-authors and users-participants need wider access privileges to pre-existing materials, to enable this creativeness. The copyright framework which was tailored for the content industry, reflects a dichotomy between authors and users. It emphasizes authors' rights and seeks to balance control by authors and access by users. The rise of UGC blurs this distinction between authors and users, on which copyright balances rests. In this environment greater weight should be given to access.

Individual Authors v. Collaborative Efforts

The creative activities of users may take different shapes and forms. Sometimes users work alone, posting a homemade video on YouTube, sharing their opinions on their blog or microblogging on Twitter. Nonetheless, the low cost of coordinating creative efforts in the online environment further enables users to work together in creating new content without any firms' organizational structure. As forcefully argued by Benkler (2002; 2006) digital networks facilitate a radically decentralized type of production mode, which is the commons-based peer-production of information. Modular projects which could make use of small independent contributions, can rely on non-monetary motivation of individuals. Large-scale collaborations are feasible as long as diverse motivations can be pooled and merged into a single effort. The low cost of communicating and processing information makes such coordination and integration cost-effective in a way that was unavailable before.

What makes online collaboration special is the architecture which allows users to benefit from the accumulative effort of all participants. The output is dynamic, and it is collectively shaped through the ongoing contributions of users. Classic examples are programmers contributing to code and fixing security bugs in free software, and users editing entries on Wikipedia. Another example is the collaborative ranking generated by users of Diggs. The extraordinary success of colossal collaborative projects such as Linux and Apache demonstrated that a complex system on a large scale could be designed and maintained by a sizeable group of unorganized collaborators in a non-proprietary setting. The development of such powerful software, which is non-rival and non-excludable, without any apparent monetary compensation and any guaranteed return for financial investment is challenging the incentives paradigm of copyright and its basic premise – the need for monetary incentives for informational, technological and intellectual creation.

It is necessary to distinguish between the act of incorporating pre-existing works into one's new creation, on the one hand, and collaborative production on the other hand. Incorporation or appropriation of creative works into one's creative work simply involves sharing. It

does not involve an intentional effort to merge one's effort into a joint enterprise that is fundamentally common: it could be claimed by each of the contributors but, at the same time, by no one in particular. These social and economic phenomena reflect a non-proprietary regime where content is developed through collaborative efforts without any claim for exclusive rights in it. Production of information, knowledge and culture, Benkler argues, no longer requires management by the hierarchy of firms, or the price signals of the market.

The rise of common-based production, and of creation by individuals rather than industries, reduces the need to secure monetary incentives for investment in creation. This implies a shift in the balance mandated by the public goods equation. While in the non-virtual world governed by content industries, monetary incentives were a must, opportunities for alternative modes of producing content suggest that other considerations should come into play. These include the non-rivalrous nature of informational works, which supports the maximization of their use.

Commercial v. Non-profit

A typical feature of UGC is that it is non-profit: industrial content is produced and distributed for profit, and, in sharp contrast, UGC is perceived as non-profit. Indeed, much of the creative activities of users are carried out without the expectation of remuneration. Users may choose to share their content online for a variety of reasons: Posting a book review on Amazon or reviewing a movie on Flixster seeking connection with peers; commenting on a blog or disputing an op-ed on the *NYT.com* for the purpose of simply voicing an opinion. At the same time, however, photographers may post their pictures on Flickr, hoping they will be able to sell it or cash-in on their rising online reputation. Users' motivation may reflect a wide range of human needs and interests: self-expression and creative satisfaction, affiliation and connecting with others, building an online reputation and strengthening self-esteem.

Nevertheless, UGC cannot be strictly defined as non-profit. We have seen that social media platforms are often (but not always) for-profit enterprises. Yet, the economic sustainability of social media platforms depends on the social context and the livelihood of the community of users (Elkin-Koren 2009). A similar duality of the commercial and social nature, characterizes participating users. Users often engage in generating content in a social context rather than within a market framework. The activity itself might not aim at producing a work for sale or establishing a business, but rather at expressing oneself, creating for the sake of fun and self-expression, or engaging in a conversation. At the same time, however, UGC does not have to be nonprofit.

New business models enable users to monetize their activities and generate revenues from the content they create (OECD 2007). Some users offer their works for sale while others profit from advertising, which is UGCs most common source of funding. Some models provide direct support to UGC by allowing users to incorporate advertisements into their content for a share in the revenues. Platforms sometimes share advertising revenues with users by offering rewards for high ratings or special performance. Advertising services such as Google AdSense, automatically deliver targeted ads to blogs and personal homepages, sharing the collected revenues from advertising with the hosting website.

Users are increasingly recruited by marketers to promote products, services or a political agenda by viral advertising and peer promotion. Bloggers and users who are identified as emerging social leaders might be paid by sponsors for promoting products by posting product reviews, generating high ratings or offering tips on products and services (Goodman 2007; Solomon 2008).

Finally, commercial players (old media and new social media, ISPs, and search engines) are increasingly funding different aspects of UGC. Some old media players are entering the social media scene by posting their own proprietary content on such facilities (OECD 2007). Moreover, UGC is sometimes integrated in the presentation of traditional media. CNN iReporter, for instance, incorporates news stories, blogs and videos uploaded by users. Leading newspapers link

to popular blogs, and TV shows often run videos posted on YouTube or other video websites.

This mixture of commercial interests and non-profit motivations should be viewed in the context of increasing financial pressure on individual users in the UGC environment. The rise of UGC increases the commercial pressure on individual users, as they become an independent unit of production. Indeed, UGC often involves lower investment. When content is produced by individuals in social contexts, it takes advantage of social motivation, and therefore does not require the large investment typically involved in producing and distributing content in an industrial manner. Therefore, unlike mass produced content, it is less dependent upon a firm business model, which secures a financial return for each creative investment. Online distribution, however, becomes increasingly costly. Users are facing rising cost of establishing an online reputation and managing their online presence in different social media platforms. This may require large investments in search enhancement, website optimizing, and viral promotion. The fact that individual creators are put at the forefront of culture creation further increases the commercial pressures. Individual users must compete with commercial players over online exposure and users' attention. To some extent, individuals are adopting promotional techniques formerly used only by commercial entities to develop their "brands," control their identities, and monetize the informational value they add (Creamer 2007).

The UGC environment should therefore be viewed as a mixture of for-profit and non-profit activities motivated by both social and commercial interests (Elkin-Koren 2009). Different types of non-monetary incentives come into play, which may sometimes conflict with monetary incentives. The introduction of monetary rewards may sometimes impair social incentives, by interfering with the sense of social solidarity and by reducing the motivation to collaborate.[1]

Even though UGC is not produced for profit, it is increasingly being shaped by market settings. What makes the UGC different, however, is the fact that in contrast to industrialized content, it is not

1 See for instance users' outrage following the introduction of the Producer Rewards® Program in the video storage site Metacafe (in 2006). Videos which pass through Metacafe strict guidelines achieved at least 20,000 worldwide views at a minimal ranking, may earn $2 per 1000 views.

produced for the sole purpose of maximizing profits, even though it could be distributed in a commercial setting and may, in fact, generate revenues.

5. UGC Environment and Copyright Law

Copyright law governs the use of creative works in the UGC environment and defines the scope of exclusive rights and permissible uses of copyrighted materials. Copyright law which was tailored to facilitate the business models of the content industry enables exclusive control over the use of creative works. These rights are shaping the relationships among users and between users and platforms. Does the ascendancy of UGC give rise to different considerations related to the governance of creative works?

Exclusivity Is Not a Must

Copyright law was designed to serve the business models of book publishers and the printing press, and was later tailored to address the needs of the mass media during the second half of the 20th century (Samuelson 2007). The business models of mass media and the content industry rely upon exclusivity. The rather high investment in production cost (of a novel, a news report, a television series or a movie) is recouped by selling copies at a monopoly price or licensing exclusive broadcast rights. Copyrights enable the owner to legally exclude any of the uses which are covered by copyright exclusive rights (17 U.S.C. § 106). This ability to commodify cultural goods enabled the content industry to orchestrate the production of cultural artifacts, as any other industrial good: Publishers were able to hire employees, cover production cost and allocate their investments between safe and risky titles, knowing that the exclusivity over copying

will enable them to recover their investment. Exclusive rights were therefore central for the business model of the content industry.

Exclusivity over the uses of creative works, no longer play the same role in the UGC environment. Social media platforms do not engage in mass production and distribution of content in the same way the old media did. Content is both generated and made available by users. The content produced by users constitutes the building blocks of these virtual communities. Consequently, the business models of social media platforms are very different from those typical of the content industry. They are based on the ability to incite social motivation and preserve a sense of community, loyalty and social commitment. They do not require any exclusivity over the content: what is attracting users to the platform are their fellow users and not necessarily a particular content; what keeps users attached to a platform is the robust information flows and the ability to connect their online presence with content and peers across platforms. Social media platforms need to maintain a vibrant community that would keep prosumers engaged and encourage them to share content with other users. This may require wide distribution of content and better mechanisms for sharing all aspects of such content. That is the reason why exclusivity created by copyright becomes less significant for the business models of platforms. In fact, it is often in the interest of the platform to secure the rights of users (and the platform itself) to access and use UGC. The interdependency between platforms and users, and the fact that they both depend on the livelihood of the community, makes platforms a potential candidate for implementing a social contract (Elkin-Koren 2009).

Gaining exclusivity over the content may no longer be the primary interest of users either. Users in the UGC environment have various stakes and interests: They may seek credit and affiliation. They may wish to secure a right to transfer their works to a different facility and to avoid commercial abuse of their creative efforts. Users may wish to maintain expressive freedom. They seek to secure some level of autonomy and exercise control over their personal data, social connections and creative choices. As suggested by the preceding discussion, UGC's heavy reliance on transformative uses emphasizes the need to secure use privileges and access rights. Users, who are

actively engaged in the UGC environment, exercise a dual role: they generate original content, and at the same time they use content originated by platforms and by other users. Prosumers need more creative freedom and access privileges for using and transforming works to take full advantage of the tools provided by the digital environment. That means that users should be able to view, read, and listen to content created by others, but also to actively use content, change its form or context and sometimes incorporate it into their own work.

The bottom-line is that the business models supporting UGC may no longer require the same level of exclusive control over creative works. The social aspects of the UGC environment, which heavily depends on engagement by a community of users, suggest that exclusive control over the content may not be as essential as in the industrial production model. The sale of copies is not the sole practice for generating revenues from content. There is rather a variety of business models which rely on users' input, engagement and contribution. Consequently, copyright is expected to play a smaller role in shaping the relationships among users and platforms. Indeed, UGC is often subject to very little use restrictions. Nevertheless, since copyright apply to most UGC it may create unnecessary barriers.

Exclusivity and Access

As pointed out by many scholars, the exercise of copyrights in the UGC environment may become an obstacle to the flourishing of UGC (Lessig 2004; Litman 2004; Cohen 2005). The copyright mechanism requires prior permission. Consequently, any user who wishes to use a preexisting work must first acquire an appropriate license. Appropriating materials which are governed by copyright law require a costly licensing process: determining which license is necessary, identifying the different copyright owners, negotiating a license to use the work and paying the license fee. The high cost involved in licensing could create barriers on access to creative works and make it difficult for users to participate in generating con-

tent. This is especially so when costs are higher than the anticipated benefits from the use of the work. In such cases, transaction cost could prevent a use that might otherwise be beneficial.

The problem is particularly acute with respect to amateurs. The exclusivity established by copyright, which requires a license for each and every use, presents a problem for amateurs, both as potential licensors and as potential licensees. As licensors, users often lack the legal knowledge required for designing a licensing strategy. Amateur users do not have the legal training and organizational support, nor do they have the financial funds which are necessary for acquiring such licenses. The lack of a fee structure further makes it difficult to acquire a license to use preexisting materials for the purpose of generating new works. Simply avoiding a copyright infringement may therefore become a major challenge for amateur creators, and the risk of liability erects new barriers to creative and collaborative activities in the UGC environment. At the same time, however, prosumers have greater capability for actively transforming pre-existing works, which may require more licenses.

The current law does not leave sufficient room for users to work upon preexisting materials. Fair use privileges are rather vague and indeterminate, causing a chilling effect even in cases where a use is legitimate. Indeed, in the absence of a proper license users are exposed to legal liability. Copyright owners have been exercising their rights both against users of social media (i.e., users of file sharing systems) and against platforms of new media. Even though a Safe Harbor regime was established under section 512 of the DMCA (Digital Millennium Copyright Act), to exempt online service providers from liability for storing or transmitting infringing material posted by their users, owners are routinely bringing lawsuits against social media platforms, seeking to establish direct and indirect liability for copyright infringement due to UGC content.[2]

Take-down notices are routinely sent to social media platforms regarding UGC that allegedly infringe upon their copyright. A typical example is the story of a 30 seconds homemade video taken by

2 See for instance, *Viacom Int'l Inc. v. YouTube, Inc*., No. 07-cv-2103 (S.D.N.Y. 2007) (Viacom's lawsuit against YouTube claiming copyright infringement in videos uploaded by users).

Stephanie Lenz showing her toddler bouncing to the sound of Prince's song *Let's Go Crazy* playing at the background. The clip *Let's Go Crazy #1*, which she posted on YouTube, was removed after Universal Music Group sent YouTube a take-down notice pursuant to the Digital Millennium Copyright Act, asserting that the video clip infringed its copyrights in Prince's song. When YouTube failed to re-post the video, even after a counter notice was sent, Lenz filled a suit asserting that the use of the music in the background was fair use. The court denied UMG's motion to dismiss the suit, holding that issuing a takedown notice without proper consideration of the fair use doctrine may constitute bad faith and may expose the copyright owner to liability under section 512(f) of the DMCA (*Lenz v. Universal Music Corp*., No. 07-3783 (N.D. Cal. 2008)).

Uncoordinated Owners

The shift from central management of copyrights by the industry to the use of the same legal mechanisms by uncoordinated owners raises new issues. UGC is not only diffusing the power to produce cultural goods, it is also diffusing the legal power to govern creative works. The advantage is that the UGC environment diffuses control over expressive resources. The downside is that access to content is governed by dispersed individuals, each of whom is free to determine the terms of use for her content. In the absence of standardization, this regulation by many-to many may result in an explosion of terms, which in turn may increase transaction costs.

Exclusive rights in UGC are held by uncoordinated individual users. Many uncoordinated rightholders could increase not only transaction cost but also the price (Depoorter and Parisi 2003). There is the risk of strategic behavior. The co-existence of commercial and non-profit motivations in the UGC environment, suggests that the relatively liberal terms of access which characterized the UGC environment so far, should not be taken for granted. As the intrusion of commercial interests into the UGC environment expands, users may

feel increasing pressure to monetize their content. They might also be reluctant to authorize access in cases involving competition or rival commercial interests. This suggests that decisions regarding which uses of the work are privileged should not be left to the users governing works in a many-to-many licensing regime. As copyright disputes will grow, we are likely to see more consequences on the negative side.

6. Some Implications

Private Ordering Remedies

Some of the difficulties listed above could be addressed by private ordering mechanisms: licenses and contractual terms of use. Independent licensing schemes ("norm-generators") allow prosumers to apply ready-made terms of access to their works. Users-authors may opt for a standard license offered by norm generators such as Creative Commons or the Free Software Foundation. A user may select a license and attach it to her content, permitting the use according to the terms which "come with the content". The significance of these independent schemes increases as users seek more mobility and freedom to transfer their content from one platform to another.

There are many licensing initiatives that offer standard provisions, each reflecting a different ideological commitment (e.g., Free Software Licenses) tailored to a particular industry, certain type of work or business strategy. There are basically two licensing strategies among open access licensing schemes: one is strictly standard, and the other is modular. Creative Commons' strategy is modular and allows each author to choose her own selection of standard terms. FSF strategy, by contrast, offers a rather rigid set of provisions. Creative Commons' user-friendly toolkit for licensing copyright simplifies the licensing process by authors. It is also intended to help end-users to easily identify works which are authorized for use. The license is accessible in a legally enforceable format, but also in a com-

prehensible language, intended for potential lay people, and in machine code that could be automatically traced by search tools. This norm generator could be effective for addressing transaction cost barriers on access, namely, the cost of identifying the right holder and reaching a bargain regarding the use of the work.

Elsewhere I have argued, however, that the use of creative commons' modular strategy (which I call "a strategy of choice") does not necessarily promote access (Elkin-Koren 2006). The modularity of provisions facilitated by Creative Commons may create barriers to access: higher transaction costs involved in figuring out the different licenses and having to resolve conflicting license terms among different licenses. Moreover, the choice imbedded in the modular licensing scheme, emphasizes the sovereignty of authors over their creative works thereby strengthening the proprietary sentiment among users and making traditional copyright more pervasive.

Thus, the use of private ordering by end-users to govern UGC may not necessarily promote access to creative works. In a many-to-many licensing environment, where every user can design her own license, licenses might create barriers to access. Authorizing access to creative works should be straightforward. Every restriction on access imposes an extra burden on each and every user, to study its scope and implications. These costs increase as the terms of access provided by different set of license become more diversified. To guarantee access to creative works terms of access must be standardized. Therefore, licensing strategies which facilitate less choice by authors are the most useful for facilitating access.

Access to UGC could also be shaped by platform. Terms of Use (ToU) posted on social media websites typically define ownership, as well as a license to use UGC which is facilitated by the platform. For instance, the ToU of Second Life provides that users are the owners of the content they generate in the virtual world, while users of Club Penguin are required to assign all rights in any submission created through the use of copyrighted materials on the Walt Disney Internet Group sites.

Social media platforms are using UGC to draw attention and increase traffic to their facilities. Therefore, their interest is to minimize the control exercised by each user/producer over the content

they have produced and allow access by the community of users. This is reflected in the terms of use of social media platforms. ToU often secure the rights of the platform itself, as well as the right of other users, to reproduce, modify and distribute the content. ToU in major social media platforms (e.g., MySpace, Facebook, LinkedIn, YouTube, Flickr and Second Life) are relatively standard. They often provide that the user remains the owner of the content uploaded by her. By simply posting the content on the social media site, however, the user authorizes the platform to use, modify, publicly perform, publicly display, reproduce, and distribute such content through the site. Such licenses are often worldwide, non-exclusive, fully paid, and royalty-free, and permit sublicensing. Some licenses terminate when the user removes the content from the sites, while others are perpetual and irrevocable (e.g., LinkedIn, Second Life). YouTube's license terminates after a "commercially reasonable time", and a recent attempt to amend this (February 2009) was defeated by users protest. Some licenses only define the terms of access vis-à-vis the platform, authorizing the platform to freely use content which was made available through its services. In other cases terms of access will secure the rights of other users to use UGC without any restrictions. The right of subsequent users to use prior works is particularly important for collaborative enterprises such as Wikipedia.

The interest of platforms and the public interest in securing access to UGC may coincide. This may hold true for securing rights of access to UGC vis-à-vis the platform and vis-à-vis other users. Does it follow that platforms can efficiently secure access to UGC and provide a suitable basis for collaboration among users? We might expect some disparities of interests between platforms and users related to the use of content. In some cases individual users may have greater incentive than a platform to share content freely, on a commercial or non-commercial basis. Users may also seek to share their works on a variety of platforms. As platforms become more powerful, there is a growing concern that they will seek mechanisms to exploit UGC and deprive users of their rights. This is a growing concern as mega platforms may also facilitate access to licensed third party content, by offering the infrastructure for licensing which is necessary for users. The recent Google Book Settlement provides an example.

It has been argued that ToU of social media platforms, which are drafted unilaterally by multinational corporations and enforced against uninformed consumers, should be treated by courts as unconscionable (Hetcher 2008). Yet, even though ToU are unilaterally drafted they are not necessarily unconscionable. In determining the legal status of ToU we must consider the relationship of platforms and users in their full complexity. Users of social media platforms are not necessarily "uninformed consumers" and are likely to be more engaged in setting the terms which apply to their online activities. Platforms are often attentive to users' preferences since they are more dependent on users' ongoing contributions. Platform–users relationships are multilevel and more complex than vendor-consumers relationships. The platform's economic value derives from the network of users, who create value. In fact, there is no value in the platform other than the users who actively engage in it. To a large extent platforms may find themselves at the mercy of their users, especially if users have decided collectively to play by different rules. Social media platforms must sustain trust with their community of users. They must maintain an engaging community, incite social motivation and preserve loyalty and social commitment.

Recent examples suggest that users have been successful in exerting pressure on providers to modify what they believed were unreasonable terms. Terms of service by hosting services such as Yahoo! and MySpace were revised in response to complaints by end-users. Digg, a social aggregator using the editorial functions performed by its users, reversed its policy of editorial intervention following a community revolt. More recently, in early 2009, Facebook announced that it is updating its terms of service, to what was described by users as perpetual ownership in UGC. Following a three days of public pressure by users, Facebook decided to withdraw, inviting its community of users to help draft a Bill of Rights and Responsibilities for its 175 users' site.

In a personal posting to Facebook users, CEO Mark Zuckerberg explained the background for the decision to change the terms of use:

> "Our philosophy is that people own their information and control who they share it with. When a person shares information on Facebook, they first need to grant Facebook a license to use that information so that we can show it to the other people they've asked us to share it with. Without this license, we couldn't help people share that information… […] People want full ownership and control of their information so they can turn off access to it at any time. At the same time, people also want to be able to bring the information others have shared with them – like email addresses, phone numbers, photos and so on – to other services and grant those services access to those people's information. These two positions are at odds with each other. There is no system today that enables me to share my email address with you and then simultaneously lets me control who you share it with and also lets you control what services you share it with."

The best way to safeguard the rights of users' vis-à-vis platform is to make sure that users are free to leave the platform whenever they choose. The stickiness of platforms that might make it difficult for users to defect and switch to a different platform, are related to a whole variety of non-legal aspects of social media, including the quality of services, the scale of the online communities, and some vested interests in particular communities. But loyalty to the social media platform may also arise from the fact that users assets – creative works, collaborative works, and social graphs, might not be transferable to other social media. The inability to transfer these users' assets may create barriers on the ability of users to switch and may weaken their standing vis-à-vis platforms. To secure competition among platforms it is therefore necessary to guarantee that users can always subject content to terms of their choosing.

Challenges for Copyright in UGC Environment

While private ordering could provide a second best solution to access barriers posed by copyright, they cannot provide a comprehensive solution to the growing gap between the legal regime that was de-

signed to incentivize creativity and the new changing modes of creativity developed online. In particular, standard licensing could provide a limited remedy for accessing those works which are subject to a license. A legal reform is necessary that would expand the scope of fair use and also provide users with more certainty regarding the limits of permissible uses.

The main challenge posed by the prevalence of UGC arises from the emerging practices of social production. Structurally, the copyright mechanism involves central governance: concentrating the power to authorize the use at the hands of a single owner: an individual author, an employer, an exploiting firm, or even partners who share ownership. What was suitable for the content industry, however, does not fit a collaborative environment which requires coordination, cooperation and mutual accountability. Copyright may allow each contributor to claim rights over a different piece of a collaborative effort, and sometimes to veto the exercise of rights by others. Exercising copyright by users may also limit the ability of platforms to use UGC (i.e., Google links to images, scraping UGC by platforms and making it available to users in different formats) and could thus further restrict access to creative works. The emergence of new forms of collaboration requires a legal design that would enable coordination among different rightholders. Such a legal framework should not leave an arbitrary power of control over the use at the hands of individual contributors.

UGC creates opportunities to democracy and new forms of creativity, and we should seek mechanisms to encourage it. In order to take full advantage of the opportunities created by UGC it is necessary to relax the fundamental structure of copyright which establishes exclusivity and enables individual control, and move towards a legal framework which enables collaboration. Such a framework should be based on a transparent set of standard privileges of access. It should further enable collaborating users to have a voice in determining the exploitation of their contributions. This could be achieved by developing mechanisms that would facilitate a social contract.

References

Anderson, N. *Tim Berners-Lee on Web 2.0: "nobody even knows what it means"* (2006-09-01) (available at http://arstechnica.com/news.ars/post/20060901-7650.html. (Retrieved on December 1, 2008).

Baker, C.E. 2007. *Media Concentration and Democracy: Why Ownership Matters*. New York: Cambridge University Press.

---. 1997 "Giving the Audience What It Wants." *Ohio State Law Journal* 58: 311.

Benkler, Y. 2006. *The Wealth of Networks: How Social Production Transforms Markets and Freedom.* New Haven: Yale University Press.

Cohen, J.E. 2005 "The Place of the User in Copyright Law." *Fordham Law Review* 74: 347.

Creamer, M. 2007 "Optimize Me: A Reporter's Journey into the World of SEO and SEM." *Advertising Age* (December 3, 2007) (available at: http://adage.com/login.php).

Depoorter, B, and F. Parisi. 2003 "Fair Use and Copyright Protection: A Price Theory Explanation." *International Review of Law and Economics* 21(4): 453.

Elkin-Koren, N. 1996 "Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace." *Cardozo Arts & Entertainment Law Journal* 14: 215–295.

---. 2002 "It's All About Control: Rethinking Copyright in the New Information Landscape." In N. Elkin-Koren, and Neil W. Netanel, eds., *The Commodification of Information* 79. The Hague: Kluwer Law International.

---. 2006 "Exploring Creative Commons: a Skeptical View of a Worthy Pursuit." In P.B. Hugenholtz, and L. Guibault, eds., *The Future of the Public Domain*. Alphen aan den Rijn: Kluwer Law International.

---. 2009 "Governing Access to Users-Generated-Content: The Changing Nature of Private Ordering in Digital Networks." In E. Brousseau, M. Marzouki, and C. Méadel, eds., *Governance, Regulations and Powers on the Internet*. UK: Cambridge University Press.

---. 2009a. Governing UGC: Three Conceptual Frameworks (working paper).

Goodman, E.P. 2007 “Peer Promotion and False Advertising Law.” *South Carolina Law Review* 58: 683.
Grimmelman, J. 2007 “The Structure of Search Engine Law.” *Iowa Law Review* 93: 1–63.
Halbert, D. 2009 “Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights.” *Vanderbilt Journal of Entertainment & Technology* [forthcoming].
Hetcher, S. 2008 “User-Generated Confusion: The Legal and Business Implications of Web 2.0.” *Vanderbilt Journal of Entertainment & Technology Law* 10: 863.
Howe, J. 2008. *Crowdsourcing: Why the Power of the Crowd Is Driving the Future of Business.* New York: Crown Business.
Keen, A. 2007. *The Cult of the Amateur. How Today’s Internet is Killing Our Culture.* New York: Doubleday.
Klien, N. 2000. *No Logo: No Space, No Choice, Taking Aim at the Brand Bullies.* London: Flamingo.
Lessig, L. 2001. *The Future of Ideas: The Fate of the Commons in a Connected World*. New York, NY: Vintage.
---. 2004. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York, NY: The Penguin Press.
Litman, J. 2004 “Sharing and Stealing.” *Hastings Communications & Entertainment Law Journal* 23: 1–48.
---. 2007 “Lawful Personal Use.” *Texas Law Review* 85: 1871.
Mørk Petersen, S. 2008 “Loser Generated Content: From Participation to Exploitation.” *First Monday* 13: 3.
Netanel, N. 2008 “New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age.” *The George Washington Law Review* 76: 101.
O’Reilly, S. 2007 “Nominative Fair Use and Internet Aggregators: Copyright and Trademark Challenges Posed By Bots, Web Crawlers and Screen-Scraping Technologies.” *Loyola Consumer Law Review* 19: 273.
Samuelson, P. 2006 “Challenges in Mapping the Public Domain.” In P.B. Hugenholtz, and L. Guibault, eds., *The Future of the Public Domain* 7.
---. 2007 “Does Copyright Law Need to Be Reformed?” *Communications of the ACM* 50.
Shirky C. 2008. *Here Comes Everybody: The Power of Organizing without Organization*. New York: Penguin Press.
Solomon, M.R. 2008. “The Truth About What Customers Want: They Think Your Product Sucks – But That’s Not a Bad Thing.” *Financial Times* (November 5).

Stone, B., and B. Stelter. 2009 “Facebook Withdraws Change in Data Use.” *New York Times* (February 18, 2009).

Sullivan, D. 2009 “Search Market Share 2008: Google Grew, Yahoo & Microsoft Dropped & Stabilized.” *Searchengineland.com* (January 26, 2009) (last visited January, 2009).

Terranova, T. 2004. *Network Culture: Politics for the Information Age*. London: Pluto Press.

Time Magazine Person of the Year: You (December 25, 2006) (available at http://www.time.com/time/covers/0,16641,20061225,00.html).

Toffler, A. 1980. *The Third Wave*. London: Collins Books.

Tushnet, R. 2004 “Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It.” *Yale Law Journal* 114: 535.

Court Cases and Official Reports:

OECD WORKING PARTY ON THE INFORMATION ECONOMY, PARTICIPATIVE WEB: USER-CREATED-CONTENT, at 4-5, 8-9 (2007), available at http://www.oecd.org/dataoecd/57/14/38393115.pdf (last visited October 24, 2007).

Fair Housing Council of San Fernando Valley, et al. v. Roommates.com LLC 489 F.3d 921 (9th Cir., May 15, 2007) aff'd en banc 2008 WL 879293 (9th Cir., April 3, 2008).

Lenz v. Universal Music Corp., No. 07-3783 (N.D. Cal. 2008).

Viacom Int’l Inc. v. YouTube, Inc., No. 07-cv-2103 (S.D.N.Y. 2007).

Warner Bros Entertainment Inc and JK Rowling v RDR Books 575 F Supp 2d 513 (SDNY, 2008) 2008 WL 4126736.

CDPT Mash-up 360. A Cauldron of Creativity: Outcomes from the University of Portsmouth Event

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Abstract

This paper details the inception of the Creative Digital Practice and Theory (CDPT) Mash-up event held at the Creative Cultural Industries Faculty at the University of Portsmouth, UK. The development of CDPT Research and the mash-up rationale are introduced along with contributions from all three core members of the project. The structure of the discussion looks at the convergence of technology and creativity via Dueze's (2006) definitions of digital culture via understandings and interpretations of participation, remediation and bricolage. The outcomes of the mash-up event are then discussed with reference to copyright, ownership and future collaborations.

The Creative Digital Practice and Theory (CDPT) group was put together in the autumn of 2007 in the School of Creative Arts, Film and Media, part of the Creative and Cultural Industries Faculty at the University of Portsmouth in the UK. CDPT aims to encourage, foster and provide a point of reference for individuals and groups who are interested in collaboration and connection between theories and practices of creativity across disciplines through exploring both contemporary and "traditional" media. In order to promote our ideology CDPT examined notions of the "Mash-up" and developed a format that would help to explore such possibilities across the faculty in particular and the University in general. In order to explain our definition of the term we considered that "Mashups involve the reuse, or remixing, of works of art, of content, and/or of data for purposes that usually were not intended or even imagined by the original creators." (Lamb, 2007, 14) CDPT also considers that "creativity" is constantly inconsistent – and with ever changing and developing technologies comes the mix , match and flux of what has been described as "upgrade culture" (Lister et al. 2003, 2) This flux can also be seen as comparable to Hemmungs Wirtén's (2006) notions of flux in her discussion surrounding public/private flows of ownership.

In turn CDPT suggests that with notions of "upgrade culture" comes our fear of competently harnessing the "upgrade" and implementing it into knowledge transfer for those who already come from a landscape rich in transformation, convergence and participation and we are therefore constantly "faced with the question of how to take a snapshot of a breaking wave." (Lister et al., 2003, 2) Accord-

ing to Lister et al, nothing is finally achievable and stable – therefore the creative cultural industries will always be in continuous flux.

Gasser and Ernst (2006) argue that "the .Internet has the promise to transform passive recipients of information into active users and creators who can interact with digital content and contribute to shared information environment." They suggest that there is good reason "to think about approaches and strategies to create a sustainable cultural environment in which *active users* play an important role in the creation and exchange of information, knowledge, and entertainment." It is because of this and because of the economic downturn, that CDPT believes in major collaborative changes, such as our version of a "Mash-up", that could bring new developments in concepts of cultural heritage and the sharing of cultural capital and innovative expressions of and experimentation with digital content and creativity.

The Mash-up 360 Rationale

> "Our fear of technology often extends to our own personal use of it. Whereas in the broadcast-era we broadly understood the basic technical principles of the dominant media and we understood their use – sharing that use with our students – today lecturers are being left behind in their knowledge of what technologies are out there, of their technical possibilities, of how they even work, of how to use them and of what they are being used for. Again, we no longer share a common culture with our students. Unless we can keep up with these changing technologies and uses and unless they become as integral a part of our lives as they are to our students then we will lose both the ability and even the right to teach them. In an era in which we watched and studied TV we had a right to teach it: in the future, unless we're downloading, sharing, ripping, burning, messaging, networking, playing, building and producing then we'll lose that right". William Merrin.

The notion that "everyone is a publisher and everyone is a broadcaster" (McConnell 2006, 71) through the explosion of consumer created content (also known as *social media*) show innovative and creative use of new technological products. This shift from what we describe as the "analogue broadcasting paradigm" to the "digital netcasting paradigm" confirms earlier predictions of the customisation of new technologies for specific activities and content by its users. (McLuhan 1967) For example the explosion of Second Life® has created an entire "virtual" consumer market of its own, with many real-time companies, institutions and service providers "moving" into Second Life in order to exploit the potential for offline profit (in hard currency) from this customisation. The key shift in this paradigm began when the technological ability moved from what was once considered *interaction* within the first wave of the Internet (Web 1.0) towards the second generation of *participation* in the "new media" (Web 2.0). We argue that this paradigm shift will be even further enhanced for the UK when the convergences of all forms of current analogue broadcast media are migrated onto the digital and broadband network. This is leading to user-driven technological innovation and comparisons with "Patchwork Prototyping" resulting in a "multitude of new services, web sites, technologies and protocols." (Floyd et al. 2007).

As a consequence of this we may see a rise in (what has already been described as Web 3.0 – see below) a new wave of participation oriented, user-generated three dimensional, intelligent platforms which will be ripe for entrepreneurs to succeed with new creative ideas, new forms of entertainment, production and consumption and edutainment.

> "Web 3.0, a phrase coined by John Markoff of the New York Times in 2006, refers to a supposed third generation of Internet-based services that collectively comprise what might be called 'the intelligent Web' – such as those using semantic web, microformats, natural language search, data-mining, machine learning, recommendation agents, and artificial intelligence technologies – which emphasize machine-facilitated understanding of information in order to provide a more productive and intuitive user experience." (Spivak, 2006).

Turner gives an excellent overview of the changing nature of creativeity through new media in what he describes as a "cultural infrastructure for emerging forms of new media production." (2009, 75). Turner makes a pertinent point that is relevant to CDPTs mash-up context in that he has explored the "bohemian ethos" that contributes to supporting "new forms of production in Silicon Valley and especially at Google."(2009, 73) He suggests that – through his research into the "Burning Man" events in the Californian dessert – there is a "building of a socio-technical commons, participation in project-based artistic labor and the fusion of social and professional interaction." (Ibid).

The "Burning Man" countercultural phenomenon according to Turner "has been studied largely as a new social form," incorporating "the syncretic religious impulses historically common to West Coast countercultures and the pro-art, anti-consumerist sentiments of contemporary do-it-yourself culture." (2009, 74).

Turner inquires about the appeal of such countercultural inclinations and asks 'What can that appeal tell us about the relationship between bohemian art worlds and new worlds of digital manufacturing?' (2009, 75). By including countercultural and bohemian attributes to the Mash-up where does this situate notions of immaterial labour (Lazzarato 1996; Hardt and Negri 2000) – that, according to Suhr contribute to suggestions that "certain aspects of mainstream convergence may threaten the aesthetic judgements of tastes and value."? (2009, 192).

It is with these thoughts in mind that the CDPT Mash-up event was created, and ran for the first time in early February 2009. Its purpose is to challenge notions of collaboration, participation and creativity and to allow a "cross fertilization" of creative ideas across faculties and disciplines.

In the CDPT Mash-up event we were witness to the socialization of technical production (Turner 2009) in that we were able to create a shared 'space for commons-based peer production' (Benkler 2006; cited by Turner 2009) founded on a three day event with an outlined structure based on an "ideological scaffolding" (Turner 2009, 76). The CDPT Mash-up ideology relied on the willingness and freedom

to contribute by interested parties in terms of research dissemination, interactive participation and creative discussion with a counter-cultural ambiance. The promotional material contained key-words such as "art-lab style event" and "participate, collaborate, innovate!" Some lecturers were invited to speak (we had a call for participation throughout the Faculty) – we had a series of what we called "mini-mash-up" events during the afternoons. This involved seminar/workshop style discussion and participation in which members of the public as well as students and staff at the university were able to attend.

CDPT was lucky enough to have some capability funding – but despite this still worked from the ideology of countercultural contribution – with the majority of contributors working for the communal ethos and non-monetary forms of compensation (Weber 2004) In turn many saw the event as a new and original experience, but also redolent of, but not the same as, earlier art "happenings" that had taken place in exactly the same space during the early 1970's with the likes of musicians Brian Eno and performance artist Peter Gabriel. Some participants likened it to creative artists and performers of Warhol's New York Factory of the mid 1960's.

The main core of CDPT revolves around three people: Ed Woodroffe, Hilary Cooke, and Dr. Trudy Barber. All three have specific specialisms that – when converged – create the skills base for construction of the project. In this context, Woodroffe developed networking for the event, Cooke developed user-generated applications, and Barber developed and observed the creative/academic mix. This can be directly correlated to three concepts of digital culture discussed by Deuze who states:

> "The principal components of digital culture can be caught in three concepts, which should be seen as articulated with each other: *participation*, *remediation*, and *bricolage*." (2006, 67).

Therefore, what follows is Woodroffe's discussion surrounding participation, Cooke's notes on remediation and Barbers' bricolage of creative practice and theory of the mash-up experience.

Participation

Organizing the Event – Ed Woodroffe's Networking and Structure

The primary goal for networking over the past year has been necessarily based on two primary targets. The first to accompany the strategic decisions of CDPT, and the second to organize a four day Mash-up event that is interdisciplinary, cross-collaborative, and which can be fed into a symposium to carry forward research ideas and to enable the instigation of further funded projects.

The essential tools in effective networking for CDPT are personal communication skills which were executed by CDPT's research networking facilitator, Ed Woodroffe. Whilst the technology, such as creating the web site and the CDPT Facebook page is essential to communications and initiating ideas of collaboration and interest – it was only after Woodroffe had made face to face contact with potential project collaborators that helped smooth the pathways to effective and efficient co-working in the initial discussions regarding the project. The skill Woodroffe most required in approaching the Mash-up project was the ability to see potential in people where others do not, and to see deeper into interesting juxtapositions of different skills in order to enhance creative cross-collaboration. Without this ability Woodroffe would not be so successful and whilst it is to a degree a matter of his own personality trait, it is also a skill that can be taught, fostered and encouraged. From this experience, Woodroffe suggests that this process can be utilized in business as well as creative ventures to provide greater efficiency and creative growth in project leadership.

The approach of designing a mash-up relies fundamentally on such skill sets. Although the mash-up is essentially a mix of both divergent and convergent disciplines melted into one pot, it can only be successful if the correct mixtures of discordant and harmonious ingredients are there to begin with. To this end, effective networking, discussion and decision-making were essential in CDPT's ability to deliver a successful four day event.

It begins, as far as Woodroffe's practice is concerned, with a theme of sorts. This theme should reflect both a concept and the goal but in the case of CDPT, it should also emphasize the potential for further projects with which to encourage opportunity and growth for CDPT and its partners. Networking for the specific requirements of the four day Mash-up event not only relied on a theme but on Woodroffe's ability to see far enough ahead in team building to see how requirements would be evolving as the project developed. It is crucial with anything as complex to co-ordinate as a mash-up that the pieces fit together perfectly to fall into place at the right time. Although the event itself was one of spontaneity, the framework to allow that mix of creativity and improvisation had to be carefully built.

> "An analogy with Jazz is certainly not inappropriate in this case, and it also helps if I think in terms of abstract expressionist painting at the same time!"

Whilst Woodroffe is in full agreement that polymathic abilities and skills should be at the centre of what CDPT represents, he has to take into consideration the blending of aesthetic standards in collaboration. Woodroffe argues that not everybody who functions with different disciplines is competent at all of them or even to an agreeable standard. As a result strict criteria for choosing participants early on had to be established and this enabled CDPT to weed out applicants whose motives for participating were of purely self interest or who lacked a degree of competence that would be a hindrance in forming synergies with other participants.

> "In other words, don't hire the trumpet player who says he can also play piano – when it's obvious at first listening that he is completely out of tune on both!"

For the mash-up to function effectively, it had to comprise of participants who were committed to working with others who may be active in fields that were to all appearances totally unrelated. Finding the participants depended on two years prior networking.

From this networking, Woodroffe had developed a database of organizations, individuals, and university departments who had all shown an interest in CDPT. From this list there began a system of meetings, discussions, and idea sharing that led to snowballing where people who had been approached began to suggest others. A great deal of the ideas of CDPT also fed into this mix.

CDPT are, for instance, heavily involved in looking at the future of the Blog and also the immersive qualities of mobile devices. Both of these fed straight into the decision to have specific people involved in the mash-up such as 02 Mobile. Sometimes it was necessary to sit back and watch the ideas grow amongst the people who had already been asked to get involved and their suggestions of possible collaborations would help shape the mash-up step by step into its next phase. These were the foundations of the "riffs" CDPT composed that would help the participants "improvise their parts".

> "We didn't want to compose a symphony; we wanted the symphony to begin composing itself once we had laid the foundation".

Throughout the networking strategy, copyright was of singular importance. The mash-up lost one artist because the copyright of what they were contemplating for the event effectively lay with a government funded arts body. All the music for the event had to be original. The band "Helsinki" played their own songs on the opening night as did "Cool Banana" who closed the event on Friday. The classical interlude was provided by a contemporary chamber-music ensemble that had composed pieces specifically for the sculptures that were on display in the room.

The final line-up of participants ranged from sculpturers, 3D animators, VJs and DJs; Fine Artists, musicians, dancers and performance artists; bloggers, ambient gamers, speakers, researchers and theorists; creative writers, live streamers, broadcasters and shaman drummers.

Remediation

The Technicalities: Hilary Cooke's Domain

As the Mash-up 360 event opened, it was interesting to hear participant Dr. David Allen discuss the merits of collage connections. How the collage art – form can be a collection of items that, when combined, make a new object. In some circumstances, the individual parts are still identifiable, retrievable from the new mass, and in other combinations, coming together and dissolving into a new substance. It is through this collage analogy that Cooke discusses how through using virtual social networks and new media tools that the CDPT Mash-up 360 event, can become an interactive ongoing creative mash-up in the reality of a virtual space.

Cooke's standpoint is that technology and access to the tools required to produce collaborative art works has raced ahead of the mainstream media corporations – bringing the world of social virtual networks to everybody who has access to a computer device, or web linked phone/PDA. The collaboration of people who are creating content on free-to-use social networking sites like YouTube, MySpace and Nings, for example, are developing platforms for a new-wave of ground breaking artists, musicians, photographers, film makers, directors, writers, who have and are producing a new media market for the interactive on-demand generation.

As corporations develop programs to merge with this content, to monetise these networks through advertising, Cooke proposes that we will see the creative entrepreneur develop their work though the

new social virtual networks. There will be no need for them to use Broadcast TV, Publishing Houses, Mega Music Corporations, News Media Conglomerates, to get their work out to the wider world population and make money along the way.

The mash-up event helps bring together the new and the old practices, to produce a collage of creative ideas which can be presented to the on-demand generation in the interactive virtual social network. Cooke also argues that this is helping expand the technological horizon, combine knowledge, and to produce new creative ideas.

For example using some of the following free tools, Local Local Media (LLM) created a virtual TV Channel, (Local local TV – LlTV www.lltv.co.uk) and a free to use Social Network (www.locallocaltv.co.uk) to help promote the idea that short TV films can be produced using tools available to most people. Mobile phones and digital cameras can take snippets of video. Video cameras made for the home movie market can produce good quality images for streaming over the Internet. Video editing programs, free (open source) or relatively cheap downloads, can be run on most modern lap/desk top computers, bringing the production of films to many who would not normally have access to these tools. In creating this free-to-access social network, Cooke brings together tools for CDPT to develop creative ideas. Using available equipment, LlTV and the network collective have produced sample programs: A political interview with a local government minister; Sporting events following the Tour de France through Kent and other community based videos including advertising docuverts, music and art videos.

As part of the research for the CDPT Mash-up, Cooke has been looking at how the marketplace is developing free media tools. One of the tools that is available is Mogulus, (http://www.mogulus.com/locallivetv) a Virtual TV Studio.

> "As part of the Mash-up 360 event we used Mogulus, to show how live TV can be broadcast to the world and recorded for future on demand playback, for the cost of an internet connection. We embedded the Mogulus Player linking to our channel on various web pages with the LlTV web site and network and also on other web sites in-

> cluding the CDPT Mash-up site (www.cdpt.info <http://www.cdpt.info/>)".

The embedded player for the Mogulus stream also provides a useful chat room facility, where viewers can communicate live with each other and the studio. This can be used as an interactive device. One could use the studio to broadcast a forum with live questions from the audience. This was used by viewers during the Mash-up 360 event to comment on the pictures they were seeing streamed live online. Cooke also discusses ideas of quality:

> "By using the virtual studio we were not trying to produce broadcast quality pictures of the type you would find on a National TV Channel, but pictures of a quality suitable for streaming live internet TV (IPTV)."

The Mogulus Virtual TV Studio brings all that the producer would need to deliver live TV. Mogulus contains an on demand library of video clips that you can produce and manage. There is also a scheduler for managing content play lists. Live cameras linked to the Internet can send a video signal to the virtual studio. The video can be formatted to Flash FLV format before being streamed to the studio to help improve picture quality. The cameras show up on the studio consol and can be selected to broadcast live or record the video stream.

Even a mobile phone with video capabilities can be used to connect to the virtual studio, using a free application provided by QIK (http://qik.com/localtv). QIK is a mobile video base social network site which can be linked to the Mogulus TV Studio enabling mobile video phone cameras to expand the live feeds to the studio.

Users of Mogulus have for example created citizen journalism channels for live and recorded news of events such as the recent USA Presidential Election: see http://www.mogulus.com/theuptake.

As well as the use of video content, users of social networks and blog sites also have a need to distribute the written word and photographs to their readers. Organisations including, national news media

and television, have used really simple syndicated RSS news feeds to disseminate articles to users who subscribe to them both on the Internet and across mobile phone networks. With the ability to add RSS feeds to blogs and social network sites, users of the virtual social networks can subscribe to each other's feeds and so keep in touch with the latest update.

Developments in mobile phone technology, have produced Internet phones with full Internet browser access and more user friendly interfaces. This has enabled the mobile phone user access to more web sites, promoting the development of mobile versions of web sites, eg. http://localtv.ning.com/m, the mobile version of the Local local TV Network. It has also brought in enterprising web sites providing free mobile feeds for favourite web pages.

One of these providers is www.mippin.com. All that is needed is the URL address for the required page – but the web page needs to include an RSS feed. Once the URL is entered into the mippin site it creates a link that can be used by a mobile phone to link to the web page RSS feed.

These are examples of free tools, of which there are many, that show the way, for the creative entrepreneur, to develop their art in what Cooke describes as "the reality that is virtual space". Cooke argues that through a virtual creative mash-up of ideas that new combinations will form new products of cultural consumption.

Bricolage

Outcomes of the Mash-up 360: Barber's Conclusion

> "For the hours (days?) while electricity still flowed, the web-hosted echoes of the Mash Up continued to play. Pictures, videos, music and words. When the power failed the record of events remained

> coded on the hard disks, the servers; all but inaccessible. Even hypothetical ghosts would have needed some kind of ectoplasmic technology to access these.
>
> So in the seconds before the end of the Mash Up people were engaging with each other both in the flesh and electronically, sharing an experience. However, not everyone involved in the Mash-Up shared in these final seconds. Rewind three days and press play, capture those three days in amber. A spaghetti of lifelines draped through the SPACE gallery, watched by the cameras, piping events to a worldwide, participatory audience." (Mark Eyles. 2009 Mash-up Participant).

The above quotation was written by one of the participants who contributed to the event with his ambient game quest project. He felt inspired to write a short creative piece about replaying the mash-up once the world had been destroyed by ecological disaster. The combination of such a variety of participants moved many to look at their creativity across the faculty and university, and to review what it means to be involved in a collaborative effort.

> "Behaviours and expectations in digital environments are not brand new phenomena that jumped into being the moment the first computer went online. Nor are the principle components of a digital culture particular to the production and consumption of either commercial, creative commons or open-source news and information." (Deuze 2006, 64).

Deuze suggests above that the challenges to cultural capital creation and creativity through digital environments are not new – but it is argued here that through the creative Mash-up 360 event at Portsmouth there was the ability to bring some disparate elements together in a bricolage that could transform the outcome of the event. Perhaps it was not through a "cultural product" or cross disciplinarity as such – but as *a creative cultural exchange* process. It is the process that participation affords that is the transformative outcome. This has been slightly touched on by Jenkins:

> "The power of participation comes not from destroying commercial culture but from writing over it, modding it, amending it, expanding it, adding greater diversity of perspective, and then recirculating it, feeding it back to the mainstream media." (Jenkins 2006, 257).

However euphoric participants of the mash-up were during and after the event, there must not be any complacency when it comes to expanding on notions of the creative cultural exchange process and online cultural flows. Katz suggests that "incompatibilities between certain Creative Commons licenses may limit the future production and distribution of creative works in ways that creators may not intend." (2006, 391). It remains yet to be discussed as to notions of "ownership" by the various contributors. Much of the event was also recorded and streamed live on the new Creative and Cultural Industries Faculty in-house live broadcast television channel as well as online. This was when the CDPT Mash-up became aware of its vast "invisible audience" of those who were watching online. The event was streamed continuously – even during the event set-up and between live performances – giving a "Reality TV" flavour to the event which needs to be further explored by CDPT.

CDPT has looked at the processes of creativity during the Mash-up and not necessarily the ownership, if any, of its content. But on reflection and in preparation for the Uppsala discussion, the thoughts of Katz and Deuze warrant further exploration, as their arguments may relate directly to those of us who wish to push the boundaries of immaterial labour and creative process further.

> "These creators want to promote a creative commons by sharing their work with anyone interested in experiencing it, while also exerting some control over their work. At a minimum, they want recognition, but may also want to require future creators to propagate the licensing scheme they have chosen. The desire to promote open access, realized through aggressive copyleft licenses, may ultimately lead to the closing off of creative works to uses that may be perceived as beneficial by the initial licensors." (Katz 2006, 410).

> "Further research could focus on how professionals and amateurs collaborate, how their roles converge, and what the results of these practices are in the emerging new media ecology, on the level of economy (new and improved returns on investment), technology (development of new hardware and software enabling open media), politics and legislation (creative commons copyright laws, audience encoding rights and open source) and global culture." (Deuze 2007, 259).

Finally, CDPT and future creative mash-up events will hope to take on board the bricolage of differing elements of ownership and collaborative cooperation through what has been described as "the *flows of ownership between spheres* that we sometimes define as private, sometimes public." (Hemmungs Wirtén 2006, 290). Therefore, it is hoped that further awareness, discussion and appreciation of the creative cultural exchange process will be encouraged between those who legislate and those who participate, collaborate and innovate.

References

Deuze, M. 2006 “Participation, Remediation, Bricolage: Considering Principal Components of a Digital Culture.” *The Information Society* 22(2): 63–75.

---. 2007 “Convergence Culture in the Creative Industries.” *International Journal of Cultural Studies* Vol. 10(2): 243–263.

Gasser, U., and S. Ernst. 2006 “From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age.” *The Berkman Center for Internet and Society Research Publication Series*: http://cyber.law.havard.edu/publications

Hardt, M., and A. Negri. 2000. *Empire*. Cambridge. Harvard University Press.

Hemmungs Wirtén, E. 2006 “Out of Sight and Out of Mind.” *Cultural Studies* Vol. 20, Nos 2-3 March/May: 282–291.

Jenkins, H. 2006. *Convergence Culture: Where Old and New Media Collide*. New York University Press. London and New York.

Katz, Z. 2006 “Pitfalls of Open Licensing: an Analysis of Creative Commons Licensing.” *IDEA* Vol. 46: 391–413.

Floyd, I.R., M.C. Jones, D. Rathi, and M.B. Twidale. 2007 “Web Mash-ups and Patchwork Prototyping: User-driven technological innovation with Web 2.0 and Open Source Software.“*Proceedings of the 40th Hawaii International Conference on System Sciences.*

Lamb, B. 2007 “Dr. Mashup or, Why Educators Should Learn to Stop Worrying and Love the Remix.” *Educause Review* July/August: 13–24.

Lazzarato, M. 1996 “Immaterial Labour” (Sourced online), http://www.generation-online.org/c/fcimmateriallabour3.htm

Lister et al. 2003. *New Media: A Critical Introduction*. Routledge. London and New York.

McConnell, B. 2006. *Citizen Marketers: When People Are the Message*. Chicago, IL: Dearborn Trade, A Kaplan Professional Company.

McLuhan, M. and F. Quentin. 1967. *The Medium Is the Massage*. New York: Touchstone.

Merrin, W. http://mediastudies2point0.blogspot.com/

Spivak, N. 2006. *The Third-Generation Web is Coming*. http://www.kurzweilai.net/meme/frame.html?main=/articles/art0689.html (sourced 14/11/07).
Suhr, H.C. 2009 "Underpinning the Paradoxes in the Artistic Fields of MySpace: the Problematization of Values and Popularity in Vonvergence Culture." *New Media and Society*. Vol 11 (1&2): 179–198. Sage.
Turner, F. 2009 "Burning Man at Google: a Cultural Infrastructure for New Media Production." *New Media and Society* Vol 11 (1&2): 73–94. Sage.
Weber, S. 2004. *The Success of Open Source*. Cambridge, MA: Harvard University Press.

Virtual Tools Used at the Mash-up:

Mippin: www.mippin.com

"Mippin is the fastest and easiest way to get your favorite web content on your mobile phone. Whether you want to follow breaking news or tech updates, from big publishers or tiny blogs, Mippin brings them all seamlessly together in the perfect format for your phone. You can quickly search and browse, see what others are reading and share your own discoveries. And Mippin is smart: it remembers exactly what you like and delivers automatic one-click updates. Just type mippin.com into your mobile browser and see just how quick and easy the web becomes."

Mogulus: www.mogulus.com/locallivetv

"The Mogulus studio transforms all of this expensive 20th century hardware into one simple, easy to use application. We're making the beauty, passion and creativity involved in television production accessible to everyone. Million dollar equipment setups and 'brick and mortar' studios are a thing of the past.

Mogulus has introduced several new groundbreaking innovations, in addition to paying homage to traditional TV.

Before Mogulus, the production control room was one fixed location, and all collaborators in the process had to be in the same building. Remote

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QIK: http://qik.com/localtv

Softare to enable mobile phones to upload video footage to social networking sites

CDPT: http://www.cdpt.info

Creative Digital Practice and Theory Research web page.

LLTV: http://www.lltv.co.uk

Local local television.

From Copyright to Copyleft and from Copyleft to Copywrong or "If Hitler Had Been a Hippy How Happy Would We Be?"

Evaluating the Practice of the Artistic "Appropriation" and Its Legal Impact

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Abstract

Contemporary art fascinates, disturbs and irritates. Many artistic projects have recently attracted attention in the world of contemporary art by refusing the binary dichotomy between original and copy, as defended by literary and artistic property law. This autonomy is intensified by the emergence of practices which are in downright opposition to the state law. This presentation will focus on the impact of this artistic appropriation to the copyright system. It will discuss if the existing copyright principles need to be re-visited. An application of these artistic concepts to a series of copyright infringement cases that have occupied the French Courts will be examined. The first part will make an in-depth analysis of the classic criteria of copyright as they exist for protecting works of art in civil law countries like France (Part 1). If the traditional copyright as a regulatory system will be proved inadequate and anachronistic, the research of alternative criteria for legal protection is envisaged (Part 2).

Contemporary art fascinates, disturbs and irritates. Many artistic projects have recently attracted attention in the world of contemporary art by refusing the binary dichotomy between original and copy, as defended by literary and artistic property law. This autonomy is stressed by the emergence of practices which are in downright opposition to the state law. Let us take, for instance, two of these controversial activist trends that provoked a real scandal. First of all, the Chapman artistic project in Great Britain; we know that Adolf Hitler painted eleven aquarelles in order to participate – unsuccessfully though – in the Fines Arts' competition of Vienna. Ninety years later, Jake and Dinos Chapman bought the originals and repainted them by adding new colorful rainbows. After a first exhibition in May 2007 entitled "If Hitler Had Been a Hippy How Happy Would We Be", the two British artists provoked some strong reactions. Some people regretted the loss of a precious original series of eleven works of art for historical reasons. Others criticized the bad taste of Chapman's work.

If the Chapman brothers' "appropriation" is a part of an artistic practice, a new generation of artists, such as the Danish Superflex, secondly, goes one step further. By renouncing the norm of authenticity in the arts, Superflex invented a new category: the "new original". In fact, the Danish artistic group takes the open-source concept,

commonly applied to software development,[4] and re-applies it to physical objects. In 2005, in collaboration with a student group from the IT University of Copenhagen, Superfex produced the world's first "open-source" beer: now anyone is free to brew "free beer", to sell it and make derivative versions of the recipe (Teilmann 2007). By exercising their artistic freedom to imitate, Superflex "investigates and re-evaluates the concept of the copy".[5]

But, what about the legal impact of this artistic appropriation? Has anybody the right to alter the original of a work of art or a copy thereof in order to "make art"? Even if something happens to be a unique object "touched" by an artist's hand, does it not still remain a copy if it is not original? While these copies may be considered as works, are they not still infringing imitations in the absence of the copied artist's agreement? Questioned about this matter, as far as the Chapman's project is concerned, the philosopher Yves Michaud stressed that neither the professional status of Hitler nor the recognition coming from the art world would name Hitler's aquarelle a work of art. But still, the object's classification as a work does not depend on the national courts but on the museums and critics. In fact, after being manipulated by Chapman's hands, the aquarelles became a sort of "helped ready-made" and they were sold for 850.000€, that is four times the price they initially had been bought for by the Chapman brothers.[6]

"The imitative faculty is precisely what makes us human" said Aristotle by using the word "mimesis" to describe this phenomenon (Aristotle 1972, 51–90). It is a common fact that we are all born copies. Like Hillel Schwartz observed in *The Culture of the Copy*, "On the one hand copying makes us what we are. […] To copy cell for cell, word for word, image for image is to make the known world our own. On the other hand, we are not identical, nor do we wish to think of ourselves as clones. Copying is ultimately imperfect, our errors eventually our heirs". (Schwartz 1998, 212 onwards).

4 The open source movement has drawn attention in recent years in the software market. Having been utilised by the likes of Google, Mozilla, Firefox browsers, Wikipedia as well as a range of academic organisations, scientific groups and artists, it has posed a significant challenge to traditional software companies in certain areas. See Mann (2006).

5 This is the main objective of the Superflex's work. For more projects see: www.superflex.net

6 *Beaux Arts Magazine* (December 1, 2008).

Art can also be defined as a "mimesis" of appearances, as an imitation of everyday life. Imitation plays a significant role in guiding art from the beginning of our civilization until now. This can certainly be observed in the world of contemporary art, where objects are transformed into works, works into copies and copies back into works.

"Every work of art is the child of his time and often the mother of our feelings. Thus, art is born by each cultural era and could not be repeated", Kandinsky explains with wisdom. (Kandinsky 1989, 51). It is undeniable that art is changing, it is a complicated movement forward and upward, which, whatever form it takes, keeps the same deep sense and the same purpose. However, law moves in a different sphere because of its different purpose: it intends to regulate the human activity with rationality. Nevertheless, law does not ignore art. On the contrary, art has been apprehended by the special regime of copyright.

But the question that inevitably merges is: what kind of protection for what type of art? Finally, is the difference between an original work of art and a copy fictive? What kind of legal intervention can we imagine towards an artistic creation that remains hostile to any attempt of definition?

Works of art take the risk of not being able to be beneficed by copyright protection. For instance, the French Copyright Act does not reserve a special status exclusively for the work of art. The latter can be a work of the mind ("*oeuvre de l' esprit*") or a national treasure. In this context, the work of art cannot be protected under copyright law unless it receives the qualification of "work of the mind", governed by the principle of aesthetical neutrality. Yet, the qualification of the work of the mind is tricky. An artist can only, in fact, claim his intellectual rights for a work whose form is perceptible to the senses and original. These criteria will always be appreciated by judges in a subjective way. Thus, their application will always be uncertain. "It would be fun to submit to the traditional criterion of originality [...] the urinal Duchamp or the white square of Malevich. It is highly likely they would not pass the exam successfully", emphasizes Professor Vivant (Vivant 1994, 76).

This presentation will focus on the impact of this artistic appropriation to the copyright system. It will discuss if the existing copyright principles are needed to be re-visited. An application of these artistic concepts to a series of copyright infringement cases that have occupied French Courts will be attempted. The first part will make an in-depth analysis of the classic criteria of copyright as they exist for protecting works of art in civil law countries like France (Part 1). The emphases will lie on the fact that the new world of contemporary art cannot easily be apprehended by traditional copyright. Thus, if the traditional copyright as a regulatory system will be proved inadequate and anachronistic, the research of alternative criteria for legal protection is envisaged. This will be the subject of our second part of this presentation (Part 2).

1. The Individualistic Approach of the Civil Law Countries' System of "*droit d'auteur*" Challenged by the Modern Artistic Practices: from Copyright to Copywrong

When Marcel Duchamp created his work of art *L.H.O.O.Q.*, he could never have imagined that the photograph of Da Vinci's *La Joconde* was imbued with copyrights or that Da Vinci's heritors could claim any legal rights as copyright owners to his work of art. In his turn, when he created his ready-made *The Fountain*, he could never have imagined that a controversial artist, Pinoncely, could enter into George Pompidou's museum, smash the object of the urinal in order to create his own artistic performance.

The specificities of contemporary art challenge the legal conditions that French Copyright law imposes for protecting works. The work of art must be embodied in a form perceptible to the senses, excluding any idea or concept. Additionally, to be eligible for copyright protection, a work must be original.

a) The Futility of the Idea/Expression Dichotomy and the Contemporary Artistic Creation

According to L.112-1 of French Copyright Law: "The provisions of this Code shall protect the rights of authors in all works, whatever their kind, form of expression, merit or purpose may be". The work can give rise to copyright only when it leaves the world of speculation to enter into the sensitive world of form. The terminology chosen by the French law is very close to that chosen at the international level. According to Article 2 paragraph 1 of the Berne Convention of 9 September 1886 "the term 'literary and artistic works' shall include every production in the literary, scientific and artistic, whatever the mode or form of expression, such as books, pamphlets and other writings ....".[7]

What is the purpose of this legal provision concerning the exclusion of ideas, set out with such thoroughness? Firstly, there is a cultural purpose; ideas should remain free forever in order to encourage creativity. The District Court of Paris considered in 1998 that "the cubist genre stemming form Picasso's creative intention cannot be the subject of a monopoly. It is rather a style or school belonging to the common fund of creation and human knowledge".[8]

This recycling, this free exchange of ideas is the noblest principle in the history of culture. Thus, the realistic painting of Courbet could have been born in the mid-nineteenth century as a reaction against romanticism, the movement of artistic symbolism in the late nineteenth century could have been inspired by the impressionism of Monet and Degas, the movement of surrealism of Miro and Dalí could have followed the dadaism etc. All these artistic endeavours cannot be monopolized, ownership of ideas would prevent any cultural evolution of mankind.

Yet, this principle of free exchange of ideas causes numerous legal questions about its precise application. Given the artistic reality,

7 The exclusion of ideas from the scope of protection becomes especially clear in the provisions of the TRIPS Agreements Article 9.2 of 15 April 1994 and of 20 December 1996 (articles 9.2 and 2 respectively): "the copyright protection is extended to expressions and not ideas, procedures, methods of operation or mathematical concepts as such ....".

8 Paris District Court, réf., 3 June 1998, 1998, Gaz Pal, somm. 689–690.

the idea/form dichotomy is frequently considered as completely artificial and unjust; artificial because ideas expressed by an author do not always warrant copyright protection. And unfair because, given that artistic genres are not static, the censure of a great part of avant-garde art will be unavoidable.[9]

The judge, in order to exclude the idea of the scope of copyright protection, inevitably takes into account the artist's reputation. Witness of that is the famous case of the painting *Stri Pauk* by Vassarely and Valluet.[10] Valluet had executed the painting with his hands while Vassarely had communicated the idea, reserving the right to correct and approve the execution. The District Court of Paris qualified the painting as a joint-work and Vassarely as a co-author, even though he had not materially executed the painting. The reputation of Vassarely as an artist justified his qualification as a co-author. The resemblance with the famous *Brancusi vs. United States* case is quite obvious. (Rowel 1928/1995). At issue here was whether a sculpture by Brancusi, *Bird in Space*, was entitled to the exemption from customs duty reserved for works of art, denied as it had been by the US government. In this case, only Brancusi's reputation as a sculptor, justified his "Bird" being classified as a work of art. A few years earlier, it is highly likely that he would have had to pay the important tax for the same work.

Or, when deciding if an idea is banal or not, the judge necessarily examines the aesthetic value of the work, something that the law strictly forbids. On the question, if the creative process of wrapping the "Pont-Neuf" bridge by Christo and Jeanne Claude could be considered as a work of art, the Court of Appeal of Paris said that "the idea of highlighting the pureness of the lines of a bridge and its lampposts by means of a cloth and ropes constitutes an original work that merits legal protection".[11] Professor Treppoz observed, "for the Court of Appeal of Paris, the creative process is not limited purely to

9 See Masiyakurima (2007, 548–572): "The central question is whether ideas expressed by an author warrant copyright protection. Given that artistic genres are not static and judges are ill equipped to determine aesthetic merit, great care must be taken if requiring a work to be recorded in a material form is to be prevented from becoming a tool for censoring avant-garde art."

10 Paris District Court, 21 January 1983, réf., 1984, D. somm. 286.

11 Paris Court of Appeal, 13 March 1986, réf., 1987, D. somm. 150.

the wrapping phase but extends, beforehand, to the choice of the object to be wrapped. The creation is not limited to the composition; it extends to the idea which thus obtains protection. While a banal idea – wrapping objects – is not protected, an original idea – wrapping the Pont-Neuf – may be" (Treppoz 2006, 51–126).

All these cases demonstrate the difficulty in delineating the boundary between idea and form. Even if courts apply the idea/expression dichotomy purposively, the task of separating ideas from expressions of ideas is likely to be a futile exercise and illustrates the insufficiency of this legal criterion regarding conceptual art.

b) The Inadequate Criterion of the Artist's Personality Stamp in the Work

Under the French Copyright Act, the initial owner of intellectual rights is, in principle, the physical person who creates the work, whose personality is printed clearly on it. A work is original because of the degree of the stamp of the author's personality in it. This is the subjective conception of originality. In the case of the objective conception, originality presupposes the existence of choice in the creative process. Whatever the conception adopted, this requirement is arguably incompatible with the protection of contemporary art. The anthropocentric conception of the French copyright system that wants to attach the work to its creator does not suffice as it does not clarify what exactly we mean when we talk about "creation". Is it the personal execution that will confer the attribution of authorship, or is it rather the consideration of a more intellectual achievement of the artistic work that will justify the copyright protection?

Many scholars supported the requirement of a personal execution by the artist. In their view, the criterion of personal execution presupposes the originality of a work (Lucas and Lucas 2006, 51). Yet, it seems to be inadequate in view of contemporary artistic practices.

The most famous example is that of *Renoir v. Guino* case.[12] Renoir, a famous sculptor, who was suffering from total paralysis, employed an assistant-executor, Guino. The Supreme Court of France adopted a conception of a creation that it is more intellectual than material. The French judges stated that Guino was indeed qualified as a co-author, by not letting any doubt about the attribution of co-authorship to Renoir, even if he did not materially execute the work. This intellectual conception was established in connection with a Renoir sculpture executed by his student Guino.

Even if an intellectual conception of the creation could be adopted, the creation in itself implies that the author is aware of its achievement. In other words, the consciousness of the result is required for a work to be considered original and thus protected by copyright law. Some legal scholars think that the work must be the result of a conscious expression controlled and directed by his author. Otherwise, the work is not eligible for copyright protection (Caron 2006, 52).

However, attention should be drawn to two aspects. Firstly, back in the early twentieth century, we see in art history, a depersonalization of the work. With his ready-mades, Duchamp demonstrates that the heart of creation has been transferred from the materiality of the object produced by the artist to the immateriality of the gesture by which he creates an artwork. At the end of the 1960's, the minimalist artists avoided marking their works in a physical way. In the United States a new artistic movement was emerging: the pop-art movement, with Andy Warhol, who spent the opening practice of the art on the contemporary world through images and media clichés. The creation is not limited to the composition; it extends to the idea which thus obtains protection.

Secondly, it is up to the artist to accept this creative chance. By exercising his moral right of divulgation, the artist recognises the work as being worthy of him, whether or not it is the fruit of full consciousness. This is the justification for accepting Pollock's drippings to be protected by copyright. This was the basic argument of the Court of appeal of Paris in the *Spoerri* case, not accepted though by

12 Supreme Court, 13 November 1973, réf. 1974, D. Jur. 533.

the Supreme Court.[13] In fact, the Cour de Cassation stated that the buyer of a painting-trap (tableau-piège) signed by Spoerri, an avant-gardist, was entitled to have the sale annulled because the work had not been executed by the artist but by an eleven-year-old child.[14]

The rejection of the criterion of intellectual conception is obvious. However, a simple question needs to be answered: Why was the consent of the buyer misled? Are not the signature of the artist accompanied by his choice, his imagination and his artistic vision of things, the elements for qualifying execution? The Spoerri's manifest, on the back of the painting, is revealing: "I try to paste situations prepared by chance... if it is an individual creation or not, I don't care ....".

2. The Desired Adaptation of Law Regarding the Evolution of Contemporary Art: from Copyright to Copyleft

The expansion of the concepts of form and originality would allow a significant number of works of art access to the copyright protection with respect to the anthropocentric philosophy of this special legal regime.

a) The Need for an Extensive Approach of Form as It Is Protected by the *'droit d'auteur*' System

It is undeniable that art is moving faster than its legal framework. The frontiers are not easily drawn between the non-protectable ideas and work that embodies protection. With conceptual art, the dematerialization of the art is real. A precursor to this approach, Marcel

13 Paris Court of Appeals, 18 October 1999, 2002, Propr. Intell. N° 3, 2.

14 Supreme Court, 5 February 2002, réf., 2003, D. Chron. 436.

Duchamp in 1915 observed that "the choice of ready-made is always based on visual indifference and, at the same time, on the total absence of good or bad taste. Now ahead, an artist is no longer just a person who produces a work; he is, above all, a creator who makes choices and these choices make him an artist."

The *Black Square* presented in 1915 by Kazimir Malevich, the *Blue Monochrome* by Yves Klein, the readymades by Marcel Duchamp, all these works of art cannot be reduced into an idea, though they do illustrate the difficulty in distinguishing the idea from the form. Since the 1960's, the term "sculpture" seems to have lost its usual sense, as it is appropriated by artistic personalities who use materials far more alternative and eccentric than the traditional ones, metal and marble. For instance, the common trait of the "arte povera" representatives – who by the way call themselves sculptors – is the use of natural, common everyday life materials: mashed carrots for Michel Blazy, bags of coffee and beans for Giannis Kounellis… The main concept is that: instead of representing an object, why not directly use it?

Under theses circumstances, a more extensive view of the form, that will include all the critical phases of creation, from the beginning of the creative process to its result, should be taken into consideration. The form must be understood in a broad sense, encompassing all languages perceptible to the senses. The work must be understood lato sensu, embracing the space, the time and interacting with its public.

The French judges seem to apprehend this need for more extensive interpretation of the notion of form. In November 2008, the Supreme Court in *Jacob Gautel v. Bettina Rheims* stated that the combination of aesthetic choices reflect the personality of the author. The Cour de Cassation acknowledged that the conceptual approach of the artist, to put the word "Paradise" in gold, in a particular place by diverting his common sense, had been materially expressed in an original form, and, thus, enjoys copyright protection.[15] In fact, the work of Jakob Gautel was based on the registration of the word "paradise" over the bathroom door of the former dormitory of the

15 Supreme Court, 13 November 2008, 2009, D. 266.

hospital for alcoholics, Ville-Evrard. The photographer Bettina Rheims copied Jacob Gautel's *Paradise* when creating her *New Eve*. Thus, Jacob Gautel accused Bettina Rheims of having infringed upon his copyright. The defendants, the famous photographer and her gallery owner, argued that the work *Paradise* could not be a proper subject of copyright, as it is only reduced to an idea, and ideas are not protected by Copyright Law. This argument was unsuccessful. The Court noted that the idea to include the word "Paradise" on a sordid toilet door can be protected by copyright law provided it is original. The protection covers the materialization of the idea of associating several elements, where their combination establishes some modicum of creativity and ingenuity. The solution is similar to the one in the *Christo* case. While a banal idea is not protected, an original one will be. "Art as idea as idea" stated Joseph Kosuth and he was right.

b) The Need for Creative Activity Instead of Originality

Duchamp used to say: "When you choose something from an earlier period and you adapt it to your own work, this can be creative. The result is not new: it is new insofar as it derives from an original." Some legal scholars seem inclined to draw the conclusion that Duchamp's work is a mystification and thus cannot be protected by copyright law. However, the merit should not be taken into consideration.[16] All that matters is the presence of the artist's personality, his creative activity. The choices made in collecting and combining the elements of a work in a distinctive manner can point to whether the originality requirement for copyright protection has been met.

The adequacy of the criterion of creative activity, rather than originality is obvious, given the artistic specificities described above. Creative activity, revealing the print of the personality of an author, captures the work by its preconception to its execution, excluding the obsolete criteria of the idea/form dichotomy and of the original/copy

16 Tarascon District Court, 20 November 1998, 2000, D. Chron. 98.

opposition. By considering the work of the mind as the manifestation of the author's creative activity we adopt a criterion able to reassure a more realistic protection.

Some recent legal decisions seem to maintain this broader approach of originality. In November 2007, the District of Avignon addressed the issue of whether an artistic performance can cause damage to a conceptual work of art. The facts are simple.[17] Cy Twombly, a conceptual artist, has created *Phaedra*, a triptych consisting of a white monochrome painting, a red canvas and a written text. As the work is consecrated to Plato, the white monochrome evokes the Platonic love whereas the red canvas the physical love. On July 19 2007, Rindy Sam, a young Cambodian performer, thirty years old, dressed in red, entered the exposition room, approached the triptych, dancing, and in an ecstasy mood she kissed the painting. After this gesture, she sighed, "It's wonderful to embrace a work if you like" and she added, "Cy Twombly has left this white for me to come and live in it. My kiss has made this painting even more beautiful."

Contemporary artistic practice establishes a close intimacy with the viewer. The concept of "open work", imagined by Umberto Ecco, finds its concrete expression in the conceptual "art attitudes" and in performances. This openness, this kind of interactivity between art and the public, traditionally rejected by the legal system of copyright, fortunately does not leave the judge indifferent.

The District of Avignon noted that "The court must put aside any aesthetic consideration that is excluded from the legal interpretation. The judge cannot appreciate if a white monochrome painting is or not mutilated, deformed, or in a certain way, degraded by the gesture of a kiss. Some may consider that, on the contrary, a kiss enriches the aesthetics of the painting. We cannot, therefore, take into consideration this argument in order to characterize the degradation of the painting". And they concluded that: "to be entirely white, the canvas-object expresses a harmony and a balance intended by the painter. The addition of a trace of seduction kiss, distorts the artist's approach, who considered his work completed and did not want any

17 Avignon District Court, 16 November 2007, 2008 D. 588.

further modification on it. Whether or not worked by the painter, the object of the painting was intentionally chosen by the artist and constitutes its intrinsic artistic value".

It is the whole process of the artist's creative activity that leads the French judges to protect Cy Twombly's *Phaedra*, like it was the case with Jacob Gautel's *Paradise*, like it should have been the case with Duchamp's *Fountain*.[18]

As a Conclusion

There has been some reluctance from the side of French judges to protect, through copyright legislation, works that could be characterized as simple manufactured objects, or simple combinations of ordinary elements. This may reflect a concern about whether it is useful to create additional monopolies that would curtail other creative works. This ideological concern gives birth to an alternative practice, the commons paradigm.[19]

The commons paradigm can be summarized as a practice that rather uses the copyright system in a somewhat subversive way, in order to facilitate the dissemination of information and unauthorized access to creativity. "Far from ignoring copyright law, this license recognizes author's rights and protects them. It reverses the principle by allowing the public to make creative use of works of art. The intention is to open access and to allow the use of a work's resources by respecting the artist's moral rights" states the Free Art license in its preamble.[20] In this context, a copyleft license uses copyright to ensure that any person who receives a copy or a derivative of a work can use, modify and pay not only the work but all versions derived from the work.

18 Tarascon District Court, 20 November 1998, 2000, D. Chron. 98: "Duchamp's approach is, especially after 1915, to create works of art by the sheer force of spirit, without physical act creator, simply by declaring 'art' of simple objects of everyday life".

19 See *Understanding Knowledge as a Commons* (2007).

20 See "Licence Art Libre" (2007) http://www.artlibre.org/licence.php/lal.html

Despite the great success of these kinds of licensing model agreements, many questions could arise as far as their compatibility with the moral rights goes.[21] First of all, Free Art or Creative Commons Initiatives seem to come in a direct conflict with the right of disclosure to the public. Despite the broad scope of the release of open content works by these open source licenses, the modifier still runs the risk of a prohibition by the author, based on his moral right. National laws such as, the French, German, Italian or Spanish copyright laws explicitly forbid the assignment of the moral right. The reason for this conclusion is that the protection of the integrity of a work is part of the hard core of the moral rights and, thus, it is intangible.

Freedom, the commons paradigm, conceptual art, artistic appropriation.... The debate is very interesting. It invites us to re-think the rules of a modern copyright law. Given the rapid technological development, it would be recommendable if we could draw some conclusions with prudence. Harmonization takes time especially in view of the fact that a growing number of participants must participate in a dialogue in the digital environment with respect for the philosophy and the general principles of each existing copyright system (Dreier 1993).

The law is flexible, highly flexible. If copyright law tends to protect the noblest of creations, it should also stimulate art. Faced with this objective, an open vision of artistic activity is welcome.

> "When, after proceeding to a mature reflection, you impose the most reasonable limits to art, you will fairly accuse of mediocrats for not submitting themselves to them; nevertheless, you are going to be surprised by observing that geniuses break them almost with impunity." Rodin

21 The main attributes of moral right as they traditionally appeared in most national legislations of the European Union are the right of disclosure to the public, the attribution right, the right against any distortion, mutilation or other modification of or other derogatory action in relation to the work and the right of withdrawal for changed convictions.

References

Aristotle. 1972. “Poetics”. In D.A. Russell, and M. Winterbottom, eds., *Classical Literary Criticism*. Oxford University Press: 51–90.

Avignon District Court, 16 November 2007, 2008 D. 588.

Beaux Arts Magazine (December 1, 2008). Levallois: Publications Nuit et Jour.

Caron, C. 2006. *Droit d' auteur et droits voisins*. Paris: Litec.

Dreier, T. 1993 “Copyright Digitized: Philosophical Impacts and Practical Implications for Information Exchange in Digital Networks.”*WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights* March 31 to April 2. WIPO International Bureau, General Information and Provisional Program, Doc. SDT/Inf.1, para. 4.

Kandinsky, V. 1989. *Du Spirituel dans l’art, et dans la peinture en particulier*, ed. Denoël.

“Licence Art Libre” 2007. *Copyleft Attitude*, http://www.artlibre.org/licence.php/lal.html

Lucas, A., and H.J. Lucas. 2006. *Traité de propriété littéraire et artistique*. Paris: Litec.

Mann, R.J. 2006 “Commercializing Open Source Software: Do Property Right Still Matter?” *Harvard Journal of Law &Technology* 20 (1).

Masiyakurima, P. 2007 “The Futility of the Idea/Expression Dichotomy in UK Copyright Law.” *International Review of Intellectual and Competition Law* 38(5): 548–572.

Paris Court of Appeal, 13 March 1986, *réf.,* 1987, D. somm. 150.

Paris Court of Appeals, 18 October 1999, 2002, *Propr. Intell.* N° 3, 2.

Paris District Court, 21 January 1983, *réf*., 1984, D. somm. 286.

Paris District Court, *réf*., 3 June 1998, 1998, Gaz Pal, somm. 689–690.

Rowel, M. (Trad. J. De Pass) 1928 [1995]. *Brancusi contre Etats-Unis, un procès historique*. Paris: Adam Biro.

Schwartz, H. 1998. *The Culture of the Copy. Striking Likeness, Unreasonable Fascimiles*. New York: Zone Books.

Superflex, www.superflex.net

Supreme Court, 13 November 1973, *réf*. 1974, D. Jur. 533.

Supreme Court, 13 November 2008, 2009, D. 266.

Supreme Court, 5 February 2002, *réf*., 2003, D. Chron. 436.
Tarascon District Court, 20 November 1998, 2000, D. Chron. 98
Teilmann, S. 2007 "Copy: From Wrong to Right." In F. Macmillan, ed., *New Directions in Copyright Law* 6. Edward Elgar Publishing Inc.
Treppoz, E. 2006 "What Legal Protection(s) for Contemporary Art?" *RIDA* 209, July: 51–126.
TRIPS Agreements Article 9.2 of 15 April 1994 and of 20 December 1996.
Understanding Knowledge as a Commons: From Theory to Practice. 2007. C. Hess, and E. Ostrom, eds. Cambridge, Mass.: The MIT Press.
Vivant, M. 1994 "Les notions d'œuvre, d'originalité et de droits voisins du point de vue des traditions du droit civil." *Actes du colloque mondial de l'OMPI sur l'avenir du droit d'auteur et des droits voisins, 1er – 3 juin 1994*, Genève, no 12–2.

User-generated Contents and Urban Middle Class

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Abstract

This paper seeks to explore relationships between the middle class in India and user-generated contents. It tries to understand the development of user-generated contents within the broader framework of growth of the new urban middle class in India. The paper is an articulation of a changed dynamic of relationships between collective selves and a digital milieu including the evolving nature of language(s) and form(s) of expressions. The process is analysed through reflecting on a ban on an orkut community and a formation of a facebook community to protest against fundamentalist elements in India.

The visibility of the middle class in India has been rapidly growing. The growth of this class, particularly after the aggressive opening up of liberal economic policies in the late nineties, has been phenomenal in asserting its identity in the "global-village". (McLuhan 1964). I will focus on the middle class as a social agency and draw from and contribute to their role in user-generated contents. A reason for this focus, needless to say, lies in the visible cultural shift of the middle class from "the use" or "the adaptation of technology" to "the appropriation of technology" in the last ten years. The deepening of activities of generating contents on the Internet among the middle classes has been a subject of creative endeavours and keen academic interest. Along these lines, institutional studies have been supplemented by research on matters like computer literacy and the democratisation of Internet which have already unearthed a socio-economic minefield of the middle class in India. My access to this area of research is not in the capacity of either an anthropologist or a sociologist. I have not any formal institutional training in these disciplines. My interest in the middle class and their role in the generation of new forms of communication in the domain of information and communication technologies, stems from my creative pursuit as a playwright. Usually, I spend a lot of time researching during the process of writing a play, and in that manner I developed my keen interest in the middle class and its relation to new forms of communication.

I started to work on this investigation on the middle class' interest in user-generated contents, during the last five to six years. One can see that the interest in Facebook and YouTube has shifted the middle class' perception of shared contents, from curiosity to viewing it as a space for engagement. Of course, the communities on these spaces are minuscule compared to India's population and existing popular tools of communications like print media. However, even though minuscule, some of the recent activities on Facebook do represent an extended understanding of the dynamic of consciousness in the ways the urban middle class perceives, conceives, expresses and interacts in the digital milieu. In this regard, while drawing from the local cultural and social context, the reflection of the communities on "space flow" (Castells 1997, 7) of Internet, will help us to understand

new patterns of networking and the role of user-generated contents in creating a dialogic space of *samvad* (dialogue), where processes of self-realization can take place.

My "take" on Facebook, Orkut and YouTube derives from my own understanding of the relation the middle class has to user-generated contents. Paradoxically, I am a playwright with conventional tools of communications addressing "traditional" readers. The language of my creative expression is totally different from that of shared contents on Internet. Even so, I am excited by the alternative ways that user-generated contents offer to share one's creativity and by the pivotal status of improvisatory now moments in user-generated contents. What amazes me, in accordance with analysts and commentators in this field, is that the process of deepening the digital communication tools has happened despite the widespread poverty, illiteracy and multi-layered hierarchies of social discriminations and also despite a few sections' apathy towards the newer forms of communication.

Actually, the democratization of digital culture has been considered unworkable from the perspective of traditional societies because of their characteristic approach to such modern tools. The middle class has been a leading current against the traditional approach to modern tools of communication. Electronic media, first with the entry of television and then with digital devices, have diversely changed the nature and function of conventional media. So, broadly speaking, my task is to reflect on the specific processes of formation of user-generated contents in the "middle-class religion,"[22] a prominent stakeholder in the contemporary cultural production and consumption and, then, to disentangle the web wherein the ideologies of the nation-state, linguistic identities and political aspirations play an important role in producing, consuming, and distributing the culture. This will lead the paper, in the later phase, to focus on other issues like: the role of "regional" stakeholders in appropriating global aspirations and hijacking themselves into an "alien" milieu, the involvement of traditional print media as an important factor in creating new

22 Tapan Raychoudhuri (1998) coined this term.

possibilities of generating sources for new contents in the digital network.

1.

Historically, sharing content is not new for societies in India. The mythological accounts of the origin of the Mahabharat, an ancient epic, is that it was dictated by Vyas to Ganesh, elephant-headed son of Shiva and Parvati: Ganesh agrees to take dictation so long as Vyas does not pause; Vyas counters by saying: "Agreed, I won't, so long as you understand what I've said instantly on all levels and in totality." I do not intend to take on, with this example, a nativist's perspective but to inform about an existing form of communication that is the ceaseless emergence of form as narrative and reception. The narrative requires total understanding with active participation. I believe that contemporary shared contents tangibly reflect similar narrative forms of communication. Interestingly enough, different historical periods in India have witnessed a fascination towards technological innovations though societies were not really equipped to adopt available technological tools to fulfill their needs of communication. An underlying reason could be in conflicting societal conditions and structures that moderate forms of communication. The daunting cultural pluralities, representational conventions, radically permeable rural and urban geographical boundaries, and an unchanged hierarchy of social and economic structures, have remained a visible aspect of societies in India.

The production, consumption, and circulation of forms of expressions have always faced "inbuilt" challenges: colonial histories, liberation movements, economic deprivation, and disparities between segmented social and religious structures. It could be observed that the different pragmatic models face each other by fusing into an identity of the nation-state and also emerge, simultaneously, as a technology-driven community of shared content. For the last fifty years, the Indian democracy has moved ahead considerably in various areas of Indian life despite the innumerable social and economic

problems, while drawing its strength from the vulnerable or marginalized, the very sections which are seen as ill equipped for adjusting to a democratic function.

Conversely, the "free flow" of digital culture has always been problematised by a large chunk of societies in India because of its mere inaccessibility to digital tools. This part of society is still in support of conventional tools of communication like print media. Analysts have highlighted the role played by the decentralisation of virtual communication in making the democratic project more feasible in India. While the quantity of users in the digital world has been growing with notable speed, among empowered, a major challenge has been an inadequacy of technical and infrastructural accessibilities in appropriating modern technological tools, and creating forms *of* digital culture that can readily be consumed by others and brought into circulation. Much of the population in this context lacks the skills and/or resources needed to participate in an emerging interface on user-generated contents. As a result, a fact could be easily observed, that new means of communication have reached only to that class which is already empowered, at least in some aspects, by policies of the contemporary state. It is important to make a point here, that these inadequacies of accessing user-generated contents remain outside the purview of our discussion. However, I should clarify; it does not mean that I am relying on attributes of modernity such as technological sophistication in my reflection on the middle class. "These are, no doubt cohorts of modernity in rarely all known empirical instances; yet they don't provide us with a definitive understanding of modernity. We can benefit much more if we emphasize instead the differences that modernity makes to how people relate to one another, and not concentrate solely on technology and scientific advances." (Appadurai 1996, 5).

In the last ten years, with aggressive attempts of liberalising the economy, India has become one of the "cheap labour countries". The already educated and dominant middle class was alert in tapping this opportunity. Through strategic attempts of appropriation, from time to time, the middle class reached a new level to mobilise, build coalitions, inform, lobby, communicate and campaign. For them, technology became a part of the discourse of a "self fulfilling and self-

justifying" project of modernity as they "wished to have become modern" with tools of technologies (Appadurai 1996, 1). And obviously, content generation in a digital milieu became solely the middle class' work.

2.

My problem here is one of defining the middle class which, in fact, has always presented a distinct challenge to theorists. It is the middle class' extraordinarily complex culture with its numerous forms of approaching culture, its ambiguous and anxiety-inducing relationship with the capitalist market, its intricate systems of being subservient as well as dominant in cultural processes that make this class an attractive subject to analyse. Appadurai believes that, "Understanding local middle class cultural processes in world context is no less important than understanding the cultural politics of 'middle-ness'in India – a place where a new cultural ground is still being pioneered, its structures and fault lines not yet obscured by the sediments of time – may shed light on class-cultural politics denial whereby we perpetuate our own myths of classlessness". (Appadurai 1996, 45). Much has been written about the evolution and growth of the middle class in India.[23] Though the impact of globalisation demonstrates a phenomenal visibility of the middle class, roots of this class can be traced back to the colonial period (Dasgupta 1993), with its access to English education, professional employments and its assertiveness in the power politics with modern tools of dominance. A quick look at the social history of India witnesses the centrality of the middle class since colonial rule. The formation of elites with access to English education, entry into government employments and the subsequent positioning of the middle class in upward mobility in a social hierar-

23 To mention only a few of the more notable works on middle class in India: Varma (1998), *The Great Indian Middle Class*; Chatterjee (1993), *The Nation and Its Fragments*; Fernades (2008), *India's New Middle Class: Democratic Politics in an Era of Economic Reform*.

chy has awarded them the status to appropriate contemporary tools of communication.

My plan here is not to intervene in these discussions but to point out the transformative-ness of the middle class that has shaped the contemporary age. It would be fatal to look into the middle class as a uniform consciousness of self in the given societies. They have their own pasts and it would be deeply problematic if one identifies a single moment within "the modern moment that by its appearance creates a dramatic and unprecedented break between past and present" (Appadurai 1996, 7). Their identities originate from their historical as well as economical domination which has been successful in constructing meanings. They carry out a new cultural space which they explicitly locate in language and material practices and caste and religion remain a strongly determining self-orienting cultural force. The identity formation of the middle class shifts at two levels. At one, it is a formation of individual identities that has been deepened particularly in the last ten years with the so called economic boom. On the flip side of it, it is a part of "collective identity" of castes that construct their identity in India. The caste hierarchy has been playing a vital role in structuring the middle class. Particularly, after the implementation of recommendations of the Mandal Commission (that recommended the reservation for backward classes in the public sector in India) which gave an entry for lower castes into government jobs.

Conversely, with these changes, the caste hierarchies have deepened among the urban middle classes and created new contested spaces in the post-Mandal period. With the new forms in a digital milieu, the imagination that had been a project of the colonial brahmin modernity seems to have, at least superficially, been challenged; the exploration of imagination has been brought out of the special expressive space of art, myth and ritual and made itself a part of the quotidian mental work of ordinary people in many societies. "It has entered in the logic of ordinary life from which it had largely been successfully sequestered – Now, however, it is no longer a matter of specially endowed (charismatic) individuals, injecting the imagination where it doesn't belong. Ordinary people have begun to deploy

their imaginations in the practice of their everyday lives." (Appadurai 1996, 5).

3.

This paper addresses and interrogates both the related and complementary aspects of two-way transactions between the contemporary middle class and user-generated contents: reception of user-generated contents, and representation of the middle class in user-generated contents. Interestingly enough, the middle class is inextricably simultaneous when playing in the fields of reception and representation. Furthermore, seen from the historical background of production and consumption of cultural expressions in the pre-modern and modern periods, these transactions also serve to indicate the nature of the "middle-ness" of this class. It is the middle ground in which both the local and global are mediated, melded and braided into cultural forms and patterns that are "neither here nor there". User-generated contents document the middle class' profound sense of between-ness, of "hanging between high and low", of anxious unresolved-ness and irresolution. The middle class is, inescapably, about the tension of perpetually negotiating in between-ness.

In this context, the themes of reception and representation are so vast of scope and I cannot think of attempting a comprehensive treatment. Instead, being more realistic, I prefer here to undertake two selected case studies of user-generated contents as may be thought to possess a generally representative and illustrative significance for reflecting on the middle class. Thus, in terms of the middle class' reception and representation of user-generated contents, cases taken up are a ban on an orkut community by the Indian government for denigrating an image of the legendary Maratha[24] warrior Shivaji

24 *Maratha* is an ambiguous term. Broadly, the term refers to those belonging to Maharashtra, a state in India. Also, the term refers to Maratha, one of the upper castes of in Hindu religion.

and a facebook community of "Fearless Karnataka" which was set up to protest attacks on women in Karnataka, a state in South India.

4.

> "It is not only Chhatrapati Shivaji Maharaj and our leader Balasaheb Thackeray but leaders like Indira Gandhi and Dr Babasaheb Ambedkar too. Some mischief-mongers have also started 'I hate India' campaign on Orkut and they want to disturb the communal harmony in our country," says Panse. "We have time and again raised this issue but nothing is being done about it so we feel the best solution would be to ban Orkut in India," he adds.[25]
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> "August 31, 2007, is a day software engineer **Lakshmana K Kailash** would like to forget. In the wee hours of that dreaded day, he was picked up from his Bangalore home by six policemen from Pune on charges of defaming Chhatrapati Shivaji Maharaj on Orkut.com.
>
> Despite protesting that he did not know anything about it, he was taken to Pune and thrown into jail, where he spent 50 days with over 200 undertrial prisoners for an offence he did not commit. He was charged under Section 295 A of the Indian Penal Code ('deliberate and malicious act intended to outrage religious feelings'), and Section 67 of the IT Act (publishing 'lascivious material on the Internet')."[26]

The middle class has since the colonial period been growing up in a duality of the rhetoric of individual freedom manifested in free labour, on one hand, and fundamental hierarchy of castes alongside religion as an irreducible essence of Indian civilization, on the other. With the help of both sides, the middle class has been constructing their self identity. As Manuel Castells writes, "The construction of identities uses buildings material from history, from geography, from biology, from productive and reproductive institutions, from collective memory and from personal fantasies, from power apparatuses

25 A news item published in a local Marathi News Paper, *Daily Pudhari* (June, 2007).

26 A news item published in a local Marathi newspaper, *The Sakal* (September 2, 2007).

and religious revelations." The formation of identities in shared communities on Orkut is not an isolated or self contained phenomenon. Rather, it is a part of the long history of caste politics framed in the nationalist agenda. It is an example of a class in the post-electronic age constructing a collective identity on the basis of available "sets of cultural attributes" – caste history and new forms of communication. In the process, "legitimizing identity" (Castells 1997, 8) was a reaction to the orkut community as a revelation by a dominant institution of society to extend and rationalise their domination vis-à-vis social actors. Broadly speaking, it was a fraction of discourse of nationalism manipulated through user-generated contents. A "Maratha" identity was "rationalized" in a conflictive manner with an "apparatus"[27] of Orkut by the dominant group in Maharashtra. In a very recent history of Maharashtra, such attempts of "legitimizing identity" by creating resistance were taking place.

I will go back to 2004 when a group of over two hundred men belonging to the organization called Sambhaji Brigade, until then very small, attacked the Bhandarkar Research Institute in Pune and vandalized the institute's archives and library, destroying several original documents and objects that were irreplaceable sources for the study of the *Marathas* as well as Indian history, rare manuscripts and artifacts, out-of-print editions of books, and so on. The anger, by Shivsena and Sambhaji Brigade, was directed to James Laine and his acknowledgement of Bhandharkar Research Institute in his book *Shivaji: Hindu King in Islamic India* which "hurt sentiments" of the Marathas for his insulting and denigrating comments on Shivaji. "James Lain" became a known name in Maharashtra.

In April 2007, the Supreme Court gave a clean chit to James Lain being prosecuted by the Maharashtra Police for allegedly promoting animosity between communities through his book on Shivaji. The ban on an orkut community is also an example of expressions of resurgence of identity consciousness in the age of globalisation. Moreover, it is a peculiar example of how user-generated contents mark and reconstitute a wider field to interrogate and transform "contextual literaracies" in network societies on Internet. Interest-

27 Gramsci's conception. See Gramsci (1971).

ingly, in the case of Orkut, the party against which the project of identity was reconstructed was "invisible". In the case of the ban on James Lain's book, the protesting community knew James Lain but he was physically unavailable though booked by a criminal court in India.

The case with the orkut community was more complex as the project identity was affirmed against the unknown alien in the virtual world by banning the online community. The orkut incident of defamation of Shivaji's image is the first of such incidents in the post-electronic age when communities had no clue who they were exactly protesting against. The communities have neither seen this person on Internet nor have most of them read about the matter on Orkut. In addition to this, people participating in reactionary violent protests in small towns in Maharastra were not familiar with Internet and user-generated contents. They came to know about the denigration of Shivaji only through local print media. In this regard, local print media played an important role in popularizing user-generated contents. Whatever it may be, the incident provoked *Marathas* (and others) across the world to debate the politics of reception, the dignity of the seventeenth century king Shivaji, and the role of online space in the formation of identity.

The violent reactions to an act of denigration of an image of Shivaji on the orkut community supported views that the modern world was growing into an iron age and the imaginative space was stunted by the regimentation of fundamentalist right wing fractions like Shivsena. The society has gone through a dual phenomenon of regimentation and secularization. Some critique that modernity has been stunted by the force of commoditization, industrial capitalism and generated regimentation and secularization of the world. Few of them has accepted the view of the modern world as a space for shrinking religiosity. In fact, there is vast evidence of growth of new religiosities of every sort, that religion is not dead but that it may be more consequential than ever. One can see it in reactions to Hussain's paintings in user-generated contents or Lord Ram's tainted painting on the orkut community. It is important to stress here that YouTube or Facebook, largely handled by individuals, has become a property of collectives. To site a specific example, the uploaded

forms of pieces of classical Hindustani vocal or of *bhavgeet*[28] clips on YouTube support my argument. They give voices to the middle class communities aspiring to be more and more rooted into culture through so called "secular" forms of entertainment and to become international through their networks. Not surprisingly, they also represent cultural ambitions of the middle class emigrating to the United States. These cultural ambitions do not work only at the level of the nation-state. As Appadurai points out, "They are communities in themselves but always potentially capable of moving and frequently operate beyond the boundaries of nation. These mass mediated sodalities have the additional complexity that, in them, diverse local experiences of taste, pleasure, and politics can crisscross with one another, thus creating the possibility of convergences in translocal social action that would otherwise be hard to imagine." (Appadurai 1996, 5).

The ban on the orkut community was not just about a virtual world in motion but about the communities connecting through this apparatus. The reception of networked communities seemed very limited and saw chaotic diffusion of virtual and real spaces. Abhijit Panase, who ransacked cybercafes for allowing browsers to access Orkut said, "When pointed out that the Internet is a free medium and there is no way for him to prevent someone sitting in, say, Australia to post anti-India messages, he said, "I know this. Our software engineers are working on this front and we will track down such people. If that person is even sitting in America we will go and thrash that person. We want to catch hold of such culprits who do such things and thrash them."

5.

Facebook narratives are simultaneously born out of experience and give shape to experiences. In this sense, narratives on "Fearless Kar-

28 A musical form created as a "mid-way" expression of classical and oral folk. It represents the dominant Brahmin middle class.

nataka"[29] and the collective self of users are inseparable. Here, self is broadly understood as unfolding reflective awareness of being-in-the world, including a sense of one's past and present. (Heidegger 1962). The collective self of users of "Fearless Karnataka" is generated through users' (self) construction of an identity based on language and gender. On the flip side of it, for non-users of Facebook, the identity of users on the protesting facebook community was that of "hi-fi modern outsiders" and elites living in urban India. For both, Facebook became a kind of playground. Narratives of users on "Fearless Karnataka" shaped how they attended to and felt about incidents of attacks on pub going women in Mangalore, a town in South India. They were partial representations and evocations of the world as they know it. From this perspective, their narratives were versions of reality of those who shared the concerns of the cosmopolitan class.

Immediately, after the formation of the "Fearless Karnataka" protest on Facebook, a member on the SARAI's reader list responded to it saying, "There is the class hierarchy that works. To site an example, in the campaign of 'Fearless Karnataka', initially, their draft of memorandum was an interesting read. It said that it was a protest by 'tax-payers' – Sir, we are tax payers of Bangalore … so it is a duty of police to give us security…. […] … this kind of statement, one can understand was a very much class based….corporate…. […] … that suited to IT – pink slip city of Bangalore. Now, thankfully, they have changed…".[30] The generation of content on such shared sites was embodiments of one or more points of view rather than objective, omniscient accounts. Milan Kundera despairs that memory never captures authentic experience. "We immediately transform the present moment into its abstraction. We need only recount on episode we experienced a few years ago: the dialogue contracts to a brief summary, the setting to a few general features… remembering is not the negative of forgetting. Remembering is a form of forgetting." (Kundera 1995).

29 Facebook, http://www.facebook.com/home.php?#/event.php?eid=57022746057

30 "[Reader-list] Another cause, not pink but blood red…" (2009), http://mail.sarai.net/pipermail/reader-list/2009-March/018470.html

The “Fearless Karnataka” campaign was formed by the middle class netizen generation who had been the “free flowing” generation that had migrated to the info-tech city like Bangalore. They would work for twelve to eighteen hours a day and earn high corporate salaries to live high end life styles. Interestingly, it is also a fact that they are aware of local issues although they did not have direct involvement in the field that electoral democracy requires. Unlike those living in that local milieu for a long time, the Facebook users in this case did not share any local history and culture. So, their personal narratives about the past were always told from the temporal and existential perspective of the present. The facebook narrators linguistically shaped their tellings to accommodate circumstances such as the setting as well as knowledge, stance and status of those in their midst. Thus, narratives were often launched in response to current worries, complaints and conflicts.

As a result, the facebook narrative on “Fearless Karnataka” turned out to be symptomatic. The entire incident was trivialized on Facebook into a question of what constitutes “Indian” culture and who had the right to enforce it. In fact, an attack on women was not merely a matter of culture. There were other important factors at play. At the most immediate level was the violation of personal rights and liberties, embodied in the brutal physical assault on the women and those men who tried to offer them protection. At this level, it was inconsequential whether or not women’s actions were outside the bounds of Indian culture. Rather, the content on Facebook can be seen as a reaction to a few people of Shriram Sene (Hindu fundamentalist organization) that attacked women on the roads to instigate attackers further in strengthening the right wing ideology of the nation. The crux of the issue was either entirely absent or merely given a passing mention. It was the question of what the constitution of India has to say on this matter. Unfortunately, cocoon-acts on Facebook allowed fundamentalists and their sympathizers to side-line the question of the criminal nature of the attackers’ act and instead turn it into a cultural debate of outsiders and insiders or Indian and non-Indian culture and extend burning issues of nationalism. That is not to say that questions of culture or women’s empowerment were less relevant. However, one must be

clear not to confuse one with the other. Also, it must be kept in mind, of which the facebook users were unaware of, that the women empowerment gets strength if the issues are addressed in the broader framework of liberty and constitutional rights.

6.

The content generation on Internet is in a transformative phase in India. Currently, it is a process with a very urban-centeredness. This can be seen in the formation and processing of "Fearless Karnataka". Mangalore (fundamentalists attacked pub-going women in this city) is not a kind of just an urban city city. It is one of the most sophisticated towns in India but it is surrounded by villages which profess a different culture. The issue of attacks on women created layers of anxieties among people in smaller towns and villages around Mangalore. The tools for their protests were not user-generated contents on the Internet as the Internet was out of question for their use. As I said before, as the campaign had not taken place with a broader vision of liberty and constitutional rights in mind; the "Fearless Karnataka" protest was not of any use to helpless women living beyond the periphery of urban reality. Currently, no activities are taking place on this Facebook community.

In both cases discussed here, we can see that as narratives reach out to tap a preexisting identity, they construct a fluid, evolving identity in the making, spinning out their feelings through choice of worlds, degree of elaboration, attribution of causality and sequentiality, and the foregrounding and backgrounding emotions, circumstances and behaviour, narrative build novel understanding of themselves – in the world. In this respect, selves evolve in the time frame of 'a single telling as well as in the course of many tellings that eventually compose a life. In this respect, user-generated contents do play an important part among urban middle class societies. However, very few have been successful in fitting content formation into a broader framework of society and culture.

References

Appadurai, A. 1996. *Modernity At Large: Global Dimensions of Globalisation*. Minneapolis: Public Works Publications.

Castells, M. 1997. *The Power of Identity*.Oxford UK: Blackwell Publishers.

Chatterjee, P. 1993. *The Nation and Its Fragments*. New Delhi: Oxford University Press.

Dasgupta, P. 1993. *The Nation and Its Fragments: Colonial and Postcolonial Histories*. New Delhi: Oxford University Press.

Fernades, L. 2008. *India's New Middle Class: Democratic Politics in an Era of Economic Reform*. New Delhi: Oxford University Press.

Gramsci, A. 1997. *Selections from the Prison Notebooks*. Trans. Quintin Hoare and Geoffrey Nowell Smith. New York: International Publishers.

Heidegger, M. 1962. *Being and Time*. New York: Harper and Row.

Kundera, M. 1995. *Testaments of Betrayed*. New York: Harper Collins.

McLuhan, M. 1964. *Understanding Media: The Extension of Man*, New York: McGraw-Hill.

Roychoudhuri, T. 1998. *Europe Reconsidered: Perceptions of the West in Nineteenth-Century Bengal*. New Delhi: Oxford University Press.

Varma, P. 1998. *The Great Indian Middle Class*. New Delhi:Viking.

If You Build It, They Won't Come: Placing User-generated Content in Context of Commercial Copyright Policy

*Andres Guadamuz**

> "Your hack was noticed. Back when I was young, you could have got a patent off it. Nowadays – "
>
> "Nowadays, it should be worth a decent grade in a high-school class."
>
> Vernor Vinge, *Rainbows End* (Vinge 2006, 342)

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Abstract

The present paper deals with policy changes to copyright law in light of the explosion in user-generated content, and its growing relevance to people. There are two narratives at work in modern debates about copyright. Firstly, commercial content owners (the traditional copyright industries) tend to over-emphasise the importance to the economy of maintaining the status quo, particularly by stressing the figure of copyright as a source of livelihood for struggling artists. Secondly, there is the one presented by user-generated content advocates, which assumes that it will bring about a more equal and democratic Internet. The starting point will be to study usage figures for both commercial and non-commercial content, followed by an analysis of its possible implications for the much-needed overhaul in copyright policy.

1. Introduction

To comment that there is a revolution in content creation brought about by the rise of the participatory web is stating the obvious. The popularisation of tools that make it possible for large sectors of the public to place content online has heralded an explosion of creativity unparalleled in history. Users have become publishers, a fact that blurs the boundaries between consumers and producers in the copyright industries, but also opens the opportunity to examine some of the hypotheses that support current copyright policy.

Traditionally, copyright law has been drafted under the assumption that there are a small minority of content creators that deserve protection of their exclusive rights, while the majority of consumers will purchase these works commercially. Copyright policy therefore has become a balancing act between the interests of those two groups. However, in the digital environment the roles are decreasingly clear, as users are empowered by the technology to place their content online. This new reality has prompted the rise of alternative means of copyright management that recognise the shift in those conventional roles. Open source software, Creative Commons, wikis, and the Free Culture movement have arisen as a response to the needs of content creators who are often not motivated by commercial gain. Nevertheless, these tools still rely on a copyright framework that has been created to enhance and protect profits.

Therefore, it has become imperative that copyright law should be revised in order to respond to the new creative environment. Copyright policy should recognise that large numbers of creators are willingly participating in sharing practices. However, it is important that while drafting revised policies, the real impact of user-generated content should be assessed. This is because while the impact of the remix culture is evident, its relative importance appears to be overstated. I call this line of thought the "If you build it, they will come" argument. Authors like Andrew Keen (Keen 2007) have been rightfully maligned for complaining that the Internet is filled with dross, while at the same time bemoaning the loss of the authoritative role of gatekeepers held by the publishing industry. Although Keen's indictment of the quality of content online is highly subjective and often ill informed, there is a good case to examine the actual relevance of the participatory web. This is because when studying usage figures of the most popular Web 2.0 sites, one comes to the realisation that the bottom-up Internet has a lot in common with its top-down counterpart. Free content also exhibits long tail usage figures that prompt one to question some of the assumptions behind alternative copyright policies.

This paper will therefore examine the widespread assumption that user-generated content (UGC) will bring about a more equal and democratic Internet. The starting point will be to study usage figures for both commercial and non-commercial content, followed by an analysis of its possible implications for the much-needed overhaul in copyright policy. The paper will assume that the reader is already familiar with the concepts of Web 2.0 and user-generated content.

2. A Tale of Two Cultures

The iSummit is an annual event that brings together people related to the international Creative Commons organisation with the purpose of showcasing experts from around the world who are interested in the

areas such as open content, open access and open education. During the 2007 edition of the iSummit in Dubrovnik, Croatia, one of the legal keynote addresses was given by David Uwemedimo from the International Confederation of Authors and Composers Societies (CISAC). Presenting to a potentially hostile audience, Mr Uwemedimo gave a balanced view on the interaction between collecting societies and open licences, and also commented that the history of collecting societies proves why collective management of intellectual property benefits creators. (Hatcher 2007). The reason for showcasing this seemingly innocent opinion is that it exemplifies a view of the process of creation, and of intellectual property in general, as something that is only done with commercial interest in mind; and the fact that it was given to an audience convened specifically to talk about creation outside of the existing frames of reference displays precisely why some in the copyright industries simply "don't get it". To think of creators as only those who make a profit or make a living may seem like common sense, but it is a view that ignores the fact that the Internet has changed the balance of the creative process (Benkler 2006, Chapter 3). The advent of easy-to-use tools that allow the publishing of text, video, photographs, music and all other forms of digitised media have brought about a new generation of creators who are less interested in traditional distribution channels and are willing to explore other methods. We have all become potential publishers.

Intellectual property law in general, and copyright law in particular, have been drafted, promoted and perpetuated with the idea of the creator as a struggling individual who requires protection in order to incentivise creativity.[31] It is no coincidence that authors have been at the forefront of copyright policy and reform since its inception; Jonathan Swift (Deazley 2004, 128) and Mark Twain (Litman 2001, 4-15) are just two names that prove this trend. In modern times, whenever there is talk of copyright reform, musicians are brought out to make impassioned arguments about their dwindling coffers in order

31 The case for this idyllic idea of copyright rhetoric is masterfully made here: Coombe (1998), *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* and Woodmansee and Jaszi (1994), *The Construction of Authorship: Textual Appropriation in Law and Literature*.

to try to garner public support for more protection.[32] The words "creation", "owner", and "author" have therefore been hijacked by the copyright industries in order to further their commercial interests.

Given this environment, it is no surprise that the enduring myth of the struggling creator has been translated into copyright policy. Just recently, the UK government conducted a review of the content industries entitled Digital Britain,[33] which sets the government's Internet regulatory strategy for the next decade. The report tackles four main topics: network infrastructure, content, universal access, and e-government. Unsurprisingly, the UK government's strategy with regards to content seems to be geared towards enforcement, piracy and unlawful use. What is surprising is that a report looking at the future of content in the digital environment practically ignores user-generated endeavours. The only mention of Web 2.0 is in the glossary, which simply glosses over the rich opportunities brought by the participatory web by insisting on the outdated view of the top-down content provider. There is an obligatory mention to UGC and YouTube, but then the drafters have no idea what to do with it other than to mention that digital technologies lower barriers to new providers such as "the wide range of services now catering to ethnic minority communities and to specialist interest, the development of community services, of user-generated content whether on YouTube or on social networking sites".[34] In one dismissing paragraph the UGC revolution is relegated to fringe status. It is disheartening that whenever it talks about content, it is talking about institutional content.

Interestingly, another result of the perpetuation of the myth of the commercial creator is that it has resulted in a clash between traditional media and Web 2.0 services. We are currently experiencing conflict between the top-down business models based on the idea of a creator described above, and the organic business model championed by aggregated service providers and UGC application builders and managers, such as Google, YouTube and Facebook. Whichever

32 For an unintentionally comical piece that demonstrates this trend, see: Hucknall (2006), http://www.guardian.co.uk/commentisfree/2006/nov/23/comment.music

33 Department for Culture, Media and Sport, Department for Business, Enterprise and Regulatory Reform, *Digital Britain: The Interim Report* (2009), http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf

34 Ibid, p.45.

way one would like to define Web 2.0,[35] it is clear that its meteoric rise has been fuelled by the widespread availability of popular tools and applications that allows users to easily upload content online. It is no coincidence then that as traditional media sees their fortunes dwindle, content aggregator giants such as Google have benefitted from the popularisation of their services, at the same time as they promote its spread to ever growing sectors of the public. This conflict has culminated in legal challenges mostly against Google; such as the ongoing case of Viacom v. YouTube[36] (a Google subsidiary), and the recently settled cases against Google Books.[37] In the first instance, YouTube has been accused by media conglomerate Viacom of direct copyright infringement, but most importantly, contributory copyright infringement and inducement to copyright infringement.[38] In the second set of litigation, Google has been accused of direct copyright infringement for commercial gain because it digitised books contained in partner libraries, and made portions available to the public (Hanratty 2005). The common denominator in these suits is that there seems to be a palpable reaction against what is often described as parasitic practices by new media. Alongside the myth of the creator, a new one is arising, that of participatory technologies as leeches that thrive while the real content creators struggle. Perhaps the most prominent example of this was a recent article in the UK newspaper *The Observer* by Henry Porter. He states:

> "Despite its diversification, Google is in the final analysis a parasite that creates nothing, merely offering little aggregation, lists and the ordering of information generated by people who have invested their capital, skill and time." (Porter 2009).

35 And there are plenty of attempts at a definition out there. See: O'Reilly (2007).

36 *Viacom International, Inc. et al v. Youtube, Inc. et al*., (United States District Court for the Southern District of New York, filed 13 March 2007, case no. 1:2007cv02103).

37 *Authors Guild v. Google Inc*. (United States District Court for the Southern District of New York, Docket No 2005 CV 8136, filed September 20, 2005); and *McGraw-Hill Cos, Inc v. Google Inc*. (United States District Court for the Southern District of New York, Docket No 2005 CV 08881, filed October 19, 2005).

This seems to imply that anyone who does not create content and simply offers an aggregating service is by definition a "parasite" that has done no investment whatsoever. Google has invested large amounts of money in creating a vast and complex infrastructure that allows its users to access, create and aggregate content. These are tangible, useful and valuable services that make it easier for content creators to get their message across.

At the other end of the spectrum, a number of copyright scholars have been exploring some of these myths by providing a framework that explains the Web 2.0 revolution. Lessig for example places user-generated content in terms of a clash between the Read-Only culture (RO) and the Read/Write culture (RW). (Lessig 2008, 28–29). Lessig explains that for much of human history, the norm was to build upon cultural works, and therefore the act of creation was mostly a communal process. However, the Western idea of copyright that places the single creator at its centre prevailed, and therefore we were stuck with the read-only proprietary model. New technologies have made it possible to go back to a more organic way of cultural exchanges through the remix ethos that permeates much of the UGC universe. While Lessig claims that both cultures can coexist, an interesting feature of some of his work is to stress the relative importance of the RW culture by framing it in constant clash with its RO counterpart.

Another influential author in this same philosophy is Yochai Benkler. In *The Wealth of Networks* he sets an impressive framework for cultural means of production and the participatory web. He states:

> "This cluster of phenomena, from free and open-source software to Wikipedia and SETI@Home, presents a stark challenge to conventional thinking about the economics of information production. Indeed, it challenges the economic understanding of the relative roles of marketbased and nonmarket production more generally. It is important to see these phenomena not as exceptions, quirks, or ephemeral fads, but as indications of a fundamental fact about transactional forms and their relationship to the technological conditions of production. It is a mistake to think that we have only two basic free transactional forms – property-based markets and hierarchically or-

38 The complaint can be found here: http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/1/0.pdf

> ganized firms. We have three, and the third is social sharing and exchange. It is a widespread phenomenon – we live and practice it every day with our household members, coworkers, and neighbors." (Benkler 2006, 462 – 463).

Another theorist of the UGC phenomenon is Cass Sunstein. In his book *Infotopia* (Sunstein 2008) he sees several problems with what he perceives as the growing balkanisation and atomisation of information, he opines that its potential is great. He argues that:

> "… there are remarkable excercises in the development of cumulative knowledge, producing an astonishing range of new goods and activities. We shall see that some of the underlying methods are novel and exceedingly dramatic. They will be used far more ambitiously than they now are. With respect to the aggregation of information, we are in the first stages of a revolution". (Sunstein 2008, 8–9).

While there is much room for agreeing with these three scholars, one should perhaps sound a word of caution. It would seem that in response to the tyranny of the author experienced since the inception of copyright, we have responded with the myth of social production. While user-generated content is usually described with superlative adjectives, it seems important to temper these comments by placing UGC within a realistic frame of reference. While none of the authors cited above has hinted that peer-production of copyright works will replace commercial approaches, the outlook and impact of social media seems overstated. A common feature of those who tend to analyse new technological trends (the author included), is that we operate in a scholarly environment that is already familiar with the technologies involved. Could we be guilty of becoming too enamoured with user-generated content because we are part of a group that constitutes its core user base?

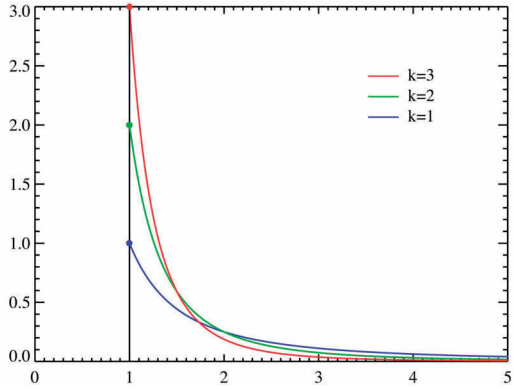
This is what one could design as "If you build it, they will come"[39] argument. There is a growing trend to assume that by simply building a blog, a wiki or a Twitter stream, users will flock to a site and immediately participate and engage with the content. While this is mostly a personal anecdote based on a long list of failed UGC experiments, it is important to try to address this often overlooked fact about Web 2.0 applications. Do the successful showcases such as Wikipedia, YouTube and Twitter distract us from the long digital graveyard of content nobody has ever seen or cared for?

3. The Long Tail

The starting point for answering the question of the relevance of user-generated content is to be found in the application of Pareto distributions to the analysis of content usage. Pareto distributions, (Reed 2001) named after economist Vilfredo Pareto, are used to describe large inequalities in data, where most of the distribution is concentrated in a relatively small portion of a graph (Figure 1). This is popularly known as the 80/20 rule, following the perception that 80 percent of the work is performed by 20 percent of the employees; or that 80 percent of the wealth is held by 20 percent of the population. (Barabási 2002, 66).

39Named so by the famous tagline used in the Kevin Costner movie *Field of Dreams*, http://www.imdb.com/title/tt0097351/

Figure 1: A typical Pareto distribution[40]



The reason why this is relevant to copyright policy is that research into the economics of the content industries clearly displays Pareto distributions of wealth, exemplified by the often-commented phenomenon that most copyright earnings go to a comparatively small number of people (Towse 2001, 80–86, Towse 2003, 66–81). For example, in a study of musician earnings in 1981, Rosen found a disproportionate skew in earnings from a few "superstars" at the top of the best-selling lists, followed by sharp drops in sales outside of a small number of artists (Rosen 1981). This is a phenomenon that can be encountered in other copyright works, such as in films (De Vany and Walls 2004) and books (Chevalier and Goolsbee, 2003, 208). Moreover, this phenomenon is replicated in other intellectual property industries, particularly in research and innovation (Scherer 1998, Scherer and Harhoff 2000).

The end result of the existence of Pareto distributions with regards to earnings, profits and royalties may very well mean that most creators cannot expect to make a living from copyright, and only a minority of works will be successful. For example, in the UK the most effective collecting society is the Mechanical-Copyright Protection

40 Source: http://commons.wikimedia.org/wiki/File:Pareto_distributionPDF.png

Society (MCPS), which has more than 18,000 members and distributed in 2004 £219 million GBP among its members. Even if those profits were distributed equally, the average would be approximately £11,000 GBP.[41] This fact alone serves as counter-evidence against the myth of the author described in the previous section, as copyright policy is based on a system that benefits a small minority. This should prompt future policymakers to look twice at setting policies that may have larger effects on the public, as a cost-benefit analysis of the current situation should attempt to benefit users and consumers, and not minority stakeholders. Nonetheless, if Pareto distributions are almost inevitable when it comes to measuring copyright earnings, it is understandable that for many years policy has been skewed towards benefiting those who make profits from content.

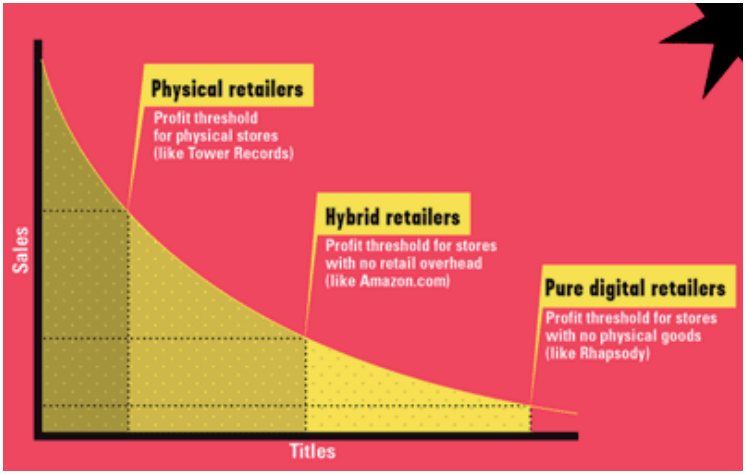
However, something interesting has been happening in recent years with regards to the allocation of profit in the copyright industries. As explained, under classic Pareto models, high-earners take the larger slice of the profits, and sales sharply drop off. (Towse 2001, 80–86). Nevertheless, a more detailed analysis of the copyright markets taking into consideration electronic commerce and new media tend to produce a different story; large amounts of sales accumulate at the head of the graph, and while there is a drop-off point, the earnings accrued by smaller participants in the market tend to tail off into the distance (Figure 2). The resulting graph shows a slightly different world to that of Pareto, that of the increasing returns, or what is also known as a "long tailed distribution". This has turned into what is known as the theory of the Long Tail. In the word of Chris Anderson, its creator:

> "The theory of the Long Tail is that our culture and economy is increasingly shifting away from a focus on a relatively small number of 'hits' (mainstream products and markets) at the head of the demand curve and toward a huge number of niches in the tail. As the costs of production and distribution fall, especially online, there is

41 See: Mechanical-Copyright Protection Society, *Directors' Report and Accounts* (2004), http://www.mcps-prs-alliance.co.uk/aboutus/

now less need to lump products and consumers into one-size-fits-all containers." (Anderson 2005).

Figure 2: Long tail economics[42]



While the Long Tail does indeed look like the traditional Pareto distribution, there is a surprising addendum when one looks at how sales charts behave when one adds into the equation internet data. In traditional brick-and-mortar creative industries, the retail sector is specifically designed to respond to Pareto inequalities. Hits are given prevalence in shelf space all over music stores, bookshops or DVD rental locales. (Anderson 2006, 38–40). However, something strange is happening to these inequalities online. Electronic retailers still experience the occurrence of few massive hits and a long tail of less fortunate sellers, but when you factor out the need for limited shelf space, the tail keeps going, and does not seem to disappear (Anderson 2006, 19–23).

Anderson offers several examples that help to explain this remarkable find. Retail giant Wal-Mart shelves an equivalent 55,000

42 Source: http://www.aurorawdc.com/ci/long_tail.gif

tracks in an average store, while digital music service Rhapsody has 1.5 million tracks. The remarkable fact is that Rhapsody's entire inventory has sold at least one copy (Anderson 2006, 19–23). In e-commerce giant Amazon, one third of total sales come from books that are outside of the top 100,000 list, and 57% of all book sales come from titles that are not stored in high-street book retailers (Anderson 2006, 23). The Long Tail therefore recognises that traditional media responds to power laws as profits go to a small cluster of entities. However, the Internet has provided a varied number of opportunities for those who did not have a chance to profit previously.

Further research into long tail economics appears to corroborate Anderson's findings. For example, an empirical study on sale distribution between electronic and catalogue sales found that consumer maturity and ease of searchability of content translated into a more equal distribution of sales between both retail outlets (Brynjolfsson, Hu, Simester 2007). The reason for this may be found in another study that contends that increased information in cultural works translates into considerable deviation from Pareto models, and accounts for increasing returns. This study claims:

> "There appear to be some similarities between the way in which particular music recordings gain popularity, and the ways in which this occurs for movies and theatrical performances. In each case, for example, word of mouth recommendations can play an important role. The more people who have listened to, and purchased, a musical recording, the more information there is available to other potential agents" (Giles 2007).

This leads to another counter-intuitive result from looking at the data emanating from the long tail model which could have tremendous policy effects. A study into P2P file-sharing has unearthed the fact that sharing does indeed seem to affect music sales from top earners (Blackburn 2004). Blackburn conducted research trying to ascertain what would be the effect for music sales of a reduction of file-

sharing volumes by 30 percent. For top earners at the head, the result was marked increase in sales. However, for those with minimum sales, decreasing file-sharing actually had a negative impact in sales (Blackburn 2004, 45–46). If this data is accurate, then it could be said that P2P is good for the tail, but bad for the head, which is consistent with the findings that increased product information translate positively in sales as it enhances the marketplace.

It is important to point out that there has been a recent controversy with regards to the long tail theory. Andrew Bud and Will Page presented findings last year on an unnamed dataset for music sales. They found that:

> "For example, we found that only 20% of tracks in our sample were 'active', that is to say they sold at least one copy, and hence, 80% of the tracks sold nothing at all. Moreover, approximately 80% of sales revenue came from around 3% of the active tracks. Factor in the dormant tail and you're looking at a 80/0.38% rule for all the inventory on the digital shelf. Finally, only 40 tracks sold more than 100,000 copies, accounting for 8% of the business."[43]

Unfortunately, the authors have not published their results, and there is no indication as to what dataset has been used. There has been speculation that the data may come from mobile downloads, which is a different market altogether (Anderson 2008). Despite this seemingly minor blip, research into other retail datasets for copyright works continues to corroborate the idea of a shift in distribution trends towards the tail. In a study of video sales (DVD and VHS) from 2000-2005, Elbersei and Oberholzer-Gee found that there was indeed a growth in "tail" markets, but interestingly, they also found that the market has been suffering considerable polarization, fewer titles account for increasingly larger slice of the market, while smaller sellers trail off into the distance. (Elbersei and Oberholzer 2006).

43 Telco 2.0, *The "Long Tail" Interrogated*, (November 12, 2008), http://www.telco2.net/blog/2008/11/exclusive_interview_will_page.html

Similarly, digital music retailer eMusic has also released some of its sales data, which according to them supports the long tail theory. In a music catalogue of five million songs, eMusic has found that 75 percent of their catalogue has sold at least one copy (Nevins and Keeble 2009), a finding consistent with Anderson's own analysis of other electronic retailers.

Placing the long tail findings alongside the Pareto earning landscape, one could see several interesting developments for copyright policy. Firstly, opposition to the long tail model has come from mainstream content industries, particularly music collecting societies. For example, Will Page, the author of the presentation "debunking" the long tail is the chief economist for the British Performing Right Society (PRS).[44] This is unsurprising, as the current framework of commercial content production has been built upon the assumptions of Pareto inequalities, and any change in the underlying business models could affect the existing regimes. But what does the long tail really tell us about copyright policy? On the one hand, it reinforces the idea that copyright protection is designed to protect the profits obtained through a few hits, and is mostly irrelevant for the majority of the public, who participate in the content market as consumers in a top-down distribution model. On the other hand, the long tail opens up the market for increasing returns for small players. While the inhabitants of the tail cannot compete with the large earners, electronic marketplaces allow the creation of niche environments where a larger number of players can obtain at least some profit. However, this could have negative effects on copyright policy, as the existence of a larger number of market participants could very well translate into longer copyright protection.

The long tail offers an even more interesting environment for user-generated content. The UGC revolution has generated a content explosion of momentous proportions. The first observation is that most of this new content inhabits the tail end of the curve. If economic incentives are largely irrelevant for a good number of the people involved in online publishing, then what is the currency of Cyberspace? From some of the research showcased above, information

44 Will Page (Undated), http://tinyurl.com/crty8c

is the real currency of the networked world, as more information about one creator clearly translates into more hits, and potentially more sales. Therefore, the real currency online consists of links. Cyberspace is a network, nodes link to other nodes, and the more links you have the more likely you are to grow. Word of mouth translates into incoming links to content, so publishing strategies for the tail should stress exchange of links.

4. Measuring the UGC Ecology

A mere look at the size of the UGC universe produces an impressive picture of the numbers involved. Wikipedia contains more than 12 million articles in 262 languages, of which 24 have more than 100,000 entries.[45] In November 2008 Flickr reached the 3 billion picture mark.[46] By March 2008, YouTube had 78 million videos on display, with 200,000 new videos uploaded every day.[47] Exact numbers on blogging are difficult to come by; blog aggregator Technorati has indexed a total of 133 million blogs since 2002, 900,000 of which had postings within 24 hours.[48] According to Nielsen, social communities (blogs and social networking sites) are now the fourth top online activity of internet users, beating email (Figure 3) (Nielsen 2009a). By February 2009, Twitter had received 7,038,000 visitors, a 1382 percent change from previous year (Nielsen 2009b).

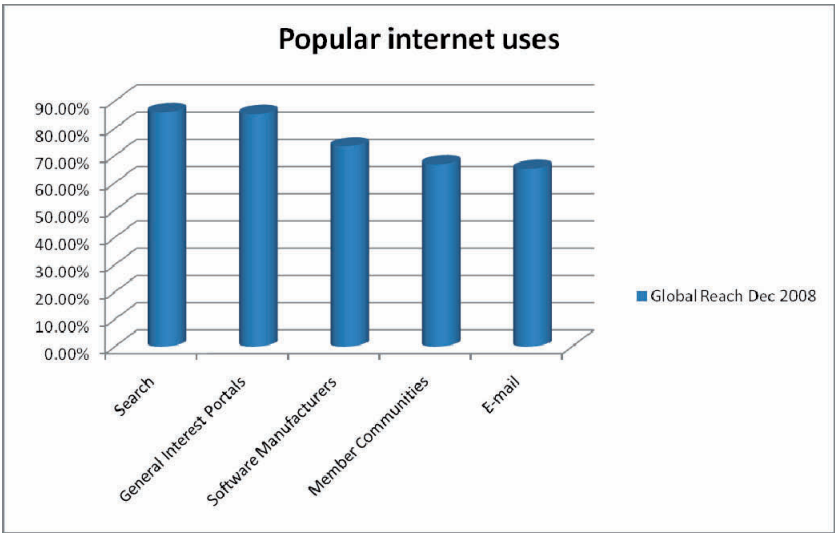
45 Wikipedia (Updated 2009), *Wikipedia*, http://en.wikipedia.org/wiki/Wikipedia

46 Flickr, *3 Billion*, http://blog.flickr.net/en/2008/11/03/3-billion/

47 Digital Ethnography, *YouTube Statistics*, (2008), http://ksudigg.wetpaint.com/page/YouTube+Statistics?t=anon

48 Technorati, *State of the Blogosphere 2008*, http://technorati.com/blogging/state-of-the-blogosphere/

Figure 3: Internet use according to Nielsen



Whichever way one looks at these figures about the biggest players in the Web 2.0 sphere, one cannot help but to be impressed. However, as the aforementioned litigation against YouTube proves, there are sectors that see such numbers as little more than widespread organised copyright infringement. Are we witnessing a true up swell in creativity, or simply rehashed postings and mash-ups from "real" creators? This is not a baseless question; last year's most prominent copyright infringement case hinged precisely on this issue. In *Rowling v. RDR Books*,[49] J.K. Rowling and Warner Bros sued Steven Vander Ark, the author of the Harry Potter Lexicon, and his publishers alleging copyright infringement over the publication of the Lexicon in printed form. The Lexicon was a reference work which contained numerous entries detailing the Harry Potter world. The case highlighted the existing clash between competing media, as the Lexicon was very much the embodiment of user-generated content, where a fan of the Potter books had taken considerable time and effort to

49 *Warner Bros. Entertainment Inc. et al. v. RDR Books et al.* (575 F.Supp.2d 513).

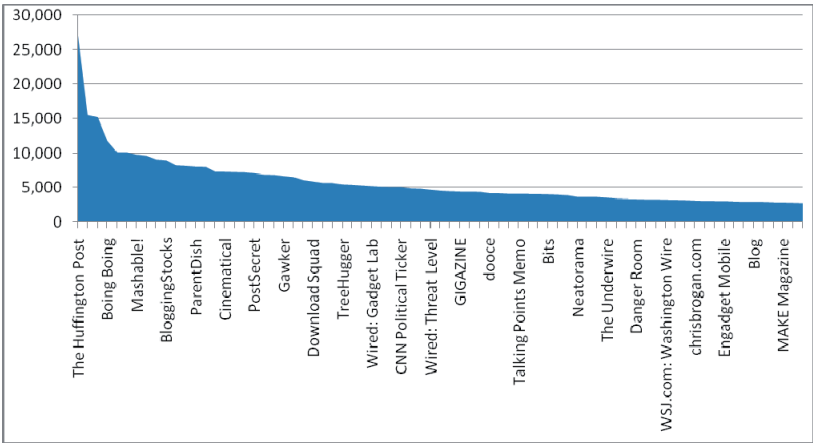
document and reference the tomes for an online audience. However, upon closer inspection, the court found that while the Lexicon conveyed "new information, new aesthetics, new insights and understandings" to the original work, it had copied and pasted entire passages unattributed, in what amounted to little more than plagiarism.

This case serves to illustrate a serious problem encountered by user-generated content in particular, and Web 2.0 tools and applications in general, and it is the perception amongst some sectors that most of the content is either pirated or copied from established sources. It is difficult to dispel this myth given examples such as the Harry Potter Lexicon, but surely there is a wealth of true creativity and inventiveness involved in peer production. How to measure this then?

Unlike commercial distribution of content, impact and success are not measured in sales, so the first task is to find an adequate way to assess its relevance. Mere hits could give us a hint of popularity of content, but website metrics could be clouded with a question of granularity of content. As hinted at above, a more indicative measure could be done through link backs to content, as this could give a better idea about the way in which information is being shared online. Technorati does precisely this with blogs by measuring impact through peer linking within the blogosphere, what they call a blog's authority. This type of measure provides a better indication of what users find relevant as they link back to that content. Interestingly, a look at Technorati's top 100 blogs reinforces the idea that we are faced with some scale-free topologies in UGC content.[50] For example, the top authority blog is The Huffington Post with more than 25,000 links to it, while there is a sharp fall in authority, producing a long tail chart (Figure 4).

50 For more about scale-free topologies, see Guadamuz (2008).

Figure 4: Technorati's Top 75 blogs[51]



The inequality is even sharper when one looks further down the chart. At the time of writing, an authority of 375 ranks at around 7,000; 200 authority ranks 17,000; 95 authority ranks 48,000; and 41 authority ranks 133,000. The blogosphere is a long tail of millions of blogs, but those at the top have disproportionate amount of followers when compared to less read ones.

This phenomenon is replicated in other user-generated sites with uncanny regularity. Incoming links to Wikipedia articles provide yet another long tail,[52] as does the measure of article views.[53] A study of 1.8 million random pictures on Flickr during a 10-day period produced an almost perfect power law, where 7 percent of images accounted for almost 50 percent of the views (Van Zwol 2007). Another study on YouTube video popularity also produced heavy skew towards the top viewed content, while also displayed a heavy tail (Cheng, Dale, Liu 2008).

It seems clear that there is considerable content inequality in the top UGC websites. Is this replicated elsewhere? This is more diffi-

51 Chart as of 11/04/2009.

52 Wikipedia (2009), *Histogram of Incoming Links for English Wikipedia Articles*, http://commons.wikimedia.org/wiki/File:Histogram_of_incoming_links_for_English_Wikipedia_articles,_January_2009.jpg

53 See Wikirank (2009), http://wikirank.com/en

cult to find out, as the research into UGC impact tends to concentrate on the bigger websites, probably because of the availability and openness of datasets and the ease of crawling through content. Studies into the usage of open source software, another type of peer production, has produced similar results, where it is clear that content follows Pareto distributions (Hunt and Johnson 2002). Research into the use of content released under Creative Commons licenses seems to indicate similar long tail behaviour, (Cheliotis et al. 2007a, Cheliotis et al. 2007b) although there are inherent limitations with producing accurate data due to search limitations (Bildstein 2007).

The relevance of these statistics for copyright policy is considerable. Firstly, one would have to ask the reason for the similarities in usage statistics displayed by both commercial content and user-generated content. It is possible that in both environments, information replicates in similar manners. As stated already, commercial content is remarkably susceptible to information, the more buzz there is for a work, the more likely it is that it will display successful sales figures. (Giles 2007). This feature seems to be shared by successful user-generated content, where hits are often referred to as "going viral". Be it a blog post, a video on YouTube, or a picture on Flickr, there are some instances when the content accumulates incoming links causing a tipping point, and the work is replicated throughout the Internet. What makes content reach this point is still a mystery, for example, there seems to be little aesthetic logic or uniting theme in top video content on YouTube (Burgess 2008, 101–109). As anyone who follows popular culture closely, the same seems to apply to commercial content.

Nonetheless, UGC is much richer than the few instances where a work has gone viral, yet if it can be described using the same distribution curves that apply to traditional creation models, then perhaps both systems are not as different as one would expect. This is counterintuitive, as UGC clearly represents a departure from commercial methods of exploitation, so the apparent similarity in distribution may mean that both types of works could be covered under the same set of copyright policies, much as it is done now.

Secondly, there is a question of the numbers of creators versus consumers. As it has been remarked already, the content industries

operate with small number of high earners at the head of the charts. While UGC tools provide a potential democratisation of the creative process, it is important to note that with few exceptions, the amount of users involved in peer production are still a minority when compared to the number of consumers of that content. Hitwise conducted research into the amount of visitors top UGC websites received against the participation from users, and it found that there was considerable disparity in this regard. YouTube and Flickr had user participation of just 0.18 and 0.12 percent respectively, while Wikipedia had 4.38 percent of user participation against visits (Figure 5). (Tancer 2007).

Figure 5: Visits versus user participation

The reason for this is that not everyone is interested in the process of creation. Having the technical capacity to create a blog does not immediately turn one into a writer. Similarly, there is no reason to believe that just because one can upload content online, one should do so.

5. Conclusion

The popularisation of user-generated content, the growing number of Web 2.0 applications, and the widespread replication of content online (both legal and infringing), pose several challenges for copyright law and policy. So far, policymakers have been single-mindedly intent in curbing copyright infringement and boosting the enforcement of intellectual property. These are solutions to problems that affect a small number of earners. Such interest in enforcement is understandable as the copyright industries generate large amount of income for the economy. However, policy should also consider the potential relevance of user-generated content as a source of wealth, research, creativity and innovation.

There seems to be a welcome trend in intellectual property policy to draft future strategies based on evidence.[54] There are two recent successful examples of evidence-based policymaking in Europe. The first was the considerable public consultation process and research going into the discussion of the European Directive on Computer Implemented Inventions, which resulted in the eventual demise of the proposal.[55] The other example has been the Gowers Review of Intellectual Property (Gowers 2006), which has made a big point of putting evidence before the interests of powerful lobbying groups. If this trend is to continue, perhaps future policymakers will look at some of the results from research into the copyright industries and will shape their policy accordingly.

The question is of course, what is the message to be learnt from the evidence presented above. This is a more difficult question, but one that will have to shape policy in years to come. Something that seems clear is that the Internet favours the long tail model for both UGC and mainstream content. Particularly when talking about internet content, there seems to be a prevalence of user-generated content because Web 2.0 tools encourage the publication of creative works,

54 One of the most outspoken supporters of this approach is Professor James Boyle. See Boyle (2004), http://www.ft.com/cms/s/4cd4941e-3cab-11d9-bb7b-00000e2511c8.html

55 Proposal for a Directive of the European Parliament and the Council on the Patentability of Computer-implemented Inventions, COM(2002) 92. For more about this, see: Guadamuz (2006), 196.

and its ulterior dissemination to the entire Web. Policymakers should take this into consideration when looking at ways to regulate copyright in the digital domain. There is growing evidence that growing numbers of copyright owners are located in the peer production sector. It would be useful if policy was no longer designed with the idealised struggling creator in mind. More often than not, the creator will be a hobbyist, never expecting a monetary return for her troubles. Nevertheless, it is easy to make this point while forgetting that while peer production is on the increase, readership of such content may not be. Just because something is online does not mean that it has an audience. Similarly, "traditional" offline world ideas of quality and peer-review still apply to the online environment.

References

Anderson, C. 2005. *The Long Tail FAQ*, http://www.thelongtail.com/about.html

---. 2006. *The Long Tail: The Revolution Changing Small Markets into Big Business*, New York: Hyperion.

---. 2008 "More Long Tail Debate: Mobile Music No, Search Yes." *The Long Tail Blog* (November 8), http://www.longtail.com/the_long_tail/2008/11/more-long-tail.html

Authors Guild v. Google Inc. (United States District Court for the Southern District of New York, Docket No 2005 CV 8136, filed September 20, 2005).

Barabási, A-L. 2002. *Linked: The New Science of Networks*. Cambridge, Mass.: Perseus Pub.

Benkler, Y. 2006. *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. London: Yale University Press.

Bildstein, B. 2007 "Finding and Quantifying Australia's Online Commons." *SCRIPTed* 4(1): 8.

Blackburn, D. 2004. "On-line Piracy and Recorded Music Sales." Working Paper, Department of Economics, Harvard University, http://www.katallaxi.se/grejer/blackburn/blackburn_fs.pdf

Boyle, J. 2004. "A Natural Experiment." *Ft.com* (November 22), http://www.ft.com/cms/s/4cd4941e-3cab-11d9-bb7b-00000e2511c8.html

Brynjolfsson, E., Y.J. Hu., and D. Simester. 2007. *Goodbye Pareto Principle, Hello Long Tail: The Effect of Search Costs on the Concentration of Product Sales*. SSRN Research Paper Series, November, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953587

Burgess, J., 2008. "'All your chocolate rain are belong to us?' Viral Video, YouTube and the Dynamics of Participatory Culture." In G. Lovink, and S. Niederer, eds., *Video Vortex Reader: Responses to YouTube*. Institute of Network Cultures: Amsterdam.

Cheliotis et al. 2007a "Taking Stock of the Creative Commons Experiment Monitoring the Use of Creative Commons Licenses and Evaluating Its Implications for the Future of Creative Commons and for Copyright Law." *35th Research Conference on Communication, Information and*

Internet Policy, http://web.si.umich.edu/tprc/papers/2007/805/CreateCommExp.pdf

Cheliotis et al. 2007b "Remix Culture: an Empirical Analysis of Creative Reuse and the Licensing of Digital Media in Online Communities." *Creative Commons Working Paper* (January 10), http://pml.wdfiles.com/local--files/working-papers/Remix_Culture_Web_Version.pdf

Cheng, X., C. Dale, and J. Liu. 2008 "Statistics and Social Network of YouTube Videos", *16th International Workshop on Quality of Service*: 229–238, http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=4539688

Chevalier, J., and A. Goolsbee. 2003 "Measuring Prices and Price Competition Online: Amazon.com and BarnesandNoble.com." *Quantitative Marketing and Economics* 1(2), 203–222.

Coombe, R.J. 1998. *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*. Durham: Duke University Press.

De Vany, A., and W. Walls. 2004 "Motion Picture Profit, the Stable Paretian Hypothesis, and the Curse of the Superstar." *Journal of Economic Dynamics and Control* 28: 1035.

Deazley, R., 2004. *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)*. Oxford: Hart.

Department for Culture, Media and Sport, Department for Business, Enterprise and Regulatory Reform. 2009. *Digital Britain: The Interim Report*, http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf

Digital Ethnography. 2008. *YouTube Statistics*, http://ksudigg.wetpaint.com/page/YouTube+Statistics?t=anon

Elbersei, A., and F. Oberholzer-Gee. 2006 "Superstars and Underdogs: An Examination of the Long-Tail Phenomenon in Video Sales." *Harvard Business School Working Paper*, http://www.people.hbs.edu/aelberse/papers/hbs_07-015.pdf

Flickr, *3 Billion*, http://blog.flickr.net/en/2008/11/03/3-billion/

Giles, D.E. 2007 "Increasing Returns to Information in the US Popular Music Industry, *Econometrics Working Paper EWP0510* July, http://web.uvic.ca/econ/ewp0510.pdf

Gowers, A. 2006 "Gowers Review of Intellectual Property."*HM Treasury*.

Guadamuz, A. 2006 "The Software Patent Debate." *Journal of Intellectual Property Law & Practice* 1(3): 196.

---. 2008 "Scale Free Law: Network Science and Copyright." *Albany Law Review* 70: 101.

Hanratty, E. 2005 "Google Library: Beyond Fair Use?" *Duke Law & Technology Review* 10.

Hatcher, J.S. 2007 “iSummit legal day – liveblog 4.” *twitchgamer.net*, http://www.twitchgamer.net/2007/06/14/isummit-legal-day-liveblog-4/

Hucknall, M. 2006 “Fundamental Socialism.” *The Guardian* (November 23), http://www.guardian.co.uk/commentisfree/2006/nov/23/comment.music

Hunt, F., and P. Johnson. 2002 “On the Pareto Distribution of Sourceforge Projects”, *Proceedings of the Open Source Software Development Workshop*.

Keen, A. 2007. *The Cult of the Amateur: How Today’s Internet Is Killing Our Culture*. London & Boston: Nicholas Brealey.

Lessig, L. 2008. *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. London: Bloomsbury Academic.

Litman, J. 2001. *Digital Copyright: Protecting Intellectual Property on the Internet*. Amherst, NY: Prometheus Books.

McGraw-Hill Cos, Inc. v. Google Inc. (United States District Court for the Southern District of New York, Docket No 2005 CV 08881, filed October 19, 2005).

Mechanical-Copyright Protection Society. 2004. *Directors’ Report and Accounts*, http://www.mcps-prs-alliance.co.uk/aboutus/

Nevins, C.H., and A. Keeble. 2009. *Emusic Sales Data Supports “Long Tail” Concept, Press Release* (January 15), http://www.emusic.com/about/pr/PR2009115.html

Nielsen. 2009a. *Global Faces and Networked Places*. Nielsen Report (March), http://server-uk.imrworldwide.com/pdcimages/Global_Faces_and_Networked_Places-A_Nielsen_Report_on_Social_Networkings_New_Global_Footprint.pdf

Nielsen. 2009b “Twitter’s Tweet Smell Of Success”. *Nielsen Wire* (March 18), http://blog.nielsen.com/nielsenwire/online_mobile/twitters-tweet-smell-of-success

O’Reilly, T. 2007 “What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software.” *Communications & Strategies* 1: 17.

Porter, H. 2009 “Google Is Just an Amoral Menace?” *The Observer* (5 April), http://www.guardian.co.uk/commentisfree/2009/apr/05/google-internet-piracy

Proposal for a Directive of the European Parliament and the Council on the Patentability of Computer-implemented Inventions, COM (2002) 92.

Reed, W.J. 2001 “The Pareto, Zipf and Other Power Laws.” *Economics Letters* 74(1): 15.

Rosen, S. 1981 “The Economics of Superstars.” *American Economic Review* 71(5): 845.

Scherer, F.M. 1998 "The Size Distribution of Profits from Innovation." *Annales d'Économie et de Statistique* 86(49-50): 495.
Scherer, F.M., and D. Harhoff. 2000 "Technology Policy for a World of Skew-distributed Outcomes." *Research Policy* 29(4–5): 559.
Sunstein, C.R. 2008. *Infotopia: How Many Minds Produce Knowledge*. Oxford: Oxford University Press.
Tancer, B. 2007. Measuring Web 2.0 Consumer Participation, Hitwise US Research Note, http://hitwise.com/downloads/reports/Hitwise_US_Measuring_Web_2.0_Consumer_Participation_June_2007.pdf
Technorati, *State of the Blogosphere 2008*, http://technorati.com/blogging/state-of-the-blogosphere/
Telco 2.0. 2008. *The "Long Tail" Interrogated*, (November 12), http://www.telco2.net/blog/2008/11/exclusive_interview_will_page.html
Towse, R. 2001. *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age*. Cheltenham: Edward Elgar.
---. 2003. "Copyright Policy, Cultural Policy and Support for Artists." In W.J. Gordon, and R Watt, eds., *The Economics of Copyright: Developments in Research and Analysis*, Cheltenham: Edward Elgar.
Van Zwol, R. 2007 "Flickr: Who Is Looking?" *Proceedings of the 2007 IEEE/WIC/ACM International Conference on Web Intelligence*, http://www.semedia.org/PubFolder/vanZwol-FlickrWhoLooking.pdf
Viacom International, Inc. et al. v. Youtube, Inc. et al. (United States District Court for the Southern District of New York, filed 13 March 2007, case no. 1:2007cv02103).
Vinge, V. 2006. *Rainbows End*, 1st ed., New York: Tor.
Warner Bros. Entertainment Inc. et al. v. RDR Books et al. (575 F.Supp.2d 513).
Wikipedia. 2009. *Histogram of Incoming links for English Wikipedia Articles*, http://commons.wikimedia.org/wiki/File:Histogram_of_incoming_links_for_English_Wikipedia_articles,_January_2009.jpg
Wikipedia. Updated 2009. *Wikipedia*, http://en.wikipedia.org/wiki/Wikipedia
Wikirank. 2009 "What's More Popular on Wikipedia? Lost or Heroes", http://wikirank.com/en
Will Page, Undated. *Chief Economist*, http://tinyurl.com/crty8c
Woodmansee, M., and P. Jaszi. 1994. *The Construction of Authorship: Textual Appropriation in Law and Literature*. Durham & London: Duke University Press.

Public Policy: Mashing-up Technology and Law

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Abstract

Online communities are changing the way we think about restricting or opening access to information. This is no more truer than in online mapping which is fueling community interest in collaborative applications. The open source communities are much like a commons of information where the non-subtractable resource actually grows with use. Restricting access to geospatial information will cut off the oxygen for both scientific as well as community activities that depend upon it. Information is restricted for many different reasons, but clearly, free and open access to new information is not guaranteed. The solution lies in not one but in multiple approaches that satisfy public policy, scientific, community and economic interests. In this paper we propose an approach for using technology to aid public policy by enabling the user to do the right thing instead of preventing the user from doing the wrong thing.

Rise of Online Communities

Online communities are turning many traditions on their heads – the Drudge Report is first-to-wire, Flickr and Twitter are quicker, and Reddit, Digg, Slashdot, Technorati and Del.icio.us aggregate diverse sources of information perhaps better than Associated Press or Reuters can. They are investigative and sensational, they break or even make careers, and sometimes they are also wrong, but, it cannot be denied that they are permanently game-changing. They are also changing the way we think about restricting or opening access to information, and this is no more truer than in online mapping. Web-based mapping is fueling community interest in collaborative applications inspiring astonishingly creative civic, environmental, social justice and journalistic maps while also mapping places to visit, sightsee or get a lunch.[56]

We believe restrictions in the form of use permissions and contractual obligations placed on access to information, both data and tools, will impede creation of legally conforming mash-ups. In this paper we offer some reasons for this impedance, and suggest that one

56. National Center for Geographic Information and Analysis organized a Specialist Meeting on Volunteered Geographic Information in 2007 in Santa Barbara, CA, to address the implications of this phenomenon. (NCGIA 2007).

way to lower this barrier is by using a technological solution that aids in implementing the permitted uses of the components of the mash-up.

Restricting Online Information

While public agencies might restrict access to information because of security concerns, private agencies do so for economic reasons as well. Public interests are served by publicly available information, but as corporations take over its collection and management, continued access to new information is not guaranteed for the various stakeholders. Uhlir and Schröder identify governments, research funding agencies, universities and not-for-profit research institutes, learned and professional societies, international scientific organizations, industry research institutions, individual researchers and the general public as the stakeholders (2007). They also identify the hidden costs of closed data systems as higher research costs, lost opportunity costs, barriers to innovation, less effective cooperation, education and training, sub-optimal quality of data and a widening gap between OECD nations and developing countries.[57]

Open Access to Information

There is much interest in free and open access to information nowadays.[58] What started off as a movement for openness in computer program source code has developed into multiple movements, from

57. Organization for Economic Cooperation and Development (OECD) is an international organization of 30 high-income economies helping governments tackle the economic, social and governance challenges of a global economy.

58. See the timeline of the open access movement maintained by the Open Access Directory for the rise in popularity of the movement (Directory 2009).

scientific data and research journals to governance to films, music, literature and other cultural products.[59] Both open access and the interest in open access are fueled by the Internet and the web.

As it becomes easier than ever to share virtually identical copies of the original virtually limitlessly, there is also much concurrent interest in enforcing intellectual property rights. This is being accomplished by both technological means as well as by tightening up intellectual property laws.

Tension of Open Access

While technology is making it easier to share information, technology is also making it easier to block information, to build walls that can keep people out. And, while technology is changing very fast, law is also changing, but very slowly. The current copyright law in the United States was passed in 1976, which, while only 33 years ago, was almost 15 years before the web came into existence. So there is arguably a need for copyright reform to keep pace with the technological changes (Samuelson 2007).

Culture is changing very rapidly in one segment, and not so rapidly in another segment. The open knowledge segment is growing fast, and changing consumption patterns, expectations and products. For example, changing readership of newspapers is attributed to the loss in advertising revenue as the money shifts to online outlets leading to a loss of paper-based newspapers and magazines. Concurrently, the large media firms are exerting a strong influence on the interpretation, application and execution of intellectual property laws in protecting their content.

Conventional wisdom has held the belief that given something of utility, its scarcity creates value. That belief drives our economic system, and everything from entrepreneurial startups to global trade.

59 See the work of The Open Knowledge Foundation that bills itself as "promoting open knowledge in a digital age." (See the work of The Open Knowledge Foundation that bills itself as "promoting open knowledge in a digital age."OKFN 2009).

Open source wisdom, on the other hand, maintains that sharing is good. Creating and maintaining scarcity is expensive, particularly in the context of information, and does not guarantee continued competitive advantage anyway.

This tension between law and technology and the gap between the cultural norms and expectations of different segments of content producers means that many laws are being broken. In fact, never before in our history has it been so easy to break so many laws with just one mouse click.

Benefits of Open Access

Research confirms that open access is good for research, particularly in the developing countries that are hungry for scientific information (Engelward and Roberts 2007; Evans and Reimer 2009). But, how do we reconcile the desire to access information freely with the desire to protect its inherent value for the benefit of its creator? How do we encourage innovation and entrepreneurism that is enabled by open access and open source while ensuring that those who come up with new ideas are able to benefit from them?

Commons as an Alternative

Commons is one alternative that is proposed as a model. A commons is traditionally a place in which the common public holds rights to its use, and no one is able to exercise a monopoly on its use. The idea of commons is a fairly old one, popular in reference to the English commons that were held open for enjoyment by all for various outdoor activities, from grazing cattle to walks and hunting. Of course,

the old English commons were not without their battle for public's rights (Shaw-Lefevre 1894).

"Freedom in a commons brings ruin to all," lamented Garrett Hardin who believed that the negative component of the utility of partaking in the commons inexorably eroded it for everyone (1968). The commons of information, however, is different – not only is it not eroded upon use, its utility, like goodwill, actually grows with its use.

The open source communities are much like a public commons of information (Hess and Ostrom 2003), but need innovative approaches to governance just as more traditional commons have needed new institutions (Ostrom 1990).

Commons of Information

The idea of a commons has been applied to information, and has been received with a surprising amount of enthusiasm. Since the original commons were physical spaces providing access to physical resources, they were naturally subtractable, that is, they would decrease in amount upon use. Information, especially digital, is inherently non-subtractable. Once produced, it costs relatively little to store and distribute. Unless access to it is restricted, scarcity does not apply because information never decreases upon use. And, because information at one level is merely data at another level, it serves as raw material for more information. The downstream benefits of public sector information can be tremendous to society, especially when put to possibly unforeseen uses because of widespread access afforded by digital information and computer networks (Uhlir and Schröder 2007).

Not surprisingly, commons has been proposed as a model for geospatial data as well. One proposed model depends upon an Internet based repository into which participants would deposit their data,

create a waiver of all their rights save an obligation for attribution, and thus, share in each others' data (Onsrud et al. 2004).

Making Commons Possible

A commons is a good idea, but it depends on the availability of one or more of such central repositories that could be trusted by its potential users not just for their security and integrity but also longevity. No one is going to deposit their intellectual output in a repository that will not instill a sufficient amount of confidence in its being around far into the future. In any case, for other reasons such as privacy and control, people are not going to be very comfortable giving up their information to an entity that may or may not be around in the future, that may or may not sell or in some other way give away or benefit from their data. Who can one trust? The private sector? The government? Themselves? And, a commons of geospatial information does not do away with legal implications but in fact, it creates many new and unique legal considerations (Mccurry et al. 2006).

Whatever the nature of the commons, be it a centralized institutional, governmental or community owned repository or a peer-to-peer based network, we require innovations in technology, the legal regime and the culture of data ownership to make it successful. Technology makes sharing possible, law makes it permissible, and culture makes it acceptable.

Most of us want things for free, but do not want to give them away for free. Culturally, we have to learn and understand the value that can come from "giving it away." This change in mindset is already happening in communities and common public, but is slower to materialize in institutions. More change in mindset will happen as a result of both activism as well as generational change. Already, all 20 years old were born after the web was invented. In another five years, every 25 year old leaving the university and entering the job

market will not have known a world without the web – cultural change is only a matter of time.

Legally, we have to make it easy to implement desired use restrictions on our own output as well as understand and adhere to the use restrictions placed on the output of others. Those who understand the value of free and open access to information in their work are willing to provide the same to their own intellectual output and data to others. Doing so, however, is onerous as it requires interpreting the intent of the creator of the product. An interoperable, interpretable, easily implementable mechanism for conveying the intent would greatly facilitate the sharing of data and information:

- Imagine a world in which everything we create automatically gets imbued with what we desire for its use and becomes available to everyone else;

- Imagine that anything we make is locatable by everyone else, is accessible to them, and they immediately know what they can do with it;

- Imagine that every time someone uses our output, somehow we get some kind of payment, be it in monetary format or in the form of attribution and credit.

We believe that one way this can be achieved is with the help of technology, and in a manner so that our existing workflows require as little added impedance or modification. This is how technology can assist in implementing our desires.

Balancing Freedom and Rights

We all talk of policy, but what do we mean by "policy"? Policy is a stance, a disposition toward a favored state. To realize a viable commons of information, we have to simultaneously provide users with the freedom to access data while provide the data providers with an avenue to benefit from their work if they so desire. This is our policy, and we are interested in the interface of technology and law as offering possible solutions to meet our policy goals.

Licenses and Contracts

Our desire for how we want our output to be used is conveyed through legal instruments called licenses and contracts.

A **license** is an instrument that conveys a right, accompanied by a promise, by the grantor to not sue the grantee if that right is exercised. In the context of property law, a license is a unilateral permission to use someone else's property. In the context of *digital files*, a license describes the conditions of usage under which those files may be used. A license on a digital file can exist whether or not there are any corresponding users of that file. A user would have to abide by the license that covers the usage of that file, and if any of the conditions of usage described in that license are violated, then the user would have to cease using that file. Licenses are covered by federal copyright laws.

A **contract** is like a license, but requires at least two parties agreeing to it. Without at least two parties, a contract cannot exist. A contract specifically describes the obligations of both parties to the contract. For example, "If we give you this data file with experiment readings, you will give me a chart showing a scattergram" is a contract, provided both you and we agree to it. Contracts fall under the purview of state law.

So, one could have a digital file that is released under a particular license, but could also be given to someone under a contract to actually deliver something in return. For example, we could license our music mp3 under a *Creative Commons 3.0 NC* license and give it to you under a contract that obligates you to add a strings soundtrack to the file and give the file back to us. If you agree to the contract and take our mp3, then you will have to deliver to us that mp3 with a strings soundtrack added to it. If you fail to give us the specified mp3 with the promised strings soundtrack incorporated in it, you will be in breach of your contract. Of course, the license itself would allow you to do anything else with the mp3 as well, as long as it was not used in a commercial project (that condition comes from the **NC** clause in the CC 3.0 NC license). This example should make the difference between a license and a contract very clear.

It should be noted that a CC license can also take on the nature of a contract. For example, a CC 3.0 BY license obligates the user of the licensed item to give attribution to the creator of the item (that obligation stems from the **BY** clause in the CC 3.0 BY license). This can be problematic in the case of data set because of attribution-stacking whereby a user can get legally obligated to attribute **all** the contributors to a crowd-sourced data set.

In the world of digital data, licenses are utilized to grant certain rights to the user by actually reducing the rights held by the user. For example, data created by me are protected for my use completely and fully by the copyright law. However, we can grant you a license to use the data for your work provided you use it for noncommercial purpose. If you start using our data for commercial purpose, we can revoke your license and ask you to stop using our data.

We can further obligate you, the user, to do something if you use our data – for example, we can ask you to pay us money, or we can ask you to give us credit. If you agree to this condition, then you are entering into a contract with us.

It is to be noted that while factual data such as pure geographic data cannot be protected by licenses, they can very well be protected by contracts. In the case of databases, this can lead to a unique problem, especially if a database contains within it data from many contributors. The user, the contractee, ends up having agreed to not one

but many contracts, and fulfilling all those contracts can become exceedingly onerous or even impractical as in the case of mash-ups.

Mash-ups Defined

Mash-ups have existed for as long as content has existed. Jazz musicians routinely quote other songs and tunes, and borrowing and mixing are considered an integral part of jazz music. Robert Rauschenberg is famous for having used Willem de Kooning's painting to create a new painting called *Erased de Kooning* (Rauschenberg 1953). Scientists routinely utilize data from different sources to conduct their own experiments.

However, mash-ups, as we know them now, are a peculiarly digital phenomenon of the internet age. They are entirely a product made possible by the portable, mixable and immediate nature of digital technology. We define a mash-up as content formed by an inline combination of two or more different content streams in real time. So, A and B data streams can be utilized to create a mashed-up content C by programmatically merging and modifying A and B from source instead of copying A and B to a different location and then merging and modifying them. That way, as A and B continue to change, the resultant changes are reflected in C in real time.

There is no doubt that mash-ups are very popular, and within mash-ups, map mash-ups are by far the most popular. One API directory, at the time of writing this paper, lists 1,254 documented mash-up APIs with 6,852 mash-ups out of which a highly disproportionate 2,281 or 33 percent are mapping mash-ups, with Google Maps API being the source of 1,658 mash-ups itself.[60]

60. The API Directory by the Programmable Web provides one measure of the popularity of mash-ups. (Web 2009).

The Problem of Mash-ups

Mash-ups create a potential legal problem by merging more than one legally encumbered data streams. By adding an additional input of creativity, they create a derivative work. This can be problematic on two fronts – the creator of the mash-ups has to worry about remaining within the bounds of the permitted uses of the components of the mash-ups, and the users of the mash-ups have to deal with not one but multiple sets of permissions should they decide to use the mash-up in their own work.

Unless the mash-up involves using two or more pure data-streams, whereby data are made up of facts that cannot be copyrighted, there will always be a finite set of permitted uses that both the mash-up creator and the mash-up users will have to contend with.

Creators and users of mash-ups can either ignore these permissions, or follow them. Either way, this creates a burden on them – ignoring them puts the mash-ups makers and users at the peril of breaking the law, and following them slows the creative process. Much creativity visible on the web is arguably because of the instantaneousness and spontaneity with which content can be accessed and used. The lack of impedance is what greases the creative process.

So, once again, we are back to a familiar problem – balancing the freedom of the users with the rights of the creators. And, there are really no two parties here since creators of content are also users of content and vice versa.

The Problem Domain

This is a multifaceted problem, and has stemmed from multiple domains intersecting at rapid speed – the cultural need to express oneself, the technological capability to do so rapidly and in innovative ways, and the legal boundaries within which it all can be done. Technological innovations makes mash-ups possible, legal innova-

tions are required to make them permissible, and cultural change makes them acceptable.

The solution to the problem is also going to be multifaceted, otherwise tackling any one aspect in isolation is only going to lead to frustration. In the rest of the paper we describe one approach that mashes up technology and law to create a solution that makes the task of abiding by the permissions on a dataset imposed by its producer easier for the consumer of the dataset.

Cleaning up the Legal Minefield

With almost a hundred different licenses available for a creator of digital data, what we have is a babel of licenses.[61] Creative Commons (CC) makes our task easier by clearing up the minefield of licenses. Through an innovative license chooser that makes the job of choosing the appropriate license easy even for a non-initiate, and through a choice of less than half a dozen possible licenses, CC presents an innovative solution to an otherwise confusing problem.[62]

A Data Purpose Algebra

One of the hazards of combining multiple data sources is that incompatible licenses can get mixed up creating a license that basically freezes the creative process. Take for example a Non-Commercial (NC) license that gets mixed with a Share-Alike (SA) license. The resulting license becomes NC-SA, but while the result satisfies the first license by also being NC, it fails the second license by not being only SA. Remember, SA requires that the resulting product be shared under exactly the same conditions as the component product under SA. So, if the component product under SA was unencumbered by

61. There are more than 90 different digital licenses that create a confusing choice for potential licensors. (Kishor 2006).

62. Creative Commons provides fewer than half a dozen licenses and an easy to use license chooser on the web. (Commons 2009).

the NC clause, adding it to an NC restricted component violates the SA requirement.

Hanson et al. show that it is possible to model data usage policies programmatically (2007). They describe each dataset as a bundle of its content, a source or agent that processes the data, the category of data, and its purpose. When another agent combines two or more datasets, a new dataset is created whose content, category and purpose are some function of the agent, content, category and purpose of each of the component datasets.

Inline Provenance

Extensible Metadata Platform (XMP) is another technology that allows one to transfer metadata along with the content by embedding the metadata in machine readable Resource Description Framework (RDF).[63] This technology is widely deployed in embedding licenses in free-floating multimedia content such as images, audio and video on the web. Jones developed a bookmarklet to copy and paste document fragments while preserving their provenance information that was stored inline using Extensible Hypertext Markup Language (XHTML) syntax (2007). Building up on that work, Seneviratne is creating a Semantic Clipboard, an extension to the open source Firefox browser to seamlessly integrate the metadata to content upon reuse, with the goal of capturing intent of the usage and making sure that the content will be reused in a policy aware manner (2009).

These projects have contributed a clearly defined document fragment ontology that can represent the information about the sources of the content, a method of excerpting from these sources, and a reasoning engine which reasons over the acceptable use of the source and the composite CC licenses.

63. Adobe, Inc., created the XMP specification (Adobe 2009).

Using Technology to Implement Licenses

How can technology be used to help implement a legal regime that makes a desired state possible? We believe that instead of using technology to make it difficult to do the wrong thing, it is better to use technology to make it easy to do the right thing.

Now that we have a potentially smaller menu of licenses to choose from, would it not be nice if we could embed the license into our work so that anyone using our work would also automatically get a copy of the license. CC allows doing just that utilizing a special kind of language called the Creative Commons Rights Expression Language (ccREL) (Commons 2009). The ccREL language allows using a world wide web consortium published specification called RDFa that allows attributes to be expressed as structured data in any markup language (W3C 2008).

Metadata

To convey our desired use restrictions with our output, we have to depend on metadata. Metadata, or literally, data about data, are used to describe mundane but useful facts such as provenance (whence the data came from?), currency (when it came into being?) and many other properties such as accuracy, author, etc. Metadata can also be used to describe use restrictions such as CC or other licenses.

To be useful, metadata need to have three important characteristics: they have to be easy to produce, be embedded within the data they describe, and be easily readable.

The easiest way to produce metadata is to have them be produced automatically. Any metadata that has to be produced manually by the user usually does not get produced at all.

The easiest way to ensure that the link between metadata and the data they describe is not broken is by embedding the former inside the latter. This way, the two travel together as a package, inseparable

always. Imagine if we all had name tags, but our name tags were kept in a different room from us. Every time we had to determine someone's name, we had to find some identifying code about them, then run into the other room and find the corresponding name tag to find out their name, and then come back and continue our interaction. That would not be very productive.

Finally, the metadata have to be accessible easily, readable both manually as well as programmatically. At best, the metadata should be readable by crawlers of the various search engines. Since metadata and data are traveling together, if popular search engines such as Google and Yahoo can read the metadata, by default the data become available to anyone who searches for them.

License Violations Validator

We find inspiration in digital photos and their Exchangeable Image File Format (Exif) data to implement a technological solution to help users stay in conformance with the licensed uses of photos. The Exif information describes the photo, is embedded inside the photo itself, and is readable using simple tools. This allows embedding within the photos licensing information about the photos.

This is essentially a tool to help an honest person remain honest when reusing content on the web. When someone aggregates content from many different sources, it is inevitable that some attribution details may be accidentally forgotten. An important consideration on the design of this tool was not to focus on the digital rights management (DRM) approach. It was also not meant to be entirely focused on Creative Commons (CC) either. But in the current implementation it is based on CC licenses with possible extensions to scenarios modeled in Policy Languages such as "Accountability In RDF" (AIR) (Kagal, Hanson, and Weitzner 2008).

While tools such as http://validator.creativecommons.org provided by the CC detects the embedded licenses in a page and gives

information about the license, it cannot be used to detect a license "violation" and obtain helpful hints as to how to make the user's composite document compliant with the original source licenses. Also, not all the CC licenses link back to the CC deed referrer Uniform Resource Identifier (URI), which, by clicking on it composes the attribution XHTML from the license deed if it is available.

As a proof of concept, we have implemented the Flickr CC license violations validator, which pinpoints any Attribution license violations on Flickr images used in composite works.In order to make sure that no CC license terms are violated, the author can run the CC License Violations Validator hosted at http://oshani.mit.edu/cc_validator.py and see if some sources have been left out or whether some have been misattributed. Once the user gives the URI where the composite work could be found at a particular URI, a site crawler will search for all the links embedded in the given site and filter out any embedded Flickr photos. From these Flickr photo URIs, it is possible to glean the Flickr photo id. Using this photo id, all the information related to the photo is obtained by calling several methods in the Flickr API. This information also includes the original creator's Flickr user account id, name and CC license information pertaining to the photo. If a Flickr photo has a CC license attached, regardless of the purpose for what it is used for, the photo should be given proper attribution as Flickr is still using the older CC2.5 recommendation. Therefore, if it was determined that a Flickr photo on a particular page has a CC License, the tool checks for the attribution information which can be either the attribution name, attribution URI, source URI or any combination of those within a reasonable scoping in the containing DOM element where the image was embedded in. If such information is missing, the user is presented with the details of the original content creator's name, the URI and the license it is under to compose the proper XHTML to properly attribute the sources used.

But, back to our problem of data – it is very difficult to determine where raw data, or facts, end and interpreted data, or creative expression of facts, begin. For example, sensors readings on a charge-coupled device (CCD) are certainly raw data, however, when such readings are acquired through a camera and stored on a reproducible medium, they become photographs that are protected by copyright. In the geospatial realm, raw data collected by remote sensing satellites are reflectance values of geographic features, that is, pure facts. These sensor readings are processed in image-processing programs to create colored photographs that can be protected by copyright.

Further complications arise vis à vis data in that while factual data themselves cannot be copyrighted, the manner in which the data are organized can indeed be copyrighted. Data, typically held in a database, are organized to optimize any one or more of atomicity, consistency, isolation, durability as well as security and speed of access. This organization reflects creativity, and hence, it is protected by copyright. Insofar as the organization of data assists in the execution of a function or a process, it can be patented. And, to make matters even more complicated, data can even be protected by trade secret – for example, names and addresses of customers can be of strategic value to a business, and the business can protect those data as a trade secret.

Since determining what portion of our data is factual and what portion is interpreted, hence, protected by copyright, is so difficult, one school of thought believes that preemptively negotiating a contractually obligatory scientific commons where all information is unencumbered would be a way toward lasting free and open access (Reichman and Uhlir 2003). The Creative Commons Zero (CC0) Protocol goes even further by suggesting that one waive all rights that one might have in one's data, the CC0 data mark serving as a mark of quality that a potential user can depend upon to represent no encumbrances on the dataset (Commons 2007).

Whatever the nature of the commons, we are hoping to apply the ideas from data purpose algebra and learned from experiments such

as the license validator to geographic datasets. We hope such effort will make it easy to do the right thing without burdening the user, and thus, greatly aid in spontaneity and creativity on the web. Our hope stems from our firm belief in using technology to aid the user in doing the right thing rather than preventing the user from doing the wrong thing.

References

Adobe, Inc. 2009. *Adobe XMP: Adding Intelligence to Media* 2009 [cited April 4 2009]. Available from http://www.adobe.com/products/xmp/

Commons, Creative. 2008. *CC0 Waiver 1.0 Universal*. Creative Commons 2007 [cited December 12, 2008]. Available from http://labs.creativecommons.org/licenses/zero/1.0/

---. *ccREL - CC Wiki*. Creative Commons, April 6, 2009. Available from http://wiki.creativecommons.org/CcREL

---. 2009. *Licenses* 2009 [cited April 4, 2009]. Available from http://creativecommons.org/about/licenses

Directory, Open Access. 2009. *Timeline of the Open Access Movement*, March 20, 2009 2009 [cited March, 31 2009]. Available from http://oad.simmons.edu/oadwiki/Timeline

Engelward, B.P., and R.J. Roberts. 2007 "Open Access to Research Is in the Public Interest." *PLoS Biology* 5(2):e48.

Evans, J.A., and J. Reimer. 2009 "Open Access and Global Participation in Science." *Science* 323: 5917.

Hanson, C., L. Kagal, T. Berners-Lee, G.J. Sussman, and D.J. Weitzner. 2007 "Data-Purpose Algebra: Modeling Data Usage Policies." *IEEE Policy*.

Hardin, G. 1968 "The Tragedy of the Commons." *Science* 162:1243–1248.

Hess, C., and E. Ostrom. 2003. "Ideas, Artifacts, And Facilities: Information As A Common-Pool Resource." *Law and Contemporary Problems* 66 (1 & 2).

Jones, H.C. 2007 "XHTML Documents with Inline, Policy-Aware Provenance. "Department of Electrical Engineering and Computer Science, MIT.

Kagal, L., C. Hanson, and D. Weitzner. 2008. Using Dependency Tracking to Provide Explanations for Policy Management. In IEEE International Workshop on Policies for Distributed Systems and Networks.

Kishor, P. 2009. Babel of Licenses 2006 [cited March 31, 2009]. Available from http://www.punkish.org/Babel-of-Licenses

Mccurry, D., J. Campbell, M. Lutz, H. Onsrud, and K. Williams. 2006 "Managing Intellectual Property Issues in a Commons of Geographic

Data." *Digital Libraries Proceedings of the 6th ACM/IEEE-CS Joint Conference on Digital Libraries*: 347–347.
NCGIA. 2008. Specialist Meeting on Volunteered Geographic Information. NCGIA 2007 [cited March 15, 2008 2008]. Available from http://www.ncgia.ucsb.edu/projects/vgi
OKFN. 2009. The Open Knowledge Foundation 2009 [cited April 2, 2009 2009]. Available from http://www.okfn.org/
Onsrud, H., G. Camara, J. Campbell, and N. Sharad Chakravarthy. 2004. *Public Commons of Geographic Data: Research and Development Challenges*. M.J. Egenhofer, C. Freska and H.J. Miller, eds.: Berlin: Springer-Verlag.
Ostrom, E. 1990. *Governing the Commons: the Evolution of Institutions for Collective Action*. Cambridge Cambridge University Press.
Rauschenberg, R. 1953. *Erased de Kooning Drawing*. San Francisco, CA: San Francisco Museum of Modern Art.
Reichman, J.H., and P.F. Uhlir. 2003 "A Contractually Reconstructed Research Commons For Scientific Data In A Highly Protectionist Intellectual Property Environment." *Law and Contemporary Problems* 66 (1 & 2).
Samuelson, P. 2007 "Preliminary Thoughts on Copyright Reform." *Utah Law Review* 2007(3): 20.
Seneviratne, O. 2009. Semantic Clipboard, Feb 17, 2009 [cited March 31, 2009]. Available from http://dig.csail.mit.edu/2009/Clipboard/extension/
Shaw-Lefevre, G. 1894. *English Commons and Forests: The Story of the Battle During the Last Thirty Years for Public Rights Over the Commons and Forests of England and Wales*: Cassell and Company, Ltd.
Uhlir, P., and P. Schröder. 2007 "Open Data for Global Science." *Data Science Journal* 6: OD36–OD53.
W3C. 2008. *RDFa in XHTML: Syntax and Processing*. http://www.w3.org/TR/rdfa-syntax/
Web, Programmable. 2009. API Directory 2009 [cited April 1, 2009]. Available from http://www.programmableweb.com/apilist/bymashups#

The Copyright Dispute: A Transnational Regulatory Struggle

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Abstract

Traditional regulation of copyright has recently been criticized from two opposing angles: While copyright holders and industries bemoan insufficient protection of copyrighted material in the digital era of lossless copying and file-sharing, a diverse coalition of dissident copyright lawyers, artists and activists claims that the prevalent copyright regime hinders new forms of content creation and distribution. In this paper, we compare the resource mobilization of industry-led Digital Rights Management (DRM) initiatives and the Creative Commons copyright licenses project. While the former was, despite the resourcefulness of the actors, fraught with collective action problems, the latter was, despite an originally weak resource position, able to mobilize support from a broad range of civil society groups and users. We conclude that there is something inherently political in the governance of new digital markets which provides opportunities for civil society actors to counterbalance the influence of large companies.

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Introduction

Traditional regulation of copyright in form of international and national legislation has recently been criticized from two opposing angles: On the one hand, copyright holders and industries bemoan insufficient protection of copyrighted material in the digital era of lossless copying and file-sharing. On the other hand, a diverse coalition of dissident copyright lawyers, artists and activists holds the opposite claim that the prevalent copyright regime hinders new forms of content creation and distribution. In their struggle both groups do not restrict their activities to traditional forms of influencing legislation via lobbying and/or protesting but also engage in (partly conflicting) private regulatory endeavours.

Taking the perspective of transnational regulation (Djelic and Quack 2008) and governance (Djelic and Sahlin-Andersson 2006; Graz and Nölke 2008), in this paper we analyze how different groups of actors pursue their goals in different arenas of the transnational "issue field" of copyright (Hoffmann 1999; see Figure 1). While our focus is on non-state actors (Arts 2003) and on (the interrelation of)

private regulatory initiatives such as the standardization of Digital Rights Management (DRM) technologies and the standardization of copyright licenses as in the case of Creative Commons, we try to incorporate the reciprocal influence of private and public authority in our analysis. In particular, we are interested in answering the question how different groups of actors through coalitions and organizations mobilize resources and support for their aims and how this in turn shapes the interests and identities of their members and potential adherents. Our argument is that interests, identities and organizational forms interact in ways that make the outcome of mobilization historically contingent. In the particular cases of Digital Rights Management and Creative Commons studied in this paper, organizational forms akin to social movements provided a platform for people interested in open content to interact and use resources in ways which gave rise to collective mobilization of a larger public of supporters, while classical associational forms of interest interpretation of the digital content industry run into considerable problems of collective action.

This result appears puzzling in the first instance since classical studies on collective action would have predicted the opposite outcome: Mancor Olsen (1965), for example, in his seminal study argued that relative small groups would be better equipped for voluntary collective mobilization in the pursuit of their interests whereas the members of large "latent" groups would be very reluctant to engage for collective goals, and hence difficult to mobilize.

In the case of copyright regulation, the users of digital content represent such a large group with latent interests. Though arguments are conceivable that users should have a principled preference for low-threshold copyright regulations, there can also be reasons found why under certain circumstances they might favour technical protection of copyright (see Stefik 2007). Hence, user preferences are not predetermined once for all but rather malleable over time and subject to influences by economic and political mobilisation projects.

Mayntz and Scharpf (1995, 51) refer to this quality of latent groups as "quasi-actors". Dolata (2003, 31–33) also highlights the importance of mobilising "non-organised collective actors" in the context of technological standardisation. This raises the question of

how to close the gap between the collective action problems described by Olsen and the realities of the millions of users of digital content out there in the global economy.

We build on contributions from various strands of literature to build a conceptual framework for understanding these processes. First, we take serious Albert Hischman's (1982) critique of Olsen that the appearance of collective actors is always a contingent phenomenon of the specific historical situation.[64] In other words, there is no automatism for interest groups to result in successful mobilisation. Second and foremost, we are building upon research on the organizational component in collective action processes: Analyzing the raising number of members in civil society organizations in the 1970's, Wilson (1995/1973, viii) emphasized formal organizations as a way out of Olson's collective action problem: In particular, associations and other non-profit organizations can provide venues for individual and collective learning and socialisation, thereby laying the basis for interest articulation, identity formation and mobilization (see also Roy and Parker-Gwin 1999). Furthermore, organizations can also provide a focus for preference and identity formation for non-members and larger publics. Diani und Bison (2004, 284) develop this for social movements:

> It brings with it a sense of common purpose and shared commitment to a cause, which enables single activists and organizations to regard themselves as inextricably linked to other actors, not necessarily identical but surely compatible, in a broader collective mobilization.

From this we can conclude that the mobilisation of users as "latent actors" is likely to be an important dimension for the struggle over different copyright conceptions, and that the capacity of different organizational forms to address this challenge should have an effect

64 "A general criticism that can be levelled against the Olson analysis – and against much economic decision theory in general – is that its subjects, while efficient and often even ingenious and devious, are *without a history*." (Hirschman 1982, 79, italics by Hirschman).

on how successful specific actor groups will be in shaping copyright regulation.

The following figure provides an overview of the actors involved in the struggle over copyright and the different organizational forms and modes of mobilisation which prevail in the field. Many transnational corporations engage in regulatory processes either directly or through industry associations, as well as informal networks of experts ("epistemic communities", Haas 1992). As a form of transnational community, the latter can also play a role in the development of civil society organizations, which in turn play a pivotal role for establishing and sustaining social movements (Davis et al. 2005; Dobusch and Quack 2008). Even non-organized groups of people that share certain characteristics may play an important role as recruiting grounds (Dahrendorf 1952) or "quasi-actors" (Mayntz and Scharpf 1995; Dolata 2003). In the remaining part of the paper we will concentrate on industry attempts to orchestrate their strategies through associations and more loose platforms as well as the attempts of opponents of technical standardization to establish an alternative regulatory approach through NGOs and social movements.

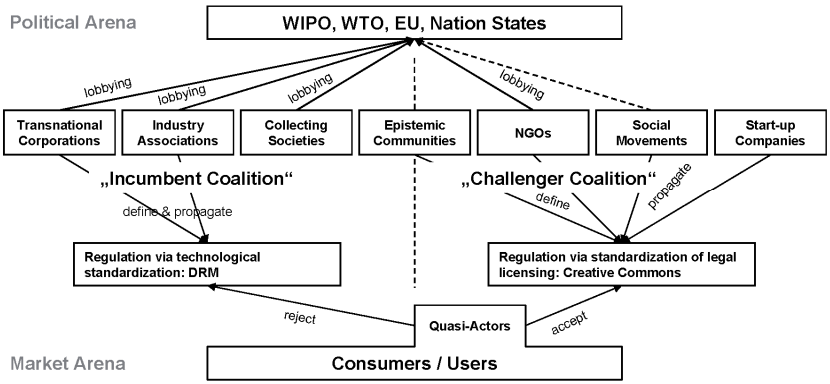

Figure 1: Stylized snapshot of regulatory arenas and actors in the transnational field of copyright regulation

Methods and Data

In conceptualizing copyright regulation as a transnational "issue field" (Hoffmann 1999), we try to identify different regulatory arenas, groups and coalitions of actors as well as different modes of regulation by looking at a broad variety of data: Primary data sources are semi-structured, issue-centred (Witzel 2000) interviews with field actors, mailing-lists and conference archives as well as organizational websites. A major part of the data has been gathered around two empirical cases: In the first case, we investigate regulation via technological standardization by major corporations and their associations in different copyright industries – mainly consumer electronics, computer manufacturers and content providers. In particular, we look at attempts to compensate for difficulties in copyright enforcement around the "Copy Protection Technical Working Group" (CPTWG) and the "Secure Digital Music Initiative" (SDMI). In the second case, we analyze how the transnational organization "Creative Commons" together with over 60 affiliate partners develop and diffuse a set of standardized copyright licenses that correct for – in their view – overly restrictive copyright law.

Conflicting Private Regulation Processes: Technological vs. License Standardization

When we emphasize private regulation and authority in the field of copyright we do not ignore regulatory developments in the realm of national and international law: In fact, these play a vital role for both conflicting regulatory initiatives we are contrasting in the following section: First, the new anti-circumvention provisions in the TRIPS- and WIPO-Treaties[65] and their implementation on the (supra)national

65 When we refer to the WIPO copyright treaties, we mean the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonographs Treaty (WPPT), see http://www.wipo.int/treaties/en/ [accessed: 07 April 2009].

level (Helfer 2004; Kretschmer 2005) are conditio sine qua non of any technological digital rights management (DRM, see Becker et al. 2003) system put forward by copyright industry incumbents. If circumventing technological protection measures of digital content was not forbidden, no private standardization of DRM technology could prevail (Marks and Turnbull 2000). Second, alternative copyright licenses as provided by the NGO network around Creative Commons not only build upon existing copyright law but are to a certain degree the paradox consequence of the new, post-TRIPS copyright legislation, which many users and supporters of Creative Commons perceive as harmful and overly restrictive (e.g. Lessig 2001, 2004).

While not being independent from classic (inter-)national copyright legislation, the private regulatory initiatives both by industry incumbents and by civil society actors are far from being determined by them. Their success or failure depends on how actors resolve the problem of collective action in building regulation as a public good, which in the case of standardization requires adoption by a significant proportion of consumers or users.

Digital Rights/Restrictions Management: Code is Law

In a paper for a WIPO workshop on implementation issues of the WIPO copyright treaties, industry experts Marks and Turnbull (1999) name four technological developments that "pose the current challenge to protecting works": (1) digital copying that enables perfect bit-for-bit replication of works at a very high speed; (2) new compression technologies such as MPEG-2 for video and MP3 for audio, which make it "increasingly easier, faster and more convenient to transmit full-length high quality audio and video works over networks such as the Internet"; increases in (3) bandwith lead to greater capacity for delivering more data more quickly; and (4) networking in the sense of "two-way links from the external world to the home and out again", today known as peer-to-peer file-sharing. Following this list of technological advances, Marks and Turnbull

(1999, 3) delineate what is the worst nightmare for established copyright industries and their business models: "Today an individual consumer with a few thousand dollars of home equipment can make and distribute an unlimited number of high quality unauthorized copies of works."

As a solution to this challenge, during the 1990's major players in the core copyright industries[66] turned to technical protection measures that should "keep honest people honest" (Levy 2000, 20; Marks and Turnbull 1999, 3). As a visionary of so-called Digital Rights Management (DRM)[67] technologies acted PARC[68] researcher Mark Stefik, who adapted the military concept of "Trusted Systems" – systems with several different security levels – for the protection of digital goods not later than in 1994[69] (Grassmuck 2004). He suggests combining hard- (e.g. integration of "trusted platform modules" into output devices) and software (e.g. cryptography and digital watermarks) to certify both digital works and different forms of usage by a central "Digital Property Trust". This would allow commercializing any form and instance of content usage (e.g. reading, printing or copying a document) and at the same time safeguard against "piracy". In a way, in Stefik's model technological architecture ("code") to a large extent substitutes for legal protection, a phenomenon Lessig describes as "code is law" (1999).

An obvious precondition for such "trusted systems" – apart from the above mentioned legal provisons against circumvention – is their industry-wide standardization and adoption. The broadest attempts of standardizing DRM technologies occurred in the realm of the Copy Protection Technical Working Group (CPTWG) and the Secure Digital Music Initiative (SDMI). The former was initiated in 1996 by the trade associations representing the major motion picture studies and consumer electronics manufacturers respectively, and focuses copy

66 In his report on copyright industries Siwek (2006, 7) defines the core as "those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials. These industries include newspapers, books and periodicals, motion pictures, recorded music, music publishing, radio and television broadcasting, and business and entertainment software."

67 Critiques of the concept regularly speak of DRM as "Digital Restrictions Management", as DRM restricts certain forms of content usage.

68 Acronym of "Xerox Palo Alto Research Center".

69 Published in Stefik (1996).

protection of video content (Marks and Turnbull 1999, 13).[70] The latter initiative, SDMI, was created in 1998 by the major recording industry trade associations and the major recording companies. It was their response to the success of the (DRM-free) MP3 format in the context of new peer-to-peer software ("Napster", Green 2002) and the failure to prevent – by litigation – the shipping of mobile MP3-devices (Marks and Turnbull 1999; Levy 2000).

Both CPTWG and SDMI functioned as standard-setting bodies and exhibit very similar organizational characteristics: *First*, conferences are the predominant mode of coordination and include technical, legal and managerial representatives from all industries involved. Out of these conferences, spin-off working groups on special subjects (e.g. the "Digital Transmission Discussion Group" in the CPTWG or the "Portable Device Working Group" in the SDMI) and more formal regimes of technological licensing (e.g. the 4C Entity, a limited liability corporation formed by IBM, Intel, Matsushita and Toshiba to offer and administer licenses for copy protection technologies) emerged (Marks and Turnbull 1999).

Second, antitrust and anti-cartel laws require relatively informal and open structures as well as standards to be voluntary guidelines. While the CPTWG did not have any restrictions for participation, the SDMI charged a membership fee of $10,000, but also allowed attendance for societies and associations representing authors, composers, performers, publishers and others (Levy 2000, 45).[71] Coordination via conferences together with very open membership structures led to very intransparent decision making procedures, as a participant of the CPTWG recalls: "It was a mystery to me, how decisions were made."

Third, in both standard-setting bodies the demand for a maximum level of protection by content providers – above all, the major film studios and major music labels respectively – had to be reconciled with the hardware manufacturer's concerns regarding implementation costs and marketability. Due to the importance of network and installed base effects, consumer acceptance and adoption is crucial

70 These two industries are joined by major corporations of the computer industry. A policy working group, formed in parallel to the technical working group by the same players, did not persevere.

71 This ruling, however, excluded consumers, independent artists and labels from participating in SDMI meetings.

for establishing any technological DRM standard (Farrell and Saloner 1986, 1987; Shapiro and Varian 1999).

The first CPTWG standard, the so-called "Content Scramble System" (CSS) for the then new DVD made it to the market but was soon challenged by circumvention software and by political criticism from open source software users, who were not able to play video DVDs on their operating system without such – since the "Digital Millenium Copyirght Act" (DMCA) illegal – circumvention software.[72] After its initial work on CSS, the CPTWG turned to other problems such as standards for recordable DVDs or the protection of content being passed along digital connections between products in consumers' homes (Marks and Turnbull 1999, 18).

In the markets for music, where the unprotected MP3 format had already been widely adopted, the SDMI did not take the hurdle of marketability: In May 2001, only about two and a half years after its blatantly announced foundation,[73] the SDMI silently shut down its activities (Rosenblatt et al. 2002). Various DRM standards developed outside of the SDMI (e.g. "PressPlay" and "MusicNet")[74] did not succeed either, as they failed to establish a sustainable installed base of adopters among both hardware producers and consumers (Buhse und Günnewig 2005; Pohl 2007). After Apple's success with very light copy protection[75] and a request for DRM-free music by its CEO Steven Jobs (2007), EMI eventually was the first major label to completely abandon DRM protection for its music in consumer markets – a move that was soon followed by the rest of the industry (Dolata 2008). Even for DRM-pioneer Mark Stefik (2007), lacking consumer

72 The computer scientist Dave Touretzky (2000) put together a "Gallery of CSS Descramblers". The legal ban of DeCSS in particular led to numerous instances of civil disobedience (Eschenfelder et al. 2005) and discussions of the relationship between DRM and the freedom of expression (see Owens and Akalu 2004).

73 On its – by now offline – homepage the SDMI described itself as follows: "The Secure Digital Music Initiative brings together the worldwide recording industry and technology companies to develop an open, interoperable architecture and specification for digital music security. The specification will answer consumer demand for convenient accessibility to quality digital music, enable copyright protection for artists' work, and enable technology and music companies to build successful businesses." (see http://web.archive.org/web/20000302230740/www.sdmi.org/ [30.08.2008]).

74 Based upon DRM technology by Microsoft and RealNetworks, "PressPlay" was a joint venture of Sony and Universal Music, "MusicNet" gathered the other major labels EMI, BMG and Warner (Rosenblatt et al. 2002, 134; see also Dolata 2008, 17).

75 The DRM in Apple's iTunes Music Store allowed burning and re-importing CDs in the unprotected MP3 format. This conversion procedure is not completely lossless but was seemingly acceptable for the average consumer.

acceptance is the main reason for the very limited success of DRM technologies in general: "The situation reflects the core issue that current DRM provides no compelling benefits to consumers."[76]

Standardization of Legal Licences: Creative Commons

Proponents of alternative copyright licenses share the basic analysis of Marks and Turnbull (1999) – namely the transformative capacity of digital copying, new compression technologies, increased bandwith and peer-to-peer networking – but come to completely oppositional conclusions. They see overly strong and long-term copyright protection – either legal or technological – not only as economically inefficient but also as a barrier for creating, remixing and sharing digital goods, especially but not only in new forms of "commons-based peer production" (Benkler 2006).[77] Instead of protection of individual works they seek to maximize a global commons of digital goods as a basis for new derivative works; in a way, their approach resembles the "standing on the shoulders of giants" theme of science. To achieve these goals, they propagate the use of alternative copyright licenses to compensate for – in their view – overly restrictive copyright law and thereby turn it against itself: By applying an alternative copyright license such as a Creative Commons license (see Table 1), creators use their copyright not to protect their own exclusive rights but rather to grant and protect certain freedoms such as the freedom to distribute, to change or even to commercialize a piece of work.

76 Unsurprisingly, Stefik's solution to this problem is more and better, not less DRM.

77 The most prominent examples of commons-based peer production are free/open source software and Wikipedia. In both cases people collaboratively create a digital good, whose status as a "commons" is protected by an alternative copyright license.

Creative Commons License Modules[78]	
	Attribution: This license lets others distribute, remix, tweak, and build upon a work, even commercially, as long as they give credit to the original creator.
	Non-commercial: This license lets others remix, tweak, and build upon a work non-commercially, and although their new works must also acknowledge the creator and be non-commercial, they don't have to license their derivative works on the same terms.
	No derivatives: This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to the creator.
	Share Alike: This license lets others remix, tweak, and build upon a work even for commercial reasons, as long as they give credit and license their new creations under the identical terms.

Table 1: Icons and descriptions of basic Creative Commons license modules

In 1985 the first example of alternative and standardized open content licensing was developed by Richard Stallman to protect the source code of his Unix-clone GNU[79] from being appropriated by any third party (Wayner 2002). Today, his GNU General Public License (GPL) is the de-facto standard in free and open source software development; more than 85 percent of all free/open source software projects – among which the operating system Linux is most well known – apply this or a similar type of license (Benkler 2006, 64). However, standardized open content licensing in domains other than software such as music, film, photo or text did not prevail until about 20 years later. Then, the demand for open content licensing became obvious in the context of Wikipedia's success: The online encyclopedia is collaboratively developed by hundreds of thousands of contributors (Voss 2005; Benkler 2006) and licensed under the

78 See http://creativecommons.org/about/licenses/ [accessed: 06 April 2009]

79 "GNU" is a recursive acronym and stands for "GNU's Not Unix". Stallman started the GNU project after AT&T had declared the previously open Unix source code to be proprietary and closed (Weber 2004).

GNU Free Documentation License (GFDL) – a GPL derivative originally designed for software manuals.

The final breakthrough for open content licensing came with the launch of a set of standardized license modules (see Table 1) by the US non-profit organization Creative Commons in December 2002. While built upon copyright law, these licenses – as their GPL role-model – do not seek to maximize control of copyright owners but instead to ease and foster distribution and recombination of published works (Lessig 2004). Differently to previous forms of open content licensing, the standardized modules offer creators more flexibility.[80] The second innovation compared to free/open source software licensing is the development of localized license versions – a process that turned out to be an unexpected "growth strategy".[81] Founded by an "epistemic community" (Haas 1992) of mainly US copyright lawyers around the Stanford law professor Lawrence Lessig (Dobusch and Quack 2008), Creative Commons managed to translate ("port") its licenses into more than 40 jurisdictions within no more than five years.

Parallel to the legal and organizational transnationalization of Creative Commons, adoption rates of its licenses experienced exponential growth in various fields of application (see Figure 1); cautious search engine estimates of the total number of Creative Commons licensed works add up to about 130 million by mid-2008.[82]

80 This flexibility, however, is not uncontested, as critics see in fragmentation between incompatibly licensed content a new barrier for the creation of derivative works. The non-commercial license module in particular was and still is controversial (see Möller 2006).

81 The head of the Finnish Creative Commons project, wich was the second to port the licenses into its local jurisdiction, described the rationale behind license porting as a "growth strategy […], a way to grow fast, [to] get the community interested in the whole process."

82 See http://wiki.creativecommons.org/Metrics [accessed: 30 August.2008].

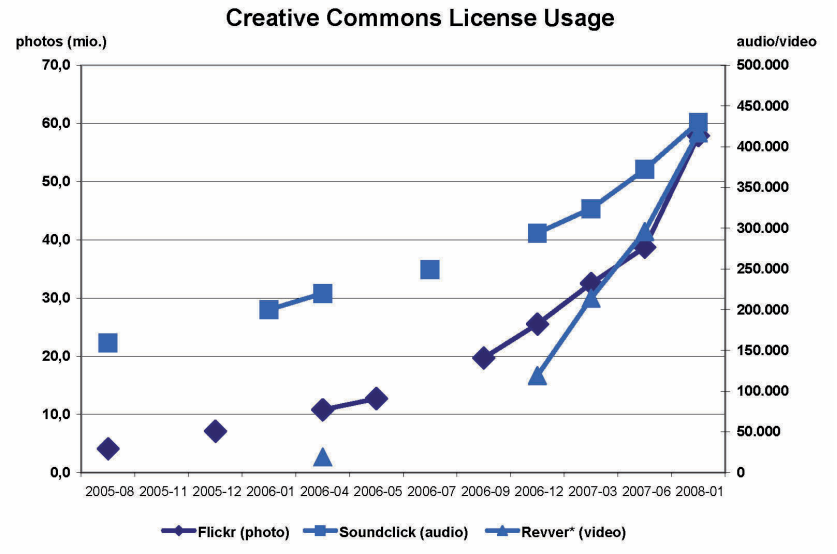

Figure 2: Usage of Creative Commons licenses in different fields of application by number of works available in three content hosting services. (*Revver is an overestimate, probably the total number of uploads; data obtained from http://wiki.creativecommons.org/License_statistics [June 26, 2008])

For porting the licenses into other jurisdictions and for promoting the licenses among creators, Creative Commons teamed up with local affiliate partners. In all jurisdiction projects, one affiliate is responsible for the legal translation of the license ("legal project lead") and – in the majority of jurisdiction projects – another one predominantly deals with the community of license users ("public project lead"). This distinction is in part reflected by the type of affiliate organizations: Most legal project leads are university law schools – often departments with prior experience in free/open source software licensing – and law firms, whereas many public project leads are non-governmental organizations with political motives. The former not only port the licenses into their jurisdiction but also participate in further development of the licenses at special meetings and confer-

ences for lawyers. The latter are best characterized as social movement organizations (Zald and Ash 1966), which perceive themselves as being part of a global "environmentalist movement for culture," as Creative Commons founder Lawrence Lessig put it.[83]

The relationship between the focal Creative Commons organization and its affiliates is probably best described as a form of "political franchising": The affiliate organizations and Creative Commons sign a "Memorandum of Understanding" (MoU) that predominantly deals with Creative Commons as a brand. License porting procedures in turn are standardized but not formally regulated. All other aspects of the affiliates' work such as local events, funding or thematic priorities are up to them to decide. As a result, different jurisdiction projects focus different fields of application, for example the education sector (Austria), digital archiving (Taiwan), video and film (Poland) or music (Spain and Germany). Theoretically, this combination of a focal organization and a multitude of very autonomous partner organizations is similar to what is called "strategic network" in the realm of business and management studies (Sydow 1992; Jarillo 1993).

Discussion and Conclusion

Comparing the two forms of copyright regulation – standardization of DRM technology and of copyright licenses – reveals an enormous level of contingency within the respective regulatory processes (see Table 2).

83 The head of the German public project lead "newthinking communication" – a hybrid between political non-governmental organization and for-profit company – expands on the similarities to traditional environmentalism by differentiating between mere license users and himself as a more conscious activist: "There is probably a gut feeling of supporting a good cause – comparable to many people who don't know exactly the consequences of energy saving but know that it helps preserve our environment. Similarly, using Creative Commons licenses preserves or cultivates an information ecology, a sustainable handling of digital resources. I am aware of this relationship but I assume the majority is not."

Table 2: Comparison of private copyright regulation initiatives

	CPTWG / SDMI	Creative Commons
Field related characteristics		
Internal front lines	• Content providers vs. hardware manufacturers	• Copyright radicals/abolitionists vs. copyright reformists
Perceived Threat	• Large scale copyright infringement ("piracy")	• Industry controlled DRM regime
Relation to copyright legislation	• Complement and expand copyright protection	• Neutralize or alleviate copyright protection
Allies	• Established artists • Copyright collectives	• Selected, avantgardistic artists • Quasi actors (filesharing scene, users of commons-based services)
Organizational characteristics		
Dominant Actors	• Transnational corporations • Trade associations	• Social movement organizations • Epistemic lawyer community
Resources	• Financial resources • Political lobbying power	• Grassroots activism • Political identity and motivation
Modes of coordination	• Informal (CPTWG) and formal (SDMI) standard setting bodies • Conferences	• Formal standard setting organization • Mailing lists • Conferences
Selection of regulatory alternative	• Negotiation among experts and market competition	• Negotiation among experts

Just looking at the idiosyncrasies of the copyright field (see first half of Table 3) probably cannot explain why Creative Commons was more effective than their industry-led counterparts in dealing with antagonistic groups of actors and their interests in the course of their respective regulatory endeavour: *First*, in both cases, internal front lines divided different interest groups; while conflicting economical interests separate content providers and hardware manufacturers on the industry side, there are also several conflicting approaches of how to best challenge restrictive copyright and DRM on the other side. In fact, copyright radicals like pirate parties[84] or copyright abolitionists (see Boldrin and Levine 2008 for a recent example) have always questioned Creative Commons' reformist approach as eventually stabilizing and strengthening copyright law. *Second*, again in both cases, an external threat initiated and fostered collaborative action. While DRM standardization together with political lobbying for stronger copyright protection clearly was a reaction to the challenge posed by file-sharing and online "piracy", Creative Commons in turn was a counter-reaction to these very developments. *Third*, established artists and copyright collectives participated in (campaigns for) DRM standardization while Creative Commons could count on selected groups of dissident or avantgardistic artists as well as on the rapidly growing number of users of commons-based services.[85]

So, while both regulatory endeavours had to cope with comparable challenges, they addressed them within completely different organizational frameworks (see second half of Table 3). Different carrier organizations – large transnational corporations and trade associations on the one hand, a network of relatively small non-profit organizations on the other hand – not only go along with different sets of resources (e.g. financial resources vs. grassroot activism) but also require different modes of coordination: Due to budget constraints of Creative Commons' mostly non-profit partner-organizations, conferences and meetings play a much weaker role for

84 Pirate parties have been formally established in more than 20 countries, see http://www.pp-international.net/ [accessed: 07 April 2009].

85 This group of "mere" users of commons-based services such as Wikipedia or Linux can be conceptualized as a "quasi-actor" in the sense of Mayntz and Scharpf (1996) and Dolata (2003).

coordinating the standard-setting process compared to the much more frequent meetings of the CPTWG or SDMI working groups.[86] As a substitute for personal meetings, license developers and users around Creative Commons rely mostly on discussions via mailing-lists or participate predominantly in regional meetings. As can be seen by looking at the data derived from Creative Commons mailing-lists in Table 3, a substantial amount of communication occurs both on transnational and on jurisdiction specific mailing-lists. Contrariwise, a CPTWG participant described the usage of the single mailing-list as merely administrative, such as for scheduling presentations.

	Mailing lists	*Posts*	*Active User**
Total	59	35.952	3.834
Transnational	15	17.297	1.696
Jurisdiction specific	44	18.655	2.129

* users that have made at least one post; overestimate due to multiple registration by individual users

Table 3: Posts and active users on openly accessible Creative Commons mailing-lists from 2002 to 2008 (October).

When it comes to decision making neither of the two approaches under study is very transparent or formalized. A major difference, however, is the degree of (market) competition between different standards: While corporate interests and antitrust law (Levy 2000) led to competing development of DRM standards – partially even in the market as in the example of PressPlay and MusicNet (Rosenblatt et al. 2002) –, Creative Commons licenses are developed centrally by an increasingly transnational community of copyright experts. At least so far, this group was very fast in reacting to and incorporating criticism in new license versions or by the development special pur-

86 In the beginning, the CPTWG met nearly weekly and drew participants from the U.S., Japan and Europe, before it later on switched over to monthly meetings (Marks and Turnbull 1999).

pose licenses.[87] Even more, after initial scepticism and due to series of confidence-building measures,[88] the Free Software Foundation (FSF) has agreed to make its GFDL compatible to the Creative Commons "Attribution Share Alike" license, which further reduces license competition and at the same time significantly increases the amount of Creative Commons licensed content. So, one could speculate that the political origin of Creative Commons and the political nature of many affiliate organizations made it better equipped for managing a political process of negotiating regulation.

Conclusions

Evaluating difficulties and success of private regulatory initiatives on both sides of the aisle in the field of transnational copyright regulation leads us to the following key findings: First, private regulatory initiatives of one group of actors may be a reaction to and thus an (unintended) consequence of another attempt of – private or public – regulation. Second, private regulation requires building upon and responding to users' practices more immediately than classic regulation. In the copyright field, compatibility of regulatory efforts with new and booming modes of distribution (e.g. file-sharing) or creation (e.g. remixing) are essential for acceptance and usage, which directly constitute regulatory legitimacy. Third, echoing Teubner's (1998) "dialectics of private governance", processes of private regulation in the market arena cannot overcome the inherently political nature of regulatory processes. Establishing a prosperous market is not only both means and end of private regulatory endeavours but is also a public political good.

87 Not only has Creative Commons after five years already arrived at license number 3.0 but it has also released a special public domain license (CC0) and a version optimized for commercial use (CC+).

88 For example, then Creative Commons CEO Lawrence Lessig regularly acknowledged and emphasized the impact and importance of the Free Software Foundation in general and Richard Stallman in particular on his blog, see for example http://www.lessig.org/blog/2006/09/fsfs_important_step.html and http://www.lessig.org/blog/2008/11/enormously_important_news_from.html [both accessed: 07 April 2009].

References

Ahrne, G., and N. Brunsson. 2008. *Meta-organizations*. Cheltenham: Edward Elgar.

Arts, B. 2003 "Non-State Actors in Global Governance: Three Faces of Power." In *Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter*, Bonn, 2003/4.

Boldrin, M, and D.K. Levine. 2008. *Against Intellectual Monopoly*. Cambridge: Cambridge University Press.

Buhse, W., and D. Günnewig. 2005 "Digital Rights Management." In M. Clement, and O. Schusser, eds., *Ökonomie der Musikindustrie*, 215–228. Wiesbaden: Deutscher Universitätsverlag.

Dahrendorf, R. 1959. *Class and Class Conflict in Industrial Society*. Stanford: Stanford University Press.

Davis, G.F., D. McAdam, R.W. Scott, and M.N. Zald, eds., 2005. *Social Movements and Organization Theory*. Cambridge (MA): Cambridge University Press.

Diani, M., and I. Bison. 2004. "Organizations, Coalitions, and Movements." In *Theory and Society*, 33: 281–309.

Djelic, M-L., and S. Quack. 2008. "Institutions and Transnationalization." In Royston Greenwood, Christine Oliver, Roy Suddaby and Kerstin Sahlin-Andersson, eds., *Handbook of Organizational Institutionalism*, 299–323. Thousand Oaks: Sage.

Djelic, M-L., and K. Sahlin-Andersson, eds., 2006. *Transnational Governance. Institutional Dynamics of Regulation*. Cambridge: Cambridge University Press.

Dobusch, L., and S. Quack. 2008. "Epistemic Communities and Social Movements: Transnational Dynamics in the Case of Creative Commons." *MPIfG Discussion Paper 08/8*. Cologne: MPIfG.

Dolata, U. 2003. *Unternehmen Technik. Akteure, Interaktionsmuster und strukturelle Kontexte der Technikentwicklung: Ein Theorierahmen*. Berlin: edition sigma.

---. 2008. "Das Internet und die Transformation der Musikindustrie: Rekonstruktion und Erklärung eines unkontrollierten sektoralen Wandels." *MPIfG Discussion Paper 08/7*. Cologne: MPIfG.

Eschenfelder, K.R., R.G. Howard, and A.C. Desai. 2005. "Who Posts DeCSS and Why? A Content Analysis of Web Sites Posting DVD Circumvention Software." *Journal of the American Society for Information Science and Technology*, 56(13), 1405–1418.

Farrell, J., and G. Saloner. 1986. "Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation." *The American Economic Review*, 76(5): 940–955.

---. 1987. "Competition, Compatibility and Standards: The Economics of Horses, Penguins and Lemmings." In H. Landis Gabel, ed., *Product Standardization and Competitive Strategy*, 1–21. Amsterdam: North-Holland.

Grassmuck, V. 2004. *Freie Software: Zwischen Privat- und Gemeineigentum*. Bonn: Bundeszentrale für politische Bildung.

Graz, J-C, and A. Nölke, eds., 2008. *Transnational Private Governance and Its Limits*. London: Routledge.

Green, M. 2002. "Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet." *Ohio Law Journal*, 63, 799–818.

Haas, P.M. 1992. "Introduction: Epistemic Communities and International Policy Coordination." *International Organization*, 46 (1), 1–35.

Hirschman, A.O. 1982. *Shifting Involvements: Private Interest and Public Action*. Oxford: Princeton University Press.

Jarillo, C.J. 1993. *Strategic Networks: Creating the Borderless Organization*. Oxford: Butterworth-Heinemann.

Jobs, S. 2007. *Thoughts on Music*. Apple: www.apple.com/hotnews/thoughtsonmusic [accessed: August 30, 2008].

Lessig, L. 2001. *The Future of Ideas. The Fate of the Commons in a Connected World*. New York: Vintage Books.

---. 2004. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: The Penguin Press.

Levy, N.N. 2000. "Method to their Madness: The Secure Digital Music Initiative, a Law and Economics Perspective." *Virginia Journal of Law and Technology*, 12, 1522–1687.

Marks, D.S., and B.H. Turnbull. 1999. "Technical Protection Measures: The Intersection of Technology, *Law and Commercial Licenses*." WCT-WPPT/IMP/3, http://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_3.pdf [accessed: April 5, 2009].

Mayntz, R., and F,W. Scharpf. 1995. "Der Ansatz des akteurzentrierten Institutionalismus." In R. Mayntz and F. W. Scharpf, eds., *Gesellschaftliche Selbstregelung und politische Steuerung*, 39–72. Frankfurt/M.: Campus.

Möller, E. 2006. “The Case for Free Use: Reasons Not to Use a Creative Commons-NC License.” In B. Lutterbeck, M. Bärwolff, and R.A. Gehring, eds., *Open Source Jahrbuch 2006*. Berlin: Lehmanns Media.

Olson, M. 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge: Harvard University Press.

Owens, R., and R. Akalu. 2004. “Legal Policy and Digital Rights Management.” *Proceedings of the IEEE*, 92 (6), 997–1003.

Pohl, G. 2007. “DRM: Digital Rights- oder Digital-Restriction-Management?“ In T. Rodriguez, M. von Rothkirch, and O. Heinz, eds., *www.musikverkaufen.de Die digitale Musikwirtschaft*, 48–66. München: Musikmarkt Verlag.

Roy, W.G., and R.R. Parker-Gwin. 1999. “How many logics of collective action?” *Theory and Society*, 28, 203–237.

Rosenblatt, B., B. Trippe, and S. Mooney. 2002. *Digital Rights Management: Business and Technology*. New York: M&T Books.

Shapiro, C., and H.R. Varian. 1999. *Information Rules: a Strategic Guide to the Network Economy*. Cambridge: Harvard Business School Press.

Siwek, S.E. 2006. *Copyright Industries in the U.S. Economic: The 2006 Report*. Prepared for the International Intellectual Property Alliance. Online: http://www.iipa.com/pdf/2006_si-wek_full.pdf [accessed: March 10, 2009].

Stefik, M. 1996. “Letting Loose the Light: Igniting Commerce in Electronic Publication.” In Stefik, Mark, ed., *Internet Dreams: Archetypes, Myths, and Metaphors*. Cambridge: The MIT Press.

---. 2007. *“DRM Inside”: DRM and the Future of Digital Media*. Arbeitspapier presented at “Digital Rights Strategies 2007”, Online: http://www.parc.com/research/publications/details.php?id=6250 [accessed: August 30, 2008].

Sydow, J. 1992. *Strategische Netzwerke: Evolution und Organisation*. Wiesbaden: Gabler.

Teubner, G. 1998. “Vertragswelten: Das Recht in der Fragmentierung von Private Governance Regimes.” *Rechtshistorisches Journal* 17, 234–265.

Touretzky, D. 2000. *Gallery of CSS Descramblers*. Online: http://www.cs.cmu.edu/~dst/DeCSS/Gallery [accessed: April 6, 2009].

Voss, J. 2005. “Measuring Wikipedia.” *Proceedings of the ISSI 2005 Conference*, 10th, Stockholm (Sweden), 24-28 July 2005.

Wayner, P. 2002. *Free for All. How Linux and the Free Software Movement Undercut the High-Tech Titans*. New York: HarperCollins.

Weber, S. 2004. *The Success of Open Source*. Cambridge: Harvard University Press.

Wilson, J.Q. 1995 [1973]. *Political Organizations*. Princeton University Press.

Witzel, A. 2000. “Das problemzentrierte Interview.” *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* 1(1), http://www.qualitative-research.net/fqs-texte/1-00/1-00witzel-d.htm[accessed: April 29, 2006].
Zald, M.N., and R. Ash. 1966. “Social Movement Organizations: Growth, Decay and Change.” *Social Forces* 44 (3): 327–341.

Revisiting the Role of Critical Reviews in Film Marketing

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Abstract

This paper examines the impact of user-generated content on film consumption choices. The development of user-generated reviews can be viewed as a merging of the realms of the professional and amateur critic. This study uses a two stage method of analysis (content analysis of review and qualitative data on film selection) to explore the impact of user-generated reviews on consumer choice. The aim of this study was to (1) map out how film consumers search for and use reviews in the online environment and to (2) assess how this has changed the influence of and influencers in the area of critical reviews. Our findings suggest that consumers do not access user-generated reviews in order to select films for cinema consumption, but may use such reviews as part of a process of amassing cultural capital and extending their consumption experience.

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This paper examines the impact of user-generated content on film consumption choices. To date, a number of studies have addressed the impact of critical reviews on the performance of films at the box office. These studies were situated in a film marketing environment which preceded Web 2.0 and the proliferation of user-generated reviews which have resulted from the development of Web 2.0 technologies. Literature on the impact which professional reviewers have on consumption of film (and other art forms) has developed separately from considerations of word of mouth. Word of mouth has been acknowledged as a key influencer for arts audiences and prior to the development of user-generated content media, such word of mouth has been limited to actual friendship/ peer groups and could be seen as geographically and socially bounded. The development of the user-generated review and the increasing importance of sites hosting such reviews can be viewed as a merging of the realms of the professional and amateur critic. This study uses a two stage method of analysis in order to explore the impact which such user-generated reviews have on the process of consumer choice. Through content analysis of user-generated reviews on popular film websites as well as qualitative data collection concerned with consumer selection of

film, we have evaluated the impact of user-generated content on film choice. This study has implications for film consumers in terms of assisting them in selecting artistic products which fit with their tastes and for film professionals who need to understand how to navigate this new emerging terrain. The aim of this study was to (1) map out how film consumers search for and use reviews in the online environment and to (2) assess how this has changed the influence of and influencers in the area of critical reviews.

Marketing Communications and Influence on Film Choice

The marketing communications campaigns which signal a film's release highlight the elements of a film that the film makers or distributors believe will be attractive to the target audience. Marketing communications highlight the elements of what Kerrigan (2005; 2009) refers to as the film marketing mix; the creative team, actors, script/genre, age classification and release strategy. Film marketers use a range of marketing communications such as public relations, marketing materials such as posters and trailers and critical reviews in order to position a film in the mind of the consumer. However, film marketing professionals such as Durie et al. (2000) believe that word of mouth is central to the market success or failure of a film. Word of mouth indicates the presence of influencers on choice and in film these influencers are identified as critics and "avids" (Litman 1983), the term applied to film fans who influence the decisions of their peer groups. Many commentators believe that it is impossible to control word of mouth. However, identifying the most likely audience for a film and focusing on bringing it to their attention can go some way to ensuring that word of mouth is positive. Durie (2000) also looks at the impact of word of mouth and reviews on a film's success or failure. He differentiates between "want-to-see" and audience enjoyment. Film marketers can create "want-to-see" through the

marketing campaign, this is also known as "marketability". However, the ultimate aim is to achieve audience enjoyment and therefore good word of mouth in order to sustain the film in the market.

Hennig-Thurau et al. (2006) discuss various influencers on film choice and find that such influences vary in accordance with the stage a film is at in its release life cycle, as films are released sequentially. Consumers consider risk through evaluating the economic outlay required as well as the perceived risks. Hennig-Thurau et al. (2006) draw on information search literature to illustrate that high levels of uncertainty can lead to expanded information search behaviour common in the service sector. This often leads film consumers to assess "quality" through clues such as the actors, directors, genre or critical reviews.

Much research has been carried out regarding the role of critics in predicting box office success (Austin 1983; Austin 1989; Cameron 1995; Eliashberg and Shugan 1997; D'Astous and Touil 1999; Holbrook 1999; D'Astous and Colbert 2002). Findings here are inconclusive but there would seem to be an overall acknowledgement that good critical reviews can help a film to achieve box office success. There has been evidence from Austin (1981) to show how the influence of critics and reviewers only impacted on the more "esoteric films" and therefore did not heavily impact on box office receipts in the main. Hsu (2006) links discussions of critical reviews with notions of legitimacy. In doing so, she draws on Zuckerman (1999) in highlighting the significance of critics as gatekeepers who screen products offered to audiences and in this way shape consumers consumption habits. Hsu (2006, 468) is particularly concerned with how critics established belief systems influence which "market categories" gain recognition within this process. Drawing on Becker's (1984) seminal work, Hsu (2006) examines the struggle which ensues in establishing legitimacy of critical reviews. In convincing the readers (and other cultural commentators) of the validity of one's schema of evaluation, critics increase their own legitimacy and as a by-product of this process, they influence wider notions of legitimacy of genres or classes of film based on the dominant discourse which they have established.

While much research has been carried out regarding the role of critics and awards in predicting box office success, the use of avids in marketing films has only recently been researched, in light of the rise of peer-to-peer file sharing and consumer reviews through social networking sites such as Facebook and MySpace. Fetscherin (2005) has found that quality concerns (e.g. lack of availability of high quality film viewing experience to date) have curtailed the level of peer-to-peer file sharing of film to a much greater extent than in the music industry. Social media and Web 2.0 have been changing the role of the expert review in the arts. This project will address the gap in the literature and the similar gap in practitioner knowledge regarding the impact of avid reviews through the use of social media.

Word of Mouth

Anderson (1998, 6) defines word of mouth as "informal communications between private parties concerning evaluations of goods and services". Word of mouth has long been a concern for marketers (Czepiel, 1974; Buttle, 1998). Much of the research (Mahajan et al. 2000) on word of mouth derived from studies examining the diffusion of innovation following Rogers (1962; 1983). Holmes and Let (1977) showed that product involvement resulted in word of mouth activity by consumers. Studies have shown a link between customer satisfaction and positive word of mouth (Bolton and Drew 1992; Schlesinger and Heskett 1991) as well as dissatisfaction and negative word of mouth (Westbrook 1987). What can be concluded by examining these studies is that word of mouth can be motivated both by satisfaction and dissatisfaction with a product or service.

One of the main problems which has arisen when studying the impact of word of mouth on consumer purchase decisions is how to measure word of mouth. The majority of studies follow Bass (1969) where it is assumed that sales data can indicate the impact of word of mouth. Such assumptions can be problematic as there are a number of factors which may be seen as contributing to sales which cannot be unpicked using existing research methods. Social network theory

has also been used in measuring word of mouth (Bansal and Voyer 2000). Smaller scale surveys have also been used in order to assess the impact of the group on decision purchases. An example of such a study is that undertaken by Reingen et al. (1984), which examined purchases among members of a US college sorority and found differences in congruency of choice between those that lived together and those that lived separately from fellow sorority members.

Word of Mouth and Film Choice

De Vany and Walls (1996) paper found that word of mouth had a significant impact on film performance at the box office. More recently, Moul (2007) concluded that consumer expectations are influenced by word of mouth, although it should be noted that Moul assumed that word of mouth would increase in line with the length of time that a film was on theatrical release, rather than actually measuring word of mouth. Moul and Shugan (2005) proposed that studios engaged in wide release strategies in the current market in order to minimize negative word of mouth. However, this can only be seen as one of the motivating factors behind the wide release.

Electronic Word of Mouth

The phenomenon of online consumer reviewing has been the focus of a number of recent studies. Chen and Xie (2008, 478) note the difference between "third-party product reviews" and consumer reviews in that the former focus on the technical performance of products while the latter focus on the relevance for customer situational usage. In transposing this to the realm of the film world, online consumer reviews can be seen as being less about analyzing the film as a

text, with reviews focusing on the fitness of a film for purpose. Is a comedy funny, a thriller thrilling and so on?

While studies of the influence of word of mouth have been hampered by methodological issues regarding the ability of researchers to accurately measure the impact of offline word of mouth, the advent of online reviewing has facilitated new methods of assessing the impact of what is now being termed "electronic word of mouth" (Hennig-Thurau 2004) or "online word of mouth" (Brown et al. 2007). Brown et al. (2007) draw on social psychology in order to develop a theoretical framework appropriate for assessing the impact of online word of mouth. In doing so, they cite Rheingold (1993) who stated that online communities resulted from sustained computer mediated public discussions between members of the community. Such interactions also illustrated discernable levels of human feeling to be considered social relationships. Dellarocas (2003) has indicated the power of online communities to influence a broad range of management activities such as brand development. This echoes the work of Kozinets (1999) in his studies of virtual communities. We can conclude that online, virtual communities should be considered by marketing managers when developing their overall marketing strategy.

Dellarocas et al. (2007) highlight the problems which have existed in measuring word of mouth in the offline context and the possibility of measurement in the online context. In a study which looks specifically at the impact of online reviews on performance of films at the box office, Dellarocas et al. (2007) propose a number of diffusion models which can be used in forecasting film performance by factoring in online product reviews increases the accuracy of the model. This builds on a number of studies based on diffusion models which have focused on forecasting box office performance of films (Jedidi et al. 1998; Sawhney and Eliashberg 1996; Swami et al. 1999).

Biyalorgorsky et al. (2001) found that consumer word of mouth was restricted to bounded social networks. Such network boundaries may be seen as limiting the impact of word of mouth in the offline context as impact of word of mouth can be seen as linked to the density of the social network within which opinions were transmitted. However, the online environment allows for such social networks to

be more fluid and membership is less tied to offline social interaction. Brown et al. (2007) also highlight the need to examine online word of mouth through studying the impact of social structures on the network formation and the impact of this on the transmission of information. It is not enough to examine information transfer in itself, but it is necessary to assess the impact of strength of ties on influencing behaviour.

Method

In order to assess the impact of user-generated reviews on film choice, this study consisted of two stages of data collection. We wished to examine both the production (stage one) and the consumption (stage two) of online user-generated reviews and the first stage of the research focused on review production. A list of ten key sites which hosted online film reviews was compiled and these sites were studied in order to assess the volume of reviewing activity which took place over the course of one month (February 2008). From these, two sites were selected for further study, IMDB (Internet Movie Database) and Rotten Tomatoes. This was followed by an analysis of the 45 most active reviewers on each website. The most active reviewers were defined as those who were posting reviews more than 10 times per day. Following an analysis of the 45 most active reviewers on the IMDB site, we profiled the two most active reviewers on each site in order to gain insight into their motivation for posting reviews. We classified the films by release date, genre(s), age classification, country of origin, language, and if the review was positive, negative, or neutral. We also selected some significant quotes which emphasised the nature of these reviews and collated all of this information into a excel spreadsheet to allow for analysis. In order to interpret the data derived from the film reviewers on IMDB and Rotten Tomatoes, we used simple categorical analysis. Hence, basic statistics were used to classify the reviews in terms of certain

properties such as genre, valence of review, country of origin, and such.

The other element of our research focused on how film consumers engage with reviews of both professional and amateur reviews. We recruited a group of consumers aged between 25 and 40 through a facebook group and asked them to reflect on their film consumption over the course of two weeks. This group were chosen due to their engagement with Web 2.0 which went beyond merely posting a profile as our participants also used quizzes, posted videos and photographs and could be seen as active users of social media. This initial understanding was further tested with a younger group of consumers who were recruited through email. This group were between 20 and 24 and were all university students in London. There were few differences to be discerned between these two groups on first analysis.

In order to interpret the data collected from the facebook group and the emails, an interpretive approach was adopted and as such, the findings are a result of analyzing the narrative data collected via facebook and interviews. Using nethnography (Kozinets 2002), we asked participants to describe how they engage with reviews of both professional and amateur reviews. The narratives provided were interpreted by both authors independently and following this, interpretations were discussed in order to arrive at a common interpretation.

Findings

There are a multitude of sites, ranging from IMDB, Variety, Screen International etc which provide box office and other professional information and opinion alongside platforms for user-generated review and content. At the other end of the scale are countless sites which are specifically created in order to discuss films generally, particular stars/genres etc or lifestyle sites where films are discussed alongside other cultural products. Many of these sites do not contain

substantial film reviews and are sites where consumers exchange gossip, some opinion and many "off topic" interactions take place.

In assessing the activity of non professional reviewers, we chose the two most active reviewers on IMDB (Moviewizguy and Zetes) and Rotten Tomatoes (Waterwizard 2005 and Bigpapasmurf) and profiled their reviewing behaviour over an eleven month period. They were chosen on the basis of the frequency of reviewing and the length and detail of reviews posted. Taking the reviewers for IMDB first, there one key difference between these two reviewers was that Moviewizguy has quite mainstream taste in comparison to Zetes and his reviews are generally for films seen in previews or immediately on release, with a minority of the films reviewed well after the release date.

Moviewizguy had posted 90 reviews over 11 months, and there was a clear bias towards positive reviews. The negative reviews were largely present for horror/thriller/fantasy films. We could draw on the economic psychological theory of losses looming larger than gains (e.g. Thaler 1985) as the reviewer watched these films but was rarely satisfied. Perhaps because of her/his particular interest in the genre, "failures" in that genre generated negative reviews. On the other hand, more mainstream, popular films were generally positively reviewed, and some such as *Slumdog Millionarie*, and *Wall-E*, which then went on to have Oscar success were among the most enthusiastically recommended. Four of the ninety films which the Moviewizguy reviewed were not in the English language. We can presume that this consumer is from an English speaking country and therefore their consumption of non English language films is largely in line with what would be expected from the general population. Having profiled the types of films reviewed by genre, country of origin, age classification, language, and the valence of the review, we need to follow this up by conducting an email interview with the reviewer. Questions which need to be answered include demographic details as well as information as to what motivates the reviewer to post reviews and general questions about their overall cultural consumption, and the interplay (if existing) between her/his reviews and peer group.

The second reviewer, Zetes, reviewed 141 films in the same time period. Many of the films Zetes reviewed were the same as those reviewed by Moviewizguy but the two usually did not agree with each other's evaluations. Compared to those of the Moviewizguy, there is a less obvious pattern within Zetes' reviews and more detailed statistical analysis is required in order to understand patterns which may occur. Overall, Zetes' film consumption is more eclectic than Moviewizguy's consumption with 17 of the films consumed not in the English language.

Turning to the two profiled reviewers for Rotten Tomatoes, Waterwizard 2005, who reviewed 94 films during this time period, and Bigpapasmurf, who reviewed 41 films during the same period, their film consumption also diverged from each other. While Waterwizard 2005 consumed a wide variety of film in terms of country of origin and genre, Bigpapsmurf had a clear preference for American films and for "action" and "thriller" genres. In common with the IMDB reviewers, the majority of their reviews were positive. Again, their views diverged from each other and Bigpapasmurf had less mainstream taste (judged in relation to box office performance and awards received) than Waterwizard and the IMDB reviewers.Figures 1, 2, 3 and 4 illustrate the breakdown of review by strength of support for the film and it is clear that overall, irrespective of the consumption taste displayed in the text of reviews and evident through analysis of the films reviewed by genre and other characteristics, reviews were positive. In the case of Zetes, he provided reviews which can be classified as either positive or strongly positive for 66 percent of films reviewed and 18 percent as either negative or strongly negative. Moviewizguy classified 57 percent positively and 24 percent negatively. Waterwizard 2005 classified 63 percent of films reviewed positively and 27 percent negatively while Bigpapasmurf classified 61 percent positively and 20 percent negatively.

Positive	69
Neutral	27
Negative	30
Strongly Negative	3
No Feedback	2
Total	141

Figure 1: IMDB reviews, Zetes

Strongly Positive	5
Positive	54
Neutral	14
Negative	15
Strongly Negative	1
No Feedback	1
Total	90

Figure 2: IMDB reviews Moviewisguy

Strongly Positive	8
Positive	51
Neutral	10
Negative	24
Strongly Negative	1
Total	94

Figure 3: Rotten Tomatoes reviews, Waterwizard 2005

Positive	25
Neutral	8
Negative	8
Total	41

Figure 4: Rotten Tomatoes reviews, Bigpapasmurf

There are a number of interesting observations to be made regarding the reviewing behaviour of the four reviewers studied. Firstly, the divergence in their assessment of the film (positive or negative impression) cannot be assessed in the way in which online reviews for other services can be assessed. Film consumption can be seen as more like a product in this sense than a service. Reinstein and Snyder (2005); Wolinsky (1995) link film reviews to other types of experience of goods where the product cannot be tested prior to consumption. As shown above, there has been a lot of attention paid to the impact of critical reviews on experiential goods and Hsu (2006) highlights the process of legitimation that critics engage in in order to establish themselves as gatekeepers of taste. Unlike conventional products, user-generated reviews for film do not focus on objective factors such as "did it work". Rather, film reviews, like those for hotels, restaurants etc must be assessed in line with the preferences of the reviewer. Hsu (2006) establishes the impact of professional reviewers on establishing their own legitimacy and therefore the increase in their ability to influence consumer choice and taste. What is missing from existing literature is transforming this study to the realm of the user-generated review. By analysing the non-professional reviews posted on IMDB and Rotten Tomatoes, we can concur with Hsu's (2006) findings regarding professional reviewers' attempts at establishing legitimacy and the clear taste patterns exhibited within this reviewing process. The next stage of the data collection and analysis sought to establish the impact which user-generated reviews have upon film choice in order to assess the level of legitimacy established by non professional reviewers.

Film Consumers and User-Generated Reviews

Existing studies have established that critical reviews from professional reviews can be seen to have some impact on film performance, although many of the studies have not been able to distinguish

between causal and predictive measures. However, Reinstein and Snyder (2005) developed an analytical approach which overcame such a distinction and found that positive reviews did have marginal impact on film performance at the box office and that this impact was particularly true in the case of drama and films receiving marginal release. Of course, the data which informed this study was US data so there may be a cultural bias in the results. Our study extends the definition of the critical review and in doing so, merges notions of critical reviews with word of mouth.

Our findings suggest that in general, film consumers do not consult non professional reviews in selecting a film that they will watch at the cinema. Most respondents were selective in being influenced in film choice and still rely on conventional marketing materials in selecting films to view at the cinema. We can tentatively conclude that there are two categories of film consumers based on their use of reviews. Firstly there are "*independents*" who are influenced by a range of marketing communications which promote the film and are only influenced by the opinion of co-consumers for that particular film, i.e. if they watch the film with a friend or partner they discuss their choice with them alone. The independents like to consult reviews and discussion forums once they have watched the film and use these to expand their consumption of films which feature actors, directors or other creative personnel associated with these films. Film appears to be an important part of their cultural consumption and following du Gay et al.'s (1997) notion of circuits of cultural consumption, the consumption of the film is only one element of their engagement with individual films and the wider filmscape. The second category is the "*cautious*" who consult reviews to try to avoid cognitive dissonance but where marketing communications can overcome reviewer comments. The cautious only consider professional reviewers' comments in their selection process, rather than user-generated reviews.

What is significant from our findings is that consumers use social media related to film in order to extend their film consumption experience after watching a film and this may have potential for greater revenue generation within what Anderson (2006) referred to as the long tail economy. While film viewing choices at the cinema are

influenced to some extent by professional reviewers, and to a larger extent by those accompanying the film viewer to the cinema or their partners, user-generated reviews are used by film consumers in selecting films to be consumed at home. Therefore, while new releases may rely on more traditional marketing tools such as advertising and promotion, existing film catalogues may be exploited through electronic word of mouth. This online process, where consumers engage with online communities which are unknown to them, mimics offline word of mouth behaviour where consumers existing social networks inform their choices for home viewing of films. Home viewing can be seen as both opportunistic; viewing as a result of a film being aired on television or being invited to view by a friend or partner, and part of a more planned process of consumption, which can be linked to notions of film heritage. The second type of consumption is where the mining of online data can be seen as influential. Online communities of consumption (Kozinets 1999) can be formed based on discussions of film heritage. This can also be linked to notions of cultural capital developed by Bourdieu (2003) as film consumers can use online reviewing sites in order to amass their cultural capital. Consuming film is complemented with exposure to film heritage. This finding may indicate why IMDB is seen as a key destination for film consumers, as IMDB combines technical information about the film in terms of cast and crew details, genre classification, age classification and so on as well as reviews for the films. This site may be seen as more valuable in efforts to increase cultural capital than those hosting non professional reviews alone.

We can conclude that for many, including both active reviewers and mere consumers, film consumption goes beyond merely watching films. Further research needs to be undertaken in order to understand the relationship between past film consumption and future consumption. In terms of contribution to film marketing theory, this research challenges existing notions of the power of critical reviews. Firstly, we go beyond the professional to look at user-generated reviews and secondly, we can distinguish between the influences of social media on cinema attendance versus other types of film consumption. As we now accept that film is part of the long tail economy, we could argue that social media and reviews and discussions

taking place within such media are significant for films in the post theatrical release stage. As the majority of earnings are accrued at this stage, further investigation of this issue is warranted. The dominance of the English language in popular film is paralleled in examining popular social media sites. This research would also assess the influence of country of origin (which brings in issues of language) on propensity for films to be reviewed and the nature of such reviews.

References

Anderson, C. 2006. *The Long Tail: Why the Future of Business Is Selling Less of More*. New York: Hyperion.

Anderson, E.W. 1998. "Customer Satisfaction and Word of Mouth." *Journal of Service Research* 1(1): 5–17.

Austin, B.A. 1981a. "Rating the movies." *Journal of Popular Film and Television*, 7(4): 384–399.

---. 1983. "Critics' and Consumers' Evaluation of Motion Pictures: a Longitudinal Test of the Taste Culture and Elitist Hypotheses." *Journal of Popular Film and Television*, 10: 156–167.

---. 1989. *Immediate Seating: A Look at Movie Audiences*, Belmont, CA: Wadsworth.

Cameron, S. 1995. "On the Role of Critics in the Cultural Industry." *Journal of Cultural Economics*, 19(4): 321–331.

Bansal, H.S., and P.A. Voyer. 2000. "Word-of-Mouth Processes Within a Services Purchase Decision Context." *Journal of Service Research*, 3(2):166–77.

Bass, F.M. 1969. "A New Product Growth for Model consumer Durables."*Management Science*, 15(5): 215–227.

Biyalogorsky, E.E., and B.L. Gerstner. 2001. "Customer referral management: Optimal reward programs."*Marketing Science*, 20(1): 82–95.

Bolton, R.N., and J.H. Drew. 1992. "Mitigating the Effect of Service Encounters." *Marketing Letters* 3(1): 57–70.

Brown, J., A.J. Broderick, and N. Lee. 2007. "Word of Mouth Communication Within Online Communities: Conceptualising the Online Social Network." *Journal of Interactive Marketing* 21(3): 2–20.

Buttle, F.A. 1998. "Word of Mouth: Understanding and Managing Referral Behavior." *Journal of Strategic Marketing* 6 (3): 241–254.

Czepiel, J.A. 1974. "Word-of-Mouth Processes in the Diffusion of a Major Technological Innovation." *Journal of Marketing Research* 11(2): 172–180.

D'Astous, A., and F. Colbert. 2002 "Moviegoers' Consultation of Critical Reviews: Psychological Antecedents and Consequences." *International Journal of Arts Management* Fall edition.

D'Astous, A., and N. Touil. 1999 "Consumer Evaluations of Movies on the Basis of Critics' Judgments." *Psychology and Marketing* 16(8): 677–694.

Dellarocas, C. 2003 "The Digitalization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms." *Management Science* 49(10): 1407–1424.

du Gay. P., S. Hall, L. Janes, H. Mackay, and K. Negus. 1997. *Doing Cultural Studies: The story of the Sony Walkman* Milton Keynes: Open University; Thousand Oaks, CA: Sage.

Durie, J., A. Pham, and N. Watson. 2000. *Marketing and Selling Your Film Around the World*. Los Angeles: Silman-James Press.

Eliashberg, J., and S.M. Shugan. 1997 "Film Critics: Influencers or Predictors?" *Journal of Marketing* 61: 68–78.

Fetscherin, M. 2006 "Movie Piracy on Peer-to-peer Networks – the Case of KaZaA." *Telematics and Informatics* 22:57–70.

Hennig-Thurau, T., K.P. Gwinner, G. Walsh, D.D. Gremler. 2004 "Electronic Word of Mouth via Consumer-opinion Platforms: What Motivates Consumers to Articulate Themselves on the Internet?" *Journal of Interactive Marketing* 18(1): 38–52.

Hennig-Thurau, T, V. Henning, H. Sattler, F. Eggers, M.B. Houston. 2007 "The Last Picture Show? Timing and Order of Movie Distribution Channels." *Journal of Marketing* 71: 63–83.

Holbrook, M.B. 1999 "Popular Appeal versus Expert Judgments of Motion Pictures." *Journal of Consumer Research* 26: 144–155.

Holmes, J.H., and J.D. Let. 1977 "Product Sampling and Word of Mouth." *Journal of Advertising Research* 17(5): 35–40.

Hsu, G. 2006 "Evaluative Schemas and the Attention of Critics." *Industrial and Corporate Change* 15(3): 467–496.

Litman, B.R. 1983 "Predicting Success of Theatrical Movies: An Empirical Study." *The Journal of Popular Culture* 16(4): 159–175.

Rogers, E.M. 1962. *Diffusion of Innovations*. Glencoe: Free Press.

---. 1983. *Diffusion of Innovations*, 3rd ed. New York: Free Press.

Reingen, P, B. Foster, J.J. Brown, and S. Seidman. 1984 "Brand Congruence in Interpersonal Relations: A Social Network Analysis." *Journal of Consumer Research* 11(3): 1–26.

Schlesinger, L.A., and J.L. Heskett. 1991 "The Service-Driven Service Company." *Harvard Business Review* 69: 71–81.

Thaler, R. 1985 "Mental Accounting and Consumer Choice." *Marketing Science* 4(3): 199–214.

Westbrook, R.A. 1987 "Product/consumption-Based Affective Responses and Postpurchase Processes." *Journal of Marketing Research* 24(August): 258–70.

Liability of Online Auction Sites for Infringing "User-generated Content": Have IP Owners Lost the Battle but Not the War?

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Abstract

To police intellectual property rights, IP holders have combined actions aimed towards the direct infringers but also, increasingly, actions directed towards those sites that are providing user-generated content an outlet. In the EU, it is under the auspice of Directive 2000/31/EC of 8 June 2000 on Electronic Commerce (E-commerce Directive) that most assaults, launched by IP owners, have been defended. By contrast to the position in the USA, IP owners are still fighting a bloody war and whilst some battles have been lost, they also emerged triumphant on a number of occasions. This paper reviews a number of decisions relating to the liability of the online auction site eBay, emanating from the German (Rolex), French (Hermès, Louis Vuitton and Christian Dior Couture) and Belgian (Lancôme) courts. The author discusses the potency of Directive 2000/31/EC as a shield against IP owners' attacks and aims to demonstrate that the French and German decisions are misguided interpretations of Directive 200/31/EC on two main grounds (namely the selective or distributive application of article 14 and the scope of article 15). The author also suggests that intellectual property rights owners may need to draw a new battle plan and deploy their activity towards legislators in order to lobby for a change in the liability regime of online auction sites if they want a real prospect of winning the war.

Introduction

Whereas the rise of "user-generated content" (UGC) is most noticeable on sites such as Wikipedia, Facebook or Youtube it is also making an impact on online auctions sites. Whilst, for many years the auction, as a method of sale, has been reserved for a handful of specialist people present in the auction room, the evolution of technology such as telephone, television and more recently the Internet has brought the auction process within the grasp of the general public (Riefa 2008a, 167). The most noted of online auction sites is eBay, which counts a staggering 86.9 million active users worldwide, 1 billion page views per day, and reports a net income in excess of $1.78 billion for 2008.[89] Today the popularity of online auctions for the sale of everyday items is unprecedented. Yet, despite their name,

89 Figures for the fourth quarter and full year results 2008, available online: http://files.shareholder.com/downloads/ebay/593094761x0x266606/581a206a-78df-4c3c-81c4-4a8b57e62440/eBay_FINALQ42008EarningsRelease.pdf

online auction sites are not traditional auctioneers (Riefa 2008a) and limit their role to that of a trading platform, which does not take possession of the goods nor control them (Peckham 2005, 981). In addition, eBay does not act as an agent for the sellers using its site, which means that traditional liabilities attached to the role of the auctioneer, such as authentication of the goods, are not applicable to eBay (Riefa 2008a, 174–175).

Rather the site is an outlet for user-generated content. UGC can be broadly defined to include not only the content that users of a service create, but also the by-product of online activity as Greg Latowska explains (2007-2008, 894–895). In the case of eBay, users generate content in the advertisement for the goods or services offered for sale, as well as the feedback left after each sale.[90] Also, some of the items on sale can be classed as UGC, for example, in the case of bootlegs or music mash-ups to name but a few.[91] But on eBay, as on many other web 2.0 websites, a variety of content of different origins co-exist that can trigger different types of liability. Indeed, whilst listings are user-generated content merely hosted by the site, the general architecture of the site, the categorisation of items for sale and the selection of items that are featured on the front page to boost sales and attract users to eBay are all within the control of the online auction site who acts as an editor (Proust 2007, 29).

When eBay is used as a channel for the sale of products or services infringing intellectual property rights, the question of the liability of the online auction site takes centre stage. On the battlefield for the protection of IP rights, copyright and trademark holders' task, whilst it has always been a difficult one, has got thornier. This is because the digital "revolution" has brought intellectual property right infringements within the reach of individuals. Business models based on user-generated content are flourishing, bringing commercial opportunities[92] but providing the means for such infringing materials

90 Note that in the case of feedback, liability for defamatory materials may be actionable, adding a supplementary liability regime to choose from.

91 The browsing history and data on purchasing patterns collected by the site and the user web browsers can be seen as content also generated by eBay users but as a by-product of their online activity on the site. We will only focus on UGC directly produced by eBay users.

92 With commercial rewards also come a number of potent legal risks as noted by Miles (2007).

to be distributed and sold the world over. The surge in the distribution of illegal and/or infringing products on the Internet (Peckham 2005, 977; Sunderji 2005, 909; Bond 2009, 128) is being met by strong opposition from IP owners who have combined actions aimed towards the direct infringers but, also actions directed towards those sites that are providing user-generated content an outlet. This is because, according to Osborne, "*suing end-users for online infringements is usually not economically viable – and in any event, may not be good PR. Many IP rights owners, therefore, look to enforce their rights against site owners rather than users*" (2008, 555). Actions against online auctions sites and other user-generated content sites have, as a result, multiplied in recent years.

In the war, that has been raging for a number of years, opposing intellectual property rights owners to eBay, a series of key battles have taken place, the most recent ones occurring during the summer of 2008. Liability in those cases was set into motion, concurrently or alternatively on the basis of trademark or copyright infringement and by engaging the liability of intermediaries – copyright and trademark holders complaining that the online auction site had failed to police user-generated content sufficiently, so as to avoid any infringement occurring. EBay has used the various safe harbour provisions afforded to them by "takedown" legislation (Osborne 2008, 555) as a shield against liability. In the USA, eBay has been able to inflict a bitter defeat to intellectual property owners on all counts. Indeed, eBay efficiently relied on the application of the safe harbour provision of the Digital Millennium Copyright Act (DMCA) *in Hendrickson v. eBay Inc.*[93]. In the cases of *Randall Stoner v. eBay Inc.*[94] and *Lars Gentry v. eBay Inc.*[95], the online auction site was equally successful and found to be immune from any liability on the basis of section 230 of title 47 of the United States Code which creates a federal exemption to any state law that would hold computer service providers liable for information originating with a third party. More recently, in the well publicised case of *Tiffany (NJ) Inc* and *Tiffany*

93 2001 WL 1078981, C.D. Cal. 2001, Sept 4, 2001.

94 California Superior Court, City and County of San Francisco, Department Number 304, No.305666, Order Granting Defendant's Motion for Summary Judgment.

95 121 Cal. Rptr. 2d 703 (Cal App. 2002).

and Company v eBay Inc[96], the court ruled that eBay's use of jewellery company Tiffany's trademarks was protected under nominative fair use and rejected claims that eBay should be liable because the site knew or had reason to know of the infringement at issue and should have done more to stop it occurring (Riefa 2008c, 16).

In the EU, it is under the auspice of Directive 2000/31/EC of 8 June 2000 on Electronic Commerce (E-commerce Directive)[97] that most assaults, launched by IP owners, have been defended. By contrast to the position in the USA, IP owners are still fighting a bloody war and whilst some battles have been lost, they also emerged triumphant on a number of occasions. In France, in the cases *of Société Hermès International c/Cindy F., S.A eBay France et eBay International AG*[98] (Hermès), *Christian Dior Couture SA c/eBay Inc. et eBay International AG*[99] (Christian Dior Couture) and *SA Louis Vuitton Malletier c/eBay Inc. et eBay International AG*[100] (Louis Vuitton), the Troyes' *Tribunal de Grande Instance* and the Paris' *Tribunal de Commerce* refused to apply Directive 2000/31/EC and found eBay liable for the sale of fake goods on its French site, under articles 1382 and 1383 of the French Civil code, ordering eBay to pay astronomical damages. In the military arsenal, those French decisions can be equated to a nuclear bomb that exploded in the online auction world and could ripple across all UGC sites. Those decisions if not reversed in appeal, could open the floodgates and ultimately force eBay to tightly control sales taking place on its web site (Riefa 2008b, 13). In Germany, in the case of *Rolex SA v. eBay GmbH*[101] (Rolex), the court accepted that eBay was protected under the E-commerce Directive, but should have some obligation to stop recurring infringements. However, in the most recent decision of all, the Brussels' *Tribunal de Commerce in Lancôme Parfums et Beauté & Cie v. eBay International AG*[102] (Lancôme) found in favour of eBay

96 United States District Court Southern District of New York, Case N°04 Civ 4607 (RJS), 14 July 2008.

97 Electronic Commerce Directive 2000/31/EC of 8 June 2000, OJEC L178/1, 17.07.2000.

98 TGI Troyes 04 juin 2008.

99 TC Paris, 1ère Ch B, 30 juin 2008.

100 TC Paris, 1ère Ch B, 30 juin 2008.

101 Bundesgerichtshof (*Rolex SA v. Ebay GmbH*) (I ZR 304/01).

102 TC Bruxelles 31 July 2008, RG n° A/07/06032.

and exonerated the site from all liability regarding the sale of infringing Lancôme products under the E-commerce Directive.

This paper will review the potency of Directive 2000/31/EC as a shield against IP owners' attacks. We will aim to demonstrate why the French and German decisions appear to be a misguided interpretation of Directive 200/31/EC on two main grounds (namely the selective or distributive application of article 14 and the scope of article 15) and suggest that after having lost so many battles, intellectual property rights owners may need to draw a new battle plan and deploy their activity towards legislators in order to lobby for a change in the liability regime of online auction sites.

Liability under Article 14 of Directive 2000/31/EC Should Be Applied Distributively

In the recent French and Belgian cases, the decisions revolved around the dual legal classification of eBay as a technical intermediary hosting information and/or a broker enabling auction sales[103], both subject to different liability regimes under French and Belgian law. The question in point was to decide if Directive 200/31/EC and the other liability regimes should be applied selectively or rather distributively. Indeed as we have already mentioned in our introduction, on most websites contents of different origins co-exist. The question is therefore to decide if the role that an intermediary plays in alleged IP infringements need to be envisaged as a whole or can be dissected to apply to each discreet activity the liability which it commands. Whilst the French decisions have opted for a selective application, the Belgian decision makes a compelling case for distributive application.

103 In France, under article L 321-3 of the Code of Commerce, the activity by which one brokers auction sales online is outside the scope of traditional auctions, where the auctioneers is subject to a strict liability regime for the sales taking place via its intermediary. The brokerage activity is called "courtage aux enchères réalisées à distance par voie électronique".

In France, until now, eBay appeared relatively safe hiding behind article 6.I.2, of *Loi du 21 juin 2004 relative à la confiance dans l'économie numérique* (LCEN)[104], which shields technical intermediaries from any liability incurred from the hosting of information if they act promptly in removing any litigious material upon notification, or in situation where it would have been apparent to the provider that the information or activity was unlawful (Riefa 2008b, 13). Whilst hosts are exempt from liability under article 6.I.2, which implements article 14[105] of Directive 2000/31/EC of 8 June 2000, auction brokers are subject to a general liability regime under article 1382 and 1383 of the French Civil Code. In Christian Dior Couture and Louis Vuitton, the French Commercial Court opted for the latter liability regime, with important consequences. The Court indeed rejected the legal classification of eBay as a simple host explaining that it is manifest that eBay is a broker and the defendant cannot benefit from the classification of technical intermediary as defined in article 6.I.2 LCEN, because eBay deploys a commercial activity remunerated on the sale of products via auctions and does not limit its role to a pure hosting service. The Court went further explaining that the essence of eBay's role is the intermediation between sellers and buyers and that eBay provides tools in order to specifically ensure the promotion and development of sales on the site. To this end, the Court cites the use of sale management tools, eBay "shops" and the possibility to become a Power Seller. The Court concluded that eBay was therefore a key actor of the sales taking place on the site and played a very active role especially with regards to advertising

104 Loi n°2004-575.

105 Article 14 states:

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

the site's activities, which in turn generates commissions to its profit. The Paris Commercial Court considered that the hosting activities were an integral part of eBay's role as an intermediary. Moreover, it noted that the hosting service was only offered in order to broker auctions and generate the allied commission for this role. As a result, eBay's primary legal status was that of a broker and not that of a host, and was therefore subject not to the protection of article 6.I.2 LCEN, but to the general liability regime under article 1382 and 1383 of the French Civil Code.[106]

The decisions are interesting in that the Court does not dispute that web hosts should have immunity under the E-commerce Directive, but simply gives a narrow interpretation of this notion and classifies eBay's activities as outside the scope of the provisions, by opting for a selective application of the liability regime. The Court did so, carefully considering the role eBay plays in the posting and the control of content on the site and evaluating which role was most prominent and should dictate the overall liability regime. This seems to be a recurrent French position as the earlier decision from the *Tribunal de Grande Instance* of Troyes in the case of Hermès also found eBay liable (jointly with the seller) for the sale of counterfeit Hermès handbags despite the fact that it had acknowledged that eBay played two different roles: host and editor of the service. Similarly in this case, although distinguishing between two types of liability the court concluded to the application of just the one and decided that eBay was no ordinary hosting service and that the liability regime of an editor should apply.

106 Article 1382 of the French Civil Code establishes that any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it. Article 1383 states that everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by its imprudence. Therefore for liability to occur one must prove a fault, damage and a causal link. In Christian Dior Couture and Louis Vuitton, the court found that eBay had committed grave faults by supporting and amplifying the commercialisation of counterfeit products on a large scale and had violated a number of obligations it owed third parties. This includes the obligation to ensure that its activities did not generate illicit acts and the obligation to verify that commercial vendors using its web site are duly registered with the competent administrations. In addition, the Court found that eBay did not respect its general obligation to monitor activities. It transpires that many sales advertising fake goods do so openly and were easily identifiable. Finally the Court noted that eBay had engaged its liability for having refused de put in place efficient measures destined to combat fraud, like those forcing vendors to produce a certificate of authenticity or an invoice for the goods, or by closing down any infringing account and taking down all pages flagged up by Louis Vuitton and Christian Dior Couture.

Such stance if not reversed, could change the eBay's business model forever and provide IP owners with a clear opportunity to win the war on infringers by being able to rely on intermediaries to provide a control gate for all content displayed on their site. The IP owners' army would have new recruits to wage war on infringers in an environment where the boundaries between makers and users, users and infringers are blurred, and where fighting individual infringers is both costly and often inefficient. The decisions will not only impact the online auctions' landscape, forcing costly tighter controls, but may also ripple way beyond their boundaries. Indeed, the interpretation given by the French Courts in Hermès, Louis Vuitton and Christian Dior Couture suggest that the role of an intermediary hosting content would now have to be considered in context, looking at the wider picture of the commercial activity being conducted. If the hosting service is only one aspect enabling the activity, it appears that no immunity will be granted to the service provider. Indeed in all three cases the Paris Commercial Court stated that eBay could not benefit from the protection of Article 6.I.2 LCEN, because the site "*did not limit its activities to that of a host, which would entitle eBay to benefit from the provisions applicable to hosting services*". This can be seen by some[107] as consistent with the objectives of the E-commerce Directive. Indeed, the justification for opting for an absence of liability was based on the absence of control exercised by the provider. Recital 42 suggests that the exemptions from liability established in the Directive only concern activities of mere technical, automatic and passive nature, implying that "*the information society service provider has neither, knowledge of, nor control over the information which is transmitted or stored*". As a result, if one was to follow this interpretation, in a situation where the host has some control, no immunity should be granted.[108]

Yet, the French position needs to be contrasted with the decision from the Brussels' *Tribunal de Commerce*, in Lancôme, of 31 July

107 We do not agree with this interpretation as we feel Recital 42 does not concern hosting but rather caching and mere conduit activities.

108 We will leave aside the difficult task of defining with some level of accuracy where this tipping point between control and absence of control should be.

2008, where the judge opted for a distributive application of the liability incumbent to online auction sites. In what we believe is a more powerful and convincing decision, the Court concluded that eBay was not liable for any IP infringements occurring on its site, providing that, according to article 20 of the *Loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information (loi sur le commerce électronique)*, which implements article 14 of Directive 2000/31/EC, it did not have knowledge of any infringement and that upon acquiring this knowledge it acted promptly to remove any infringing materials.

The Court reached this conclusion noting that despite Directive 200/31/EC, section 4 being entitled "liability of intermediaries", the formulation of articles 12 to 14, clearly shows that the exemption concerns some type of services provided by intermediaries rather than identify rigid categories of intermediaries. Indeed, articles 12 to 14 concern the activities of mere conduit, caching, and hosting. Whilst Lancôme was pointing to eBay's activities [which include assisting in redacting advertisements, directing users to other similar products or products from the same seller and editing terms and conditions and the advertising on its website (Bond 2009, 127), arguing that it would be erroneous and artificial to classify eBay as a host, when it is clear that the activities of this economic agent go grossly beyond the scope of a simple hosting service for third parties, the Court rejected such a view. First, it did so because, the only activities criticised by Lancôme were the hosting activities conducted by eBay. Indeed, the court noted that in their submission, Lancôme only referred to listings of offers to sell and not, to the presence, on the eBay site, of tools for which eBay would have direct responsibility. Second, the court convincingly demonstrated that if at the outset of e-commerce, it was possible to conceive that services of mere conduit, caching and hosting, could be provided by specialised providers, it quickly became apparent that those services also proposed other services of a different nature, in parallel, with the consequence, that e-commerce services now have to be envisaged as aggregate services. Indeed, citing Proust (2007), the court explained that eBay was an editor liable for the site's graphic and commercial environment surrounding the listings, but was also at the same time a host

for the information contained in the listings themselves. Proust observes, and we agree with him, that it is potent that some Internet sites have a composite nature that it would be completely arbitrary to reduce to a sole classification. In this case, a mixed classification has to prevail and the judge should apply the special legal regimes distributively.

As a result, under Directive 2000/31/EC as well as Belgian law, an intermediary who can show that it provides a service covered by articles 12 to 14, should benefit, for this service, from the exemption from liability granted by law. This is, the court said, regardless of any other activities this intermediary may provide on his site and regardless of the profits that are made by this activity. Intellectual property owners seem to therefore have lost their battle in front of the Belgian court and it is our view that they should also have lost it in France on similar grounds, because the decision provides "a" correct interpretation of the Directive. As a result, until the law is changed, liability for user-generated content should be applied distributively regardless of the other activities conducted by online auction sites.

The Absence of an Obligation to Monitor Information under Article 15 Should Prevail

The difficulties in the battle IP owners have to fight are compounded by the absence of an obligation for online auction sites to take active steps to avoid the hosting of illegal UGC. Indeed, in accordance with Article 15 of Directive 2000/31/EC of 8 June 2000, providers do not have an obligation to monitor the information, which they store. They also do not have an obligation to actively seek illegal activity taking place on their site.[109]

109 Article 15 states:

Whilst diligent IP owners may provide takedown notices to eBay via the VeRO programme, those appear to be only of a limited effect and unable to deter similar future infringements. The VeRO (Verified Rights Owner) programme is a comprehensive set of procedure put in place by eBay to attempt to avoid infringement. VeRO allows intellectual property rights' owners to request the removal of listings that offer an item (or contain material) that allegedly infringes a claimant's copyright, trademark or other intellectual property rights (Peckham 2005, 980). The notices have limited effect because a host can only be liable if, according to article 14 (1):

> (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
>
> (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

The main question here, in the absence of a definition in the Directive of the notions of "actual knowledge" and "awareness of facts or circumstances from which the illegal activity or information is apparent" is to determine if, to be liable, eBay must be notified of each re-occurrence or if once notification has occurred, this will be enough to constitute awareness and therefore engage eBay's liability should further infringement occur. The difficulty, of course, is that if one considers that one initial notification is enough to prevent any further infringement, this would necessarily imply that eBay has to monitor its site in order to detect new similar infringements. Yet this

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

is contrary to the letter of article 15 (1) according to which, "*Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*" (Hardouin 2007, 2).

In the German case of Rolex, the court went beyond what we believe are the boundaries of article 15, recognising that eBay should, in addition to deleting the specific offers of forged watches drawn to its attention (Hartwig 2005, 322), have some obligation to stop recurring infringements and take down further clearly recognisable infringing offers. The Court, in 2004, overturned previous decisions including a decision from the Court of Appeal in Düsseldorf, which considered that eBay could not be held liable for any sale of fake Rolex watches, identified as such on its site, because the intermediary was not in fact aware of the specific listings containing fake items. In this case, Rolex was asking eBay to monitor and filter new listings concerning "noble replicas" or "deceptively similar to the original" Rolex watches and stop any such listing from appearing on the eBay.de website. The Düsseldorf Court rejected eBay's liability on the basis that one could not impose an obligation to monitor content on the intermediary in application of Sections 8(2), 11(1) (1) and (2) TDG[110]. However, the Federal Supreme Court, considered that whilst "*eBay could not be expected to examine every offer for potential unlawful content, it was nonetheless effectively participating in the sale of pirated goods via the commission it was due*." The Court based its decision on Art 14(3) of Directive 2000/31/EC which states that the absence of liability for hosting services shall not affect the possibility for a court of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for the member state of establishing procedures governing the removal or disabling of access to information. As a result, the Court decided that eBay ought to prevent not only any specific listing whenever its at-

110 Which implements Directive 2001/31/EC.

tention is drawn to it, but also use a filtering software to prevent any further infringement of the same type.[111]

At the time, the decision was considered to have provided assistance to brand owners and have the potential to significantly impede the operability of online-auction houses and other fields of e-commerce (Hartwig 2005, 322). However, this German decision should not be given such significance because it is objectionable on at least two counts.

First of all, this is because the decision had limitations as to its scope and suffered from a lack of clarity rendering it difficult to apply in practice. The decision only applied to adverts where the item was listed showing that it was clearly offering a fake for sale. The case concerned items described as noble replicas or deceptively similar to the original. It therefore was unable to have much impact on sales where the seller does not reveal the true nature of the item. Further, the court indicated that:

- EBay could not be held liable for listings that are infringements to the Rolex trade mark but could not be spotted by the use of the filtering software;
- Claims against eBay were limited to injunctive relief;
- Claims for damages were excluded;
- EBay was under no obligation to prevent against trademarks infringement and the initial listing would still be for the trademark owner to bring to the attention of eBay.

In addition, the Court did not provide much guidance as to what type of monitoring/filtering software will be satisfactory, and whilst it mentioned some criteria to be used those were rather imprecise (although the Court did mention low price and the suggestion that an item is a fake).

Second of all, the decision should not provide IP owners with the victory expected because the interpretation of article 14(3) of Direc-

111 Interestingly, it was not the first time that such an outcome was reached in Germany. See, *Montres Rolex v. Ricardo*, I ZR 304/01.

tive 2000/31/EC seems erroneous. Indeed, article 14(3) does not compete with article 15 but simply allows a court to require termination or prevention of a particular infringement as opposed to provide basis for preventing future general infringements. The reference to member States establishing procedures to remove or disable information has been used in France for example, in article 6.I.5 LCEN, where the content of a notice to take down is closely defined. It was not as the German interpretation seems to suggest to enable any court to dictate to a particular intermediary what monitoring activities need to occur.

Also, to try and impose monitoring obligations, however reduced, they may be was to go against the letter and spirit of article 15, a practice that the recent Lancôme decision clearly rejects. In this case, Lancôme argued that once an infringing offer or a suspicious' vendor behavioural pattern was brought to eBay's attention, the site could not limit itself to eliminate a specific offer but needed to take measures to avoid that such an offer found its way on the site again. The court rejected such a claim stating that trying to add any other obligation other than that to act promptly to take down infringing materials on having knowledge of them was contrary to the specific liability regime applicable to hosts under the Directive. The Court, citing the legislative preparatory materials to the Belgian law implementing article 15, explained that no further obligation could be imposed: no general monitoring obligation, nor any obligation to probe or put in place any filtering procedure or advisory obligation. The court, however, rightly points out that the specific liability regime applicable to hosts is not offering a total immunity. Indeed, as Recital 40 of the Directive indicates: "*the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC*". Yet, if it can be anticipated that eBay as a host should deploy some activity by way of using state of the art technology to track infringing materials, it cannot be expected, as the German decision seemed to imply, that the site would be liable if it did not actively seek to stop further recurring infringements.

The chances of success under the application of Directive 2000/31/EC, despite a clear, albeit perhaps temporary victory in France and some encouraging progress in Germany, remain rather bleak in our view. This is because we view the French cases, in particular, as misguided interpretations of the Directive and constrained to a particular national legal landscape. Many authors indeed note the inconsistencies in the application of articles of the LCEN in a number of decisions concerning UGC sites and overtly criticise the courts for confusing hosts with editors, ignoring the hierarchy of the sources of law and acting *contra legem* (see for example Hardouin 2007 and 2008; Taïeb 2008; Proust 2007). As a result, one can hope that the decisions will be reversed in appeal or at the very least that the appeal court will seek a preliminary ruling in order to obtain some guidance on the interpretation of articles 14 and 15 of the Directive. In the mean time, we are tempted to conclude that the E-commerce Directive should provide online auction sites with an effective shield against IP owners' attacks.

Drawing a New Battle Plan to Win the War: for the Amendment of Directive 2000/31/EC to Impose some Liablity on Online Auction Sites in Case of Intellectual Property Law Infringements

Regardless of what one may think about the current state of the law, out of all the cases reviewed, it is the Belgian judge that has provided what we would describe as a just interpretation of Directive 2000/31/EC. Yet, we are not disputing that the law may need changing. However, if that is the case, fighting battles in the courtroom will have limited effects and IP owners as well as other interested parties (we think here of consumers) would be better inspired to review their battle plan and start alliances with legislators.

The fact that eBay profits financially from the sale of infringing items on its website has been raised many time as a reason for re-thinking its liability regime. Riefa comments: "*if the absence of liability seems perfectly justified for intermediaries who do not directly benefit from the illegal activities perpetrated, eBay's position appears different here. Indeed the site will receive commission even on the sale of counterfeit goods, thus benefiting from illegal activities taking place via its intervention. It should, in my view, be a factor taken into account when considering the liability or absence of liability of online auction sites*" (2008a, 187). The author further remarks that "*one cannot deny that the total absolution of the intermediary may be shocking when this intermediary provides a venue and benefits financially from the transaction […] and when it seems apparent that eBay is aware that frauds and illegal trades take place on the site, although they may not be aware of the exact items that would fit the fraudulent description*" (2008a, 188).

In France, a parliamentary report from 28 January 2008, the Dionis du Séjour/Erherl report, comments that the current regime is too lenient and needs to accurately reflect the diversification of hosting activities in the Web 2.0.[112] Yet, the EU legislator has on different occasions indicated that it did not feel a reform of the Directive was neither necessary nor desirable. Furthermore, a response from the European Commission to a Parliamentary question concerning illegal sales on online auction sites, dated 08 September 2006, pointed out that the Commission did not consider necessary at this stage to impose on online auction sites supplementary obligations. Yet, IP owners may find some comfort in the fact that following the bloody summer of 2008 the Commission may be willing to re-consider its position.

Legislative reform also seems necessary since divergence of interpretation in the scope of Directive 200/31/EC have been rather problematic to say the least, especially since the Directive was sup-

112 Rapport d'information n° 627, enregistré à la Présidence de l'Assemblée nationale le 23 janvier 2008 et déposé en application de l'article 86, alinéa 8, du Règlement par la Commission des affaires économiques, de l'environnement et du territoire, sur la mise en application de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, et présenté par M, Jean Dionis du Séjour et Mme Corinne Erherl, Députés. Available online, http://www.assemblee-nationale.fr/13/rap-info/i0627.asp#P377_51595, [10/04/2009].

posed to provide legal certainty for online service providers acting as intermediaries and expecting to be paid for doing so (Bond 2009, 125). Indeed, whilst some "*solutions prétoriennes*" can be welcomed, they can also be particularly dangerous as they may lead to a difference in regimes of online intermediaries' liability in different member states creating barriers stifling the functioning of the European market. Notwithstanding that clear divergence in liability regime can also encourage forum shopping.

As a result, if it is the case that the liability regime for online auction sites is no longer satisfactory, then it is for IP owners and other interested parties (consumers included) to review their battle plan and start putting pressure on legislators in order to prompt a review of the E-commerce Directive and a rewrite of ISP liability in Europe, rather than keep presenting judges with claims of infringement in the hope that they can be solved satisfactorily when in fact, the ammunition at the judge's disposal is simply not there.

Interestingly, in France, a process of reform has been started with the Dionis du Séjour/ Erherl report. We need to note that the report also indicates that the exoneration for liability of hosts should be applied pending a reform in the law, a recommendation clearly ignored by the French courts in the aforementioned cases. As we have seen, the French judges tried long and hard to find an alternative solution in order to be able to award damages and clearly show their disapproval at the eBay business model. Yet, as the report rightly points out, it is not for judges to create the law, but to apply it. The report calls for a rapid change in the law in order to define more precisely the limits within which the liability regime for hosting services is applicable. One of the strong contenders for such a change is the fragmentation of the legal status of a host, taking into account the degree of control, i.e. the nature, more of less active of the hosting activity.[113] The report therefore recommends the adoption of a law to adapt the LCEN to the diversification of hosting activities (taking into account, for example, the specificities of the hosting activity of collaborative sites or online auction sites).

113 The report indicates two types of UGC sites that show the need for an evolution of the law. The report contrasts collaborative sites to online auction sites.

Conclusion

When eBay is used as a channel for the sale of products or services infringing intellectual property rights, the question of the liability of the online auction site has taken centre stage in many courtrooms around the world. As we have seen, the conclusion as to whether or not online auction hosts should be required to actively police the sale of counterfeit goods, or rather if this burden should rest with IP owners themselves is somewhat uncertain. Too many decisions, especially in Europe, have come to different conclusions. This has created an insecure legal landscape for online auction hosts. Rather than wait for the will of the judges and in particular for the outcome of the appeal of the French decisions, IP owners ought to consider lobbying for a change in the E-commerce directive to push for a more balanced regime. The next question is of course to define what law should France and other EU countries adopt to police the liability of online auction sites for user-generated content. This is yet another battle to come…

References

Bainbridge, D.I. 2004. *Introduction to Computer Law*, Longman.

Bell, T.W. 2007-2008 "The Spectre of Copyism v. Blockheaded Authors: How User-generated Content Affects Copyright Policy." *Vanderbuilt Journal of Entertainment and Technology Law* 10: 841.

Bond, R. 2009 "Business Trends in Virtual Worlds and Social Networks – an Overview of the Legal and Regulatory Issues Relating to Intellectual Property and Money Transactions." *ENT.L.R* 20(4): 121–128.

Hardouin, R. 2007a "Observations sur les nouvelles obligations prétoriennes des hébergeurs – a propos de l'affaire Google Video, TGI Paris, 19 octobre 2007." *JURISCOM.NET*, 8 novembre 2007, available online www.juriscom.net, [10/04/2009].

---. 2008 "Affaire Hermès c/eBay: Quel régime de reponsabilité pour les éditeurs de services de communications au public en ligne?" *JURISCOM.NET*, 09 juin 2008, available online www.juriscom.net, [10/04/2009].

Hartwig, H. 2005 "Online Auctioning between Trade Mark and Consumer Protection." *European Intellectual Property Review* 27(9): 319–326.

Hetcher, S. 2007-2008 "User-generated Content and the Future of Copyright: Part 1 – Investiture of Ownership." *Vanderbuilt Journal of Entertainment and Technology Law* 10: 863.

Lastowka, G. (2007-2008), "User-Generated Content & Virtual Worlds." *Vanderbuilt Journal of Entertainment and Technology Law* 10: 893.

Miles, J. 2007 "Distributing User-generated Content: Risks and Rewards." *ENT.L.R*. 18(1): 28–30.

Osborne, D. 2008 "User Generated Content (UGC): Trade Mark and Copyright Infringement Issues." *Journal of Intellectual Property Law & Practice* 3(9): 555–562.

Peckham, D.J. 2005) "The Internet Auction House and Secondary Liability – Will eBay Have to Answer to Grokster?" *The Trademark Reporter*. 95: 977.

Proust, S. 2007 "Propos critiques à l'encontre de 'orientation actuelle de la jurisprudence face au développement du web 2.0." *Revue Lamy droit de l'immatériel* 30, août-septembre 2007.

Riefa, C. 2008a "To Be or Not to Be an Auctioneer? Some Thoughts on the Legal Nature of Online eBay Auctions and the Protection of Consumers." *Journal of Consumer Policy* 31: 167–194.
---. (2008b), "eBay Case: Liability of Third Parties for Sale of Goods." *E-COM LAW* June, 13–15.
---. 2008c, "*Tiffany (NJ) Inc. and Tiffany and Company v eBay Inc*", *E-COM LAW REPORTS* 8(01): 16–18.
Sunderji, F.S. 2005 "Protecting Online Auction Sites from the Contributory Trademark Liability Storm: a Legislative Solution to the *Tiffany Inc. v. Ebay Inc*. Problem." *Fordham Law Review*. 74: 909.
Taïeb, J. 2008 "Prestatires techniques de l'Internet: le sens des reponsabilités." *JURISCOM.NET*, 19 mai 2008, available online www.juriscom.net, [10/04/2009].

User-generated Content and Intellectual Property Rights: Rules Governing an Internet Service Provider's Liability in Europe and USA

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Abstract

Along with the main role of the Internet as a unique means of distance communication, it proves to be true that the user's technical ability of creating content online constitutes one of its crucial parallel functions, as well. In such a creative process, end users may interfere with existing copyrighted works by impairing one or more of the owners' exclusive rights. On the other side Internet Service Providers *facilitate* users' infringing activities by offering either a mere access to the net or by providing them with hosting services for relevant actions to take place. This paper examines the question of whether an Internet host provider is liable for copyright infringement for any content originated by the user, by offering a deeper understanding on the rules governing ISP's liability in the USA and EU. The author attempts to extract the main recent developments taken place in this area of law.

1. Introduction

The terms "user-generated content" (UGC), "consumer-generated media" (CGM) or "user-created content" (UCC) actually refer to various kinds of media content, publicly available, produced by end-users, acting outside of their profession or business.[114] The capability of creating "content" and making it available online derives from the emerging of new technologies and especially from the Web 2.0 cyberspace technologies (blogs, wikis, multimedia sharing services, content syndication, podcasting, content tagging services etc), by use of which, consumers may produce content for various reasons (commentary, criticism, entertainment, etc) and then display it publicly on the web (Carlisle and Scerri, 2007, 2).

On the other side, in order for this content to be delivered online, a use of a service has to intervene, that is, a use of an "information society service",[115] since no information – in the digital world – is capable of being transmitted without the use of a network, such as the World Wide Web. The natural or legal person providing such a service is an "information service provider"[116] and the person, who uses such an information society service, is the recipient of this service or the "end user".[117]

In any case, the term "information society services" may cover a wide range of activities and not just a transmission of information via a communication network or providing mere access to such a network.[118] One distinct type of "information society services" is the so-called "Hosting service" and in case that such activity takes place over the internet protocol, this service is called "Web Hosting Service". A web hosting service, in particular, is a type of Internet hosting service which is constructed to perform a double task: In the first place, it allows individuals and organizations to provide their own

1 For the various definitions on this issue see http://en.wikipedia.org/wiki/User-generated_content

115 According to Article 2 (a) of Directive 2000/31/EC committing to art. 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC defines an information society service as "… any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services."

116 Art 2 (b) of Directive 2000/31/EC.

117 Art 2 (d) of Directive 2000/31/EC.

118 See recital 18 of Directive 2000/31/EC.

websites accessible via the WWW, while in a second place, third parties are able *to access these websites* and exercise additional capabilities *of uploading content in this particular part of the cyberspace*.

As follows, one may identify three entities involved in the case of web hosting: the web hosting provider as an information service provider, the website "owner" as a content provider and a third party acquiring access to the website as an end-user. A host provider is legally connected to the content provider due to an agreement, called the "website hosting agreement", which allows the content provider to retain for itself a certain part of the cyberspace and also a certain amount of memory in the host provider's central system for main functions to be carried out (Igglezakis 2002). Accordingly, a third party (an end-user) that accesses the website, – in most cases – enters into an agreement with the content provider (or the host provider whatever the case may be) in order to have access to all the facilities that the website owner offers, according to the terms and conditions of an electronic contract that defines the rights and obligations both of the contracting parties, usually appeared in the form of a "click – wrap" contract (Murray 2006).

In this context, a host provider is that information society service provider, which allows a content provider (website owner) and subsequently third parties (end-users) to acquire access to the WWW and then display content to the online world. As follows, the issue of liability for copyright infringement in terms of user-created content will be examined only in accordance to the provision of hosting services. Thus, the analysis will be restricted to the rules governing a host provider's liability for copyright infringement within the US and EU legal order.

2. Liability for Copyright Infringement in General

One of the most crucial issues associated with the emerging of the "user-generated content" phenomenon is the potential liability for IPR's (and especially copyright) infringement both on behalf of the user and the host provider involved. Indeed, both the user's technical ability to interfere with existing works protected by copyright and the facilitation of such an activity, into which Host Providers engage, give rise to an intense dialogue nowadays among lawyers, academics and stakeholders on whether copyright law provides adequate protection to copyright owners. Thus, we are going to mention only the key points of copyright law that associate to content generated by users and most probably constitute a copyright infringement upon the intellectual property right owner both in the US and the EU.

3. Liability for Copyright Infringement in the USA

US law provides authors with a set of exclusive rights, the moment their "…original work is fixed in any tangible medium of expression".[119] This set of exclusive rights consists – according to the Copyright Act of: 1) the reproduction right; (2) The right to prepare derivative works based upon the copyrighted work; (3) The distribution right; (4) the right to perform the copyrighted work publicly; (5) the right to display the copyrighted work publicly; and (6) the right to perform the copyrighted work publicly by means of a digital audio transmission.[120] Anyone that exercises activities that constitute the subject matter of those rights without the author's prior authorization has infringed upon a holder's copyrights (Richardson 2008).[121]

119 17 U.S.C. § 102.

120 17 U.S.C. § 106.

121 17 U.S.C. § 501.

It should be recalled that user-generated content may consist of the exploitation of an existing work in conjunction with a personal contribution. If the initial work is protected by copyright, then the user's created content may infringe upon one or more of the owner's exclusive rights,[122] if he has not acquired the initial creator's prior consent and such action cannot be justified by a transformative use defense (Hetcher 2008).[123]

Apart from that, US law provides that a plaintiff that claims a copyright infringement has – as a question of procedure – to show: (1) ownership of a valid copyright; and (2) that the defendant violated the copyright owner's exclusive rights under the Copyright Act.[124] Moreover, the American courts have long before recognized that there are three main types of liability for copyright infringement, the distinction based upon the way the infringing activity is apparent in each one case:

A. Direct Infringement

Supporting a claim of a direct copyright infringement, the plaintiff must show, first, that he owns a valid copyright over the work in question and, secondly, that the defendant "…*himself* violated one or more of the plaintiff's exclusive rights under the Copyright Act."[125]

The question of whether an internet service provider may be liable for *direct* copyright infringement has been raised before the US Courts in the *Netcom* case.[126] In that case, plaintiffs Religious Technology Center ("RTC") and Bridge Publications, Inc. ("BPI") held copyrights in the unpublished and published works of L. Ron Hubbard, the late founder of the Church of Scientology. Defendant Den-

122 Of the set of the exclusive rights, the ones that are mostly violated are: the reproduction right, the right to produce derivative works and the public display right.

123 The author argues that a transformative use argument (as part of a fair use defense) against a direct infringement claim might be successful in US law.

124 17 U.S.C. § 501(a).

125 *A&M Records v. Napster, Inc*., 239 F.3d 1004, 1013 (9th Cir. 2001) (Napster II).

126 *Religious Tech. Ctr. v. Netcom On-Line Communication Servs*. 907 F. Supp. (N.D. Cal. 1995)(Netcom).

nis Erlich ("Erlich") was a former minister of Scientology turned vocal critic of the Church, whose pulpit was then the Usenet newsgroup "alt.religion.scientology", an online forum for discussion and criticism of Scientology. Plaintiffs maintained that Erlich infringed their copyrights when he posted portions of their works on a.r.s. It should be emphasized that Erlich gained his access to the Internet through defendant Thomas Klemesrud's ("Klemesrud's") BBS "support.com", and that Klemesrud's BBS *was not directly linked to the Internet, but gained its connection through the facilities of the other defendant* Netcom On-Line Communications, Inc. ("Netcom"), one of the largest providers of Internet access in the United States.

It was undisputed that defendant Erlich infringed the plaintiffs' exclusive right to reproduce an original copyrighted work by sending a message to a.r.s. containing the plintiffs' original copyright work. But the central issue of that case was whether Netcom was *directly liable for copyright infringement*, and especially for *reproducing* an original copyright work. To the plaintiff's claim, the Court, after citing *RCA Records v. All-Fast System*[127] responds:

> "…Netcom's act of designing or implementing a system that automatically and uniformly creates temporary copies of all data sent through it is not unlike that of the *owner of a copying machine who lets the public make copies with it*. Although some of the people using the machine may directly infringe copyrights, courts analyze the machine owner's liability *under the rubric of contributory infringement, not direct infringement*."

The court also held that Netcom *was not directly liable* for infringing the plaintiff's *exclusive distribution or display right* on the ground that it provided mere access to the Internet and did not create or control the content of the information available to its subscribers. In that regard, the court stated:

127 *RCA Records v. All-Fast System, Inc*., 594 F. Supp. 335 (S.D.N.Y. 1984).

> "… It would be especially inappropriate to hold liable *a service that acts more like a conduit*, in other words, one that does not itself keep an archive of files for more than a short duration. Finding such a service liable *would involve an unreasonably broad construction of public distribution and display rights*. No purpose would be served by holding liable those who have no ability to control the information to which their subscribers have access, even though they might be in some sense helping to achieve the Internet's automatic 'public distribution' and the users' 'public' display of files."[128]

B. Contributory Infringement

The American case-law describes as liable for contributory infringement the person "… who, *with knowledge* of the infringing activity, *induces, causes or materially contributes* to the infringing conduct *of another*."[129] So, in this type of copyright liability two persons or entities have to be identified: the direct copyright infringer, who is directly liable, and a second person or entity that has a *knowledge* of the infringing activity of the direct infringer and despite that fact *induces, causes or materially contributes* to such an infringing conduct.

Whether an alleged contributory infringer has "knowledge", within the meaning of the settled US case-law, depends on establishing whether a reasonable trier of fact could conclude affirmatively or not to such a question.[130] However, it has been suggested that, in case that an information service provider receives a notice of alleged copyright infringement, there will be no liability for contributory infringement for allowing the continued distribution of the works on its system, if the operator cannot *reasonably verify a claim of infringement*, either because of a possible fair use defence or the lack of copyright notices on the copies or, finally, because of the copyright holder's failure to provide the necessary documentation to show

128 *Religious Tech. Ctr. v. Netcom On-Line Communication Servs*. 907 F. Supp. (N.D. Cal. 1995)(Netcom).

129 *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc*., 443 F.2d 1159, 1162 (2d Cir. 1971).

130 *Harlan Ellison v. Stephen Robertson & America Online Inc*., 357 F.3d 1072 (9th Cir. 2004).

that there is a likely infringement.[131] It is in such cases that the operator's lack of knowledge will be found reasonable.

On the other hand, taking into account that a copyright infringement related to user-generated content takes place over the WWW, a contributory liability for a copyright infringement of an information service provider could only be related to a *material contribution* to the infringing conduct rather than *inducing* or *causing* such conduct. In this context, the US case-law suggests that the fact of whether there is a *material contribution* to the infringing conduct is again a matter of establishing whether a reasonable trier of fact could conclude affirmatively or not to such a question.[132] Such contribution, however, must be substantial.[133]

According to the reasoning of Netcom, which still constitutes a valuable source of guidance to the US Courts, the mere fact of passive inaction of an information society service provider to remove the infringing material or to block the infringing conduct is – without prejudice to the knowledge requirement – sufficient to raise a triable issue regarding material contribution.[134]

C. Vicarious Infringement

According to US case law, a defendant is vicariously liable for copyright infringement "… if he enjoys a *direct financial benefit from another's infringing activity* and 'has the *right and ability* to supervise' the infringing activity."[135] This type of copyright liability resembles contributory liability in the sense that – in both situations – there should be two infringers involved, namely a vicarious infringer and another person acting either as a direct infringer or possibly as a

131 *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc*., 907 F. Supp. (N.D. Cal. 1995)(Netcom).

132 *Harlan Ellison v. Stephen Robertson & America Online Inc*. 357 F.3d 1072 (9th Cir. 2004).

133 *Apple Computer, Inc. v. Microsoft Corp*., 821 F. Supp. 616, 625 (N.D. Cal. 1993), aff'd, 35 F.3d 1435 (9th Cir. 1994); *Demetriades v. Kaufmann*, 690 F. Supp. 289, 294 (S.D.N.Y. 1988).

134 *Religious Tech. Ctr. v. Netcom On-Line Communication Servs*., Inc., 907 F. Supp. at 1375 (N.D. Cal. 1995)(Netcom).

135 *A&M Records v. Napster, Inc*., 239 F.3d, at 1022 (9th Cir. 2001) (Napster II), quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc*., 443 F.2d, at 1162 (2d Cir. 1971).

contributory infringer. For example, if a host provider is contractually connected with a website operator and the latter one with an end-user, then a host provider may be vicariously liable if he has the contractual right (in the relevant agreement with the website operator) to intervene with an infringing activity or content initiated by an end-user, with whom he is *not directly contractually connected*.[136] In such a case, the host provider may be held as vicariously liable, if he enjoys a direct financial benefit from the website operator or the end-user himself as directly liable.

The direct financial benefit should derive from the availability of infringing material or activity, which in that case acts as a "draw" for customers.[137] The basic criterion used by the US Courts is whether the benefit enjoyed by the defendant due to an infringing activity constitutes a draw in proportion of its overall profits, whether substantial or not.[138] So, there should be a causal relation between the infringing activity of the (direct or contributory) infringer (as the case may be) and the financial benefit of the vicarious infringer due to the infringing conduct.

4. Liability of a Host Provider in the USA – DMCA

In the above-mentioned framework, the question of whether a host provider is liable for copyright infringement towards the copyright owner acquires both a theoretical and a practical importance. As already analyzed in general terms, Netcom and the subsequent case law suggests that a host provider may be held liable only for *indirect copyright infringement*, namely for contributory and/or vicarious liability. However, in order to reinforce such a finding one has to inevitably resort to the provisions of the Digital Millenium Copyright

136 The court suggests such finding at note 22.

137 *A&M Records v. Napster, Inc*., 239 F.3d, at 1023 (9th Cir. 2001) (Napster II).

138 *Harlan Ellison v. Stephen Robertson & America Online Inc*. 357 F.3d 1072 (9th Cir. 2004).

Act (DMCA) of 1998. As will be seen, the provisions of the DMCA – following the Netcom case – discuss only a possible exemption from liability for contributory/vicarious liability and not for direct copyright infringement.

A. DMCA

In 1998, the US Congress enacted the Digital Millenium Copyright Act (DMCA)[139], in order for the American law to comply with the international treaties and face the new challenges of the online world. The provisions of the DMCA provide for four "safe harbours", by application of which, a service provider may not be held liable for copyright infringements. These safe harbours provide protection from liability for: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools. According to an established interpretative thesis of US law, the limitation of liability provided for by the four safe harbours of the DMCA is applicable only "… *if the provider is found to be liable under existing principles of law*."[140] So, a service provider will seek for an exemption in the light of the DMCA provisions, only if found to be liable according to the principles of traditional copyright law.[141]

139 17 U.S.C. § 512.

140 S. Rep. 105-190, at 19.

141 See also the wording of the Court in *Harlan Ellison v. Stephen Robertson, Shaken@tco.net and America Online Inc.*, 357 F.3d 1072; (2004):

"… We thus agree with the district court that the DMCA did not simply rewrite copyright law for the on-line world." Ellison, 189 F. Supp. 2d at 1061. Congress would have done so if it so desired. Claims against service providers for direct, contributory, or vicarious copyright infringement, therefore, *are generally evaluated just as they would be in the non-online world*."

B. Hosting Services

In the light of the doctrine mentioned above, 17 U.S.C. § 512(c) titled "Information Residing on Systems or Networks at Direction of Users" defines a host provider as an entity that stores at the direction of a user "… *material that resides on a system or network controlled or operated by or for the service provider*…". Such a description of the function that a hosting service performs is in conformity to the actual technical function of a hosting service as described above.

The American law suggests that an entity acting as host provider shall not be liable for copyright infringement if certain conditions are met. These conditions are related to certain factual circumstances and especially whether the service provider: A) has *knowledge* of the infringing activity B) enjoys a *financial benefit* just in case that he has the *right and ability* to control the infringing activity and C) whether he has acted expeditiously to remove or disable access to material which is either infringing as such or constitutes the subject matter of an infringing activity. In order to qualify for a safe harbor, a host provider has to establish both that the first two (A, B) elements are absent and that the third one (C) is present; otherwise he will not be successful in the relevant claim.[142] In that regard, we are going to analyze these requirements one by one.

(i) Knowledge

The first condition is related to knowledge and basically seems to reflect the elements of *liability for contributory copyright infringement*. It is then further divided into three sub-conditions. First, a host provider should establish that it does not have "… *actual* knowledge that the material or *an activity using the material* on the

142 *Als Scan, Inc v. Remarq Communities, Inc*., Court of Appeals for the Fourth Circuit 239 F.3d 619; 2001, stating: "… to qualify for this safe harbor protection, the Internet service provider must demonstrate that it has met all three of the safe harbor requirements, and a showing under the first prong – the lack of actual or constructive knowledge – is prior to and separate from the showings that must be made under the second and third prongs."

system or network is infringing;".[143] Secondly, just in case that actual knowledge is absent, the host provider should further establish absence of *constructive knowledge*, that is, that the service provider "… *is not aware* of facts or circumstances from which infringing activity is apparent;".[144] Thirdly, once a service provider obtains either actual or constructive knowledge of the infringing activity, he is still able to be benefited by the safe harbor, if he is able to prove that "… upon obtaining such knowledge or awareness, *acts expeditiously to remove, or disable access to, the material*;".[145]

(ii) Financial Benefit – Right and Ability to Control

The second condition also consists of two elements. A service provider should firstly establish that it does not have the right and ability to control the infringing activity. However, if he does so, he is further burdened to prove that he "…does not receive a *financial benefit directly attributable* to the infringing activity…".[146] These requirements that the DMCA sets recalls in our minds the circumstances that the US case law sets, by virtue of which, a internet service provider may be held liable for *vicarious* copyright infringement.

(iii) Expeditious Removal

A host provider is finally burdened to prove that upon notification of a claimed infringement, the provider "… responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."[147]

143 17 U.S.C. § 512 (c) 1 (A) (i).
144 17 U.S.C. § 512 (c) 1 (A) (ii).
145 17 U.S.C. § 512 (c) 1 (A) (iii).
146 17 U.S.C. § 512 (c) 1 (B).
147 17 U.S.C. § 512 (c) 1 (B).

(iv) Procedural Requirements

Even if a host provider has complied with the above-mentioned rules of the US substantial law, he is still subject to procedural requirements according to the DMCA.

In the first place, a host provider has to designate an agent that will be responsible for receiving notifications of claimed copyright infringement, by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, contact information regarding the agent.[148] It should be recalled that if this condition is not met, then a host provider could not enjoy the safe harbor of the DMCA.[149]

In a second place, a service provider (in general) should already have – and prior to receiving of any notification for copyright infringement – implemented a policy that provides for the termination, in appropriate circumstances, of subscribers and account holders of the service provider's system or network who are repeat infringers.[150] According to established case-law, such requirement is further divided into three more specialized conditions: (1) adopting a policy that provides for the termination of service access for repeat copyright infringers in appropriate circumstances; (2) implementing that policy in a reasonable manner; and (3) informing subscribers of the policy.[151] It has further been judged that a host provider, by changing its email address, to which notifications may be sent, without a parallel registration of the new address to the US Copyright office fails to comply with the "implementation" requirement of the relevant subsection of the DMCA.[152] Accordingly (in the context of P2P file sharing in particular), a host provider fails to meet the "implementation" requirement, if – in the light of the whole notification procedure – *"... it [is] impossible to ascertain which users are transferring which*

148 17 U.S.C. § 512 (c) (2).

149 17 U.S.C. § 512 (c) (2).

150 17 U.S.C. § 512 (i) (1) (A).

151 *Harlan Ellison v. Stephen Robertson and America Online Inc*.., United States Court of Appeals for the Ninth Circuit 357 F.3d 1072; 2004 .

152 Ibid.

files".[153] On top of what was just mentioned, in order for a service provider to meet the implementation requirement, the policy should be implemented "reasonably" or "appropriately", which means, in effect, that the termination of an alleged repeat infringer's account takes place, if the relevant procedure has been followed by the copyright owner and the service provider acts expeditiously.[154]

As a final requirement, a service provider should accommodate and not interfere with standard technical measures.[155]

5. Observations as to the Relation between DMCA Provisions Regarding Host Providers and the Three Types of Liability for Copyright Infringement

A first observation to be made is related to the logical connection between the requirements set by DMCA as they regards to host providers and the various types of copyright infringement. So, the first requirement regarding knowledge seems to be much related to the concept of liability for *contributory copyright infringement*. Indeed, the knowledge requirement is basically related to that particular type of copyright infringement.

In addition, the second requirement regarding the financial benefit of a service provider that does have the right and ability to control the infringing activity of another infringer reflects the elements of the traditional liability for *vicarious copyright infringement*.

These observations regarding liability for contributory and vicarious copyright infringement – as far as a host provider is concerned – basically indicate that the american law would almost *never perceive*

153 *Aimster v. John Deep*, Court of Appeals for the Seventh Circuit 334 F.3d 643; 2003.

154 See in that regard the reasoning of the court in *Perfect 10, Inc. v. CCBill L*, United States Court of Appeals for the Ninth Circuit 481 F.3d 751; 2007.

155 17 U.S.C. § 512 (i) (1) (B).

a host provider as liable for direct copyright infringement. The provisions of that safe harbor are basically connected to provide an immunity to those service providers that meet the requirements of the Act against contributory or vicarious copyright infringement. Such a result seems to be reasonable, since the DMCA was enacted in 1998 in order to include within the law the results of the court's reasoning in the *Netcom* case, according to which, a service provider acting mostly as a mere conduit could not be held liable for *direct copyright infringement*. Even if the court in the *Netcom* case treated that internet service provider as providing a mere access to the network and *not as a host provider*, it still seems that the US law finds it almost impossible to declare a provider of hosting services as liable for *direct copyright infringement*. This finding has been verified by the Court of Appeals in *Costar Group, Inc. v. Loopnet, Inc*.,[156] as one of the most thoughtful decisions of the US case-law stating that:

> "…At bottom, we hold that ISPs, when passively *storing material at the direction of users* in order to make that material available to other users upon their request*, do not 'copy'* the material *in direct violation of § 106 of the Copyright Act*. Agreeing with the analysis in *Netcom*, we hold that the automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render an ISP strictly liable for copyright infringement under §§ 501 and 106 of the Copyright Act. An ISP, however, *can become liable indirectly* upon a showing of additional involvement sufficient to establish a contributory or vicarious violation of the Act. In that case, the ISP could still look to the DMCA for a safe harbor if it fulfilled the conditions therein."

A second observation should also follow as regards the underlying philosophy of the DMCA provisions towards the host provider. As the American case law repeatedly suggests, the provisions of the DMCA do nothing more than just require a service provider to do "*… what it can reasonably be asked to do to prevent the use of its*

156 *Costar Group, Inc. v. Loopnet, Inc*. Court of Appeals for the Fourth Circuit 373 F.3d 544; 2004.

service by 'repeat infringers'."[157] In that regard the law provides an immunity only to those service providers that appear to be "innocent" towards the rest of the world; but such "innocence" disappears at the time the service provider obtains an actual or constructive knowledge of the infringing nature of the activity itself. It is then that the law requires the service provider to demonstrate that he has actively disabled the infringing matter.[158]

6. Liability for Copyright Infringement in the EU

Copyright law is not yet harmonized across the EU member states. However, the existing regulatory framework in the context of the information society consists basically of Directive 2001/29.[159] According to the provisions of this Directive, a copyright owner retains – in the context of information society – the following exclusive rights: 1) the reproduction right[160]; 2) the right of communication to the public of works and the right of making available to the public other subject matter[161] and 3) the distribution right.[162] Moreover, the Directive does provide an exhaustive list[163] of exceptions in the exercise of each one of the aforementioned exclusive rights, but none of these exceptions may relate to content originated by the user (Commission document, 2007).

The European Commission has long before identified that a legitimate exploitation of user-generated content, as part of the so called "creative content distributed online" will definitely present

157 *Aimster v. John Deep*, Court of Appeals for the Seventh Circuit 334 F.3d 643; 2003.

158 See in this regard *Als Scan, Inc. v. Remarq Commuities, Inc*, Court of Appeals for the Fourth Circuit 239 F.3d 619; 2001.

159 Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167.

160 Article 2 of the Directive.

161 Article 3 of the Directive.

162 Article 4 of the Directive.

163 The list is exhaustive in the sense that member States may not adopt additional exceptions. See in that regard recital 32 of the Directive.

many advantages within the borders of the EU both from an economic and a social perspective (Communication from the Commission, 2007). However, the creation of new or derivative works or the interference with existing copyrighted works remains a central issue to be resolved at a community level (Commission Document, 2007). Thus, the European Commission has issued a Green Paper on Copyright in the Knowledge Economy calling for proposals on two basic issues: 1) whether there should be more precise rules on what exactly is permitted to the end-user to do when interfering with copyrighted material online and 2) whether an exemption regarding user-created content should be introduced in Directive 2001/29 (Green Paper, 2008).

At the same time, the European Council has invited the member states to launch consultations on finding solutions to develop legal offers of creative content online and protecting the original creators' rights on existing copyrighted works.[164] In this context, however, the most important development seems to be the recent discussion within the EU on adopting a Directive on European Copyright, thereby regulating the matter in a uniform way, according to the principles of EU law including the principle of proportionality (Opinion, 2007).

7. Liability of a Host Provider in the EU – E-commerce Directive

Given this framework, we turn to the main issue of ISP's liability for copyright infringement. It should basically be noted that the relevant legislation derives from the secondary community law and, as such, it provides for a minimum harmonization level across the member states. It should also be recalled that the analysis focuses on that type of ISP that actually provides web hosting services, as the most rele-

164 Council conclusions of 20 November 2008 on the development of legal offers of online cultural and creative content and the prevention and combating of piracy in the digital environment, OJ C 319.

vant to the way that content generated by users may be presented in cyberspace.

A. The E-commerce Directive

The relevant legislative instrument is Directive 2000/31/EC also known as "Directive on electronic commerce".[165] It is important to note that according to the most accurate thesis, a service provider will seek for an exemption in the light of the provisions of this Directive, only if found to be liable according to the existing provisions of copyright law (Igglezakis 2002). Moreover, the limitations on liability provided for by the Directive are established in a horizontal manner, meaning that they cover liability, both civil and criminal, for all types of illegal activities initiated by third parties (Report from the commission 2003). This is a main difference between the US and EU legal framework, because the provisions of the DMCA provide for limitations of liability for copyright (in particular) infringement.

The Directive on electronic commerce provides safe harbours for three "types" of ISPs, that is, for those: 1) acting as a "mere conduit" (2) performing temporary storage (system caching); and (3) those providing hosting services.[166] Unlike US law, information location tools are outside of the scope of the Directive, but the Commission will consider whether the Directive should provide for the fourth safe harbor related to hyperlinks and search engines (Report from the Commission 2003).

The main concept of the Directive seems to be substantially in line with the underlying principles, as articulated by the American case-law after *Netcom* and its subsequent case-law of the DMCA era: a service provider acting as a mere conduit or temporary storing information in order for the function of a network to be more effective,

165 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce").

166 Articles 12 to 14 of the Directive.

could not be held liable for – inter alia – copyright infringement, because of application of the safe harbor of the Directive.[167] On the contrary, as the Directive states:

> "A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts *goes beyond the activities of 'mere conduit' or 'caching'* and as a result *cannot benefit from the liability exemptions established for these activities*."[168]

B. Hosting Services

According to Article 14 titled "Hosting", an information society service provider that stores information at the request of the recipient of such service will not be held liable (including his liability for copyright infringement) if he meets two basic conditions: 1) "… he does not have actual knowledge of illegal activity or information…" or "… is not aware of facts or circumstances from which the illegal activity or information is apparent…"[169] and 2) just in case that he obtains such knowledge or awareness, "… acts expeditiously to remove or to disable access to the information."[170] However, this provision will not apply if the host provider exercises authority or control over the recipient of a service.[171] It should also be noted that the relevant Article 14 applies not only to hosting services as such, but also to bulletin boards or "chat-rooms" (Report from the Commission 2003, Second Report 2003).

167 See Recitals 42,43 of the Directive.

168 Recital 44.

169 Article 14 (1) (a).

170 Article 14 (1) (b).

171 Article 14 (2).

8. Concluding Remarks: Comparing the Rules Governing Liability of a Host Provider in the USA and the EU

If someone compared the provision of the E-commerce Directive to the corresponding provisions of the American DMCA on liability of host providers,[172] he would inevitably come to the conclusion that the following arguments seem to be true.

First of all, it seems to be true that the wording of the EU Directive is almost identical to the corresponding provisions of the DMCA as regards the knowledge requirement and the obligation for expeditious removal upon obtaining actual or constructive knowledge. Such finding gives rise for someone to assume that *EU regulators were much influenced by the wording of the DMCA at the time the Directive was adopted and were ready to include the case of a "contributory infringer" within the provisions of the Directive*.

In a second place, Article 14 (2) refutes the application of the first paragraph of the same article, if the host provider exercises authority or control over the recipient of the service. This means, in effect, that EU regulators were also aware of the notion of "vicarious liability" of the US law, but they preferred to be more severe than the US legal order; Indeed, in order for a host provider to be exempted from liability for vicarious copyright infringement in USA, he should claim and prove both that he has no "right and ability to control the infringing activity" and that he does not enjoy a "direct financial benefit" due to the exercise of such activity. *On the contrary, EU law suggests that the mere fact that a host provider exercises authority or control over the recipient of the service is sufficient in order for the application of the safe harbor to be denied without having a need to fulfill the "direct financial benefit" requirement of US law*.

In a third place, EU Directive seems to prevent – in general – member states from imposing a general obligation to service providers to monitor the information stored.[173] However, such a rule is not

172 17 U.S.C. § 512 (c) 1.

173 See Recital 47 and article 15 (1) of the Directive.

without exemption. Orders by national authorities in accordance with national legislation are exempted;[174] member states may impose specific obligations to a host provider in order to detect and prevent certain types of illegal activities;[175] and the provisions of Directive 2001/29 acknowledge that copyright owners should retain the right to apply for an injunction in case that Internet intermediaries commit acts that may be considered as infringing the owner's exclusive rights, even if these acts may fall within the exceptions of the exclusive rights of the Directive.[176] All those complex provisions of EU law indicate that a further distinction may be drawn between the US and EU legal approaches. As analyzed above, US case law has long before recognized that ISP's have clearly *no obligation of actively seeking facts or circumstances that indicate a copyright infringement*. On the contrary, EU establishes complex and contradicting rules that may lead – in the writer's opinion – national judges to issue excessive or inoperative measures.

In a fourth place, one may draw a further differentiation between US and EU law. The DMCA contains specific and detailed provisions for "notice and take down" procedures, while the Directive allows the member states to adopt – according to article 16 – specific rules for such procedures (Commission Report 2003). This is also the case regarding the imposition of sanctions due to infringements of domestic law.[177] In that regard, EU law seems to be much more ambiguous than the US law, both on the notification procedures and the sanctions imposed on the alleged infringers, thereby giving rise for the Member States to adopt quite differentiated measures across the EU (Legal – IST Report 2006, 88–89).

The analysis of the provisions of the DMCA and the E-commerce Directive, leads us to the conclusion that US law has adopted a much clearer view than the EU laws on the circumstances, under which a provider of hosting services may be held liable for copyright infringement. Indeed, the detailed provisions of the Copyright Act, the DMCA along with their extensive interpretation by the US courts

174 See Recital 47.

175 See Recital 49 and article 15 (2) of the Directive.

176 See Article 8 (3) and Recital 59 of Directive 2001/29.

177 Article 20 of the Directive.

provide useful guidance on the issue of copyright infringement in the electronic environment that may be followed when facing the so called "user-created content" phenomenon as well. On the contrary, the lack of full harmonization of copyright laws across the EU member states and the absence of case law at a community level to interpret the provisions of the E-commerce Directive has caused ambiguity and legal uncertainty within the borders of Europe, thereby giving room for the member states to adopt quite differentiated measures. In the writer's opinion, the European Commission should consider more carefully possibilities for regulating such matters in a uniform and detailed way in the near future, exercising its power by means of Regulations and not Directives.

References

A&M Records v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001) (Napster II).

Aimster v. John Deep, 334 F.3d 643; (7th Cir. 2003).

Als Scan, Inc v. Remarq Communities, Inc, 239 F.3d 619; (4th Cir. 2001).

Apple Computer, Inc. v. Microsoft Corp., 821 F. Supp. 616, 625 (N.D. Cal. 1993), aff'd, 35 F.3d 1435 (9th Cir. 1994).

Carlisle, G., and J. Scerri 2007 "User-generated content on-line: Legitimate power or the wild west?" Paper presented at the Annual Conference 2007, BILETA, Hertfordshire, UK.

Commission staff working document 2007. *Report to the Council, the European Parliament the Economic and Social Committee on the application of Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information society*, SEC/2007/1556.

Commission staff working document. 2007. *Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market*, COM(2007) 836 final SEC/2007/1710 final.

Communication from the Commission. 2007, *to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market*, SEC(2007) 1710 COM/2007/0836 final.

Costar Group, Inc. v. Loopnet, Inc., 373 F.3d 544; (4th Cir. 2004).

Council conclusions, 2008, of 20 November, 2008 *on the development of legal offers of online cultural and creative content and the prevention and combating of piracy in the digital environment*, OJ C 319.

Demetriades v. Kaufmann, 690 F. Supp. 289, 294 (S.D.N.Y. 1988).

Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

Green Paper, "Copyright in the Knowledge Economy," COM 2008, 466 Final.

Harlan Ellison v. Stephen Robertson & America Online Inc. 357 F.3d 1072 (9th Cir. 2004).

Hetcher, S. 2008 “User-generated Content and the Future of Copyright: Part Two – Agreements between Users and Mega-Sites*.” Santa Clara Computers and High Technology Law Journal*, 24, retrieved March 31, 2009, http://www.chtlj.org/sites/default/files/media/articles/v024/v024.i4.Hetcher.pdf

Igglezakis, I. 2002 “Web Hosting Agreement: Meaning, Function and Legal Nature.” *Trade Law Review*, 8th year, Issue D.

Legal-IST. 2006. *Report on Additional Legal Issues (Cumulative Study)*, retrieved March 31 2009, www.veforum.org

Murray, A.D. 2000. “Entering into Contracts Electronically: the Real WWW. ”In L. Edwards, and C. Waelde, eds., *Law and the Internet: a Framework for Electronic Commerce*. Oxford: Hart Publishing. Retrieved March 31, 2009, http://www.leginetcy.com/articles/Entering%20Into%20Contracts%20Electronically.pdf

Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, (2008) on Creative Content Online in the Single Market COM (2007) 836 final, OJ C 77.

Perfect 10, Inc. v. CCBill L, 481 F.3d 751; (9th Cir. 2007).

RCA Records v. All-Fast System, Inc., 594 F. Supp. 335 (S.D.N.Y. 1984).

Religious Tech. Ctr. v. Netcom On-Line Communication Servs. 907 F. Supp. (N.D. Cal. 1995) (Netcom).

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, (2000) – *First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce*, in the Internal Market (Directive on electronic commerce) COM/2003/0702 final.

Richardson, F. 2008. *User Generated Content: Everyone is a Star*, retrieved March, 2009, http://www.fr.com/practice/User%20Generated%20Content%20-%20Everyone%20is%20a%20Star_Feb2008.pdf

Second Evaluation Report. 1998, *from the Commission to the Council and the European Parliament on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity*, COM/2003/0776 final.

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