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► To cite this version:

Primavera de Filippi, Katarzyna Gracz. Resolving the crisis of copyright law in the digital environment : reforming the "copy-right" into a "reuse-right". 7th International Conference on the interaction of knowledge rights, data protection and communication., Nov 2012, Helsinki, Finland. pp.44. hal-00855714

HAL Id: hal-00855714

<https://hal.science/hal-00855714>

Submitted on 29 Aug 2013

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Resolving the crisis of copyright law in the digital environment : reforming the “copy-right” into a “reuse-right”

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Keywords: *copyright law, autopoiesis, digital technologies*

Abstract: *The paper explores the mechanisms that led to the current crisis of copyright law in the digital era by applying the concept of law as an autopoietic system. It analyses how copyright law has evolved over the years, and how - every time a new technology has come to disrupt the system - the law has evolved to try and preserve the traditional status quo. Today, however, in order to benefit from the new opportunities offered by digital technologies, copyright law must be radically reformed to encourage - rather than discourage - the dissemination of online works. This might require a shift from a system based on the concept of reproduction (copy-right) to a system based on the reutilization of works (reuse-right).*

1. Theoretical stance

The paper explores the mechanisms that led to the current crisis of copyright law in the digital era by applying the concept of law as an autopoietic system - as developed by Niklas Luhmann and Gunther Teubner (Luhmann, 2008; Teubner, 1988) - whereby the legal system is regarded as an autonomous, self-referential normative system that remains separate from other normative systems (such as religion, morality, or social norms), independently setting its own boundaries through a binary process that distinguishes what is *legal* from what is *illegal*.

This paper draws from systems theory to analyse the eco-system of copyright law and to describe its historical development throughout the years. The study reconstructs the mutual interplay between the **legal system** and the following elements: **technology**, **social norms** and **collective interests** of four

groups representing most important actors in the copyright regime (authors, intermediaries, state authorities, and the public) (Gracz 2013a, p.2).

Yet, systems theory is not regarded as an ontological claim about the nature of law, but rather as a means to explain the historical pattern that characterizes the evolution of copyright law: what are the drivers of its evolution and what is the cause of its failure in the digital era. From an historical perspective, the paper focuses on four fundamental phases that are perceived as landmarks in the development of copyright law: 1) shift from the manuscript era to the age of print, 2) advent of modern copyright law, 3) introduction of technologies allowing for mass consumer copying, 4) era of digital technologies and Internet (Gracz 2013a, pp.3-7).

In this context, the concept of self-referential social systems is used as a useful metaphor for modelling the dependencies that gave rise to the shortcomings of copyright law in the digital era and to explain the growing discrepancy that is emerging between **social** and **legal** norms (Bicchieri et al., 1997, pp. 25–7; Homans, 1961, p. 12; Durkheim, 1915, pp. 236–45; 1951; Parsons, 1952, pp. 36, 38, 43; Wrong, 1994, p.48;).

Yet, the authors do not consider this discrepancy to be inevitable, as it does not stem from the very nature of law. Quite to the opposite, it is argued that compliance with copyright law in the digital world can only be achieved once the divergence between these two normative bodies will be overcome.

2. The problem: a mismatch between legal and social norms

The paper contends that the current divergence between social and legal norms is at the source of the crisis of copyright law in the digital era - a crisis illustrating the failure of copyright law as an autopoietic system. Yet, the process of autopoiesis in copyright law did not start with the introduction of Internet and digital technologies, but actually has its roots at the inception of the copyright regime, when the proprietary paradigm was first transposed from property law into the realm of copyright law. It is argued, however, that it was not the transposition of the proprietary paradigm into the realm of intellectual creations that actually led to the current crisis of the copyright system, but rather its evolution, throughout the years, into something that is ever more akin to an absolute monopoly right.

Travelling through a variety of historical phases, the copyright system has managed to keep a proper balance between protecting the interests of right holders on one hand, and those of the general public on the other hand. For a long time, even though powerful campaigns in favor of a strong proprietary rhetoric arose with every significant technological change, the legislator did not submit to the lobbying of the cultural industry advocating for an *absolute-property* paradigm. Yet, with the advent of Internet and digital technologies - which effectively eliminated scarcity - copyright law's selective response to environmental *stimuli* resulted in its failure to adapt to the digital reality. The delicate equilibrium of the

copyright regime has progressively been disrupted through a series of legislative reforms aimed at adjusting the law to the digital environment, mainly focusing on furthering the commercial interests of the cultural industry, at the expense of the public and in certain cases of the authors (as illustrated by the recent debates around ACTA). This eventually led to the degeneration of the proprietary paradigm (which had been formerly transposed from the realm of property law into the realm of intellectual property law), by turning a limited monopoly right over information into a right which has become gradually more encompassing than its physical counterpart (Gracz 2013a, pp.6-7).

The authors claim that by stubbornly trying to apply old and inadequate patterns to an entirely new context, the law did not adapt satisfactorily to the digital world. Rather than understanding and taking advantages of the new opportunities offered by digital technologies, the law attempted to replicate the rules of the physical world into the digital world by providing extensive protection to the interests of right holders, often at the expense of the public's general interest.

This, along with the progressive removal of the creative author from the value chain (increasingly controlled by large corporations or collecting societies) (*See e.g.*: Gendreau, 2006, p.212; Ginsburg, 2002, pp.61-62;), the belligerent strategies of copyright holders in the fight against copyright infringement (*See, e.g.*: Lessig 2008), the increasing number of criminal prosecution against end-users (*See, e.g.*: Lehman 1995), as well as the linguistic battles describing individuals as “pirates” even when they operate outside of the commercial sphere (*See, e.g.*: Johns 2011), is what - according to the authors - has mostly contributed to today's negative perception of copyright law by the general public (Gracz 2013b, pp.27-29). The paper contends the law has distanced itself so much from social norms and the technological context in which it operates, that it has nowadays lost most of its credibility and applicability in the digital era. As a result of this divergence between legal norms (restricting the use and reuse of information) and social norms (advocating for the free circulation of knowledge on the Internet), many activity which are actually disrespectful of the law at least under some legal orders, (such as the practices of file-sharing, remix or mash-ups) are not perceived negatively by end-users even though they constitute copyright infringement.

3. The solution: from “copy-right” to “reuse-right”.

Digital technologies and the social norms of sharing that have progressively emerged on the Internet promoted a shift from a situation of *information scarcity* to a situation of *information overload*: users need no longer struggle to find good online content; the main struggle consists, on the contrary, in finding a public for such content (Melgoza & al., 2002).

This shift radically changed the rules of the game in terms of content production and consumption (De Filippi, 2012a): from a situation where content is being *pushed* to the the consumer to a situation where

content is being *pulled* by the consumer. Internet users thus assume an important new role in assessing the quality of the content they consume: their preferences determine the type of content that will most likely be produced and the modalities under which it should be made available to the public. In particular, in a situation of information overflow - where the consumption of information constitutes an indicator of its extrinsic quality - dissemination can enhance the value of information (as perceived by the public) by creating more opportunities for consumption (Aigrain, 2012). Thus, the growing availability of free content online requires a careful reconsideration of the copyright regime with a view of understanding whether, and how, copyright law could eventually adapt to the digital world by better taking into account - and benefiting from - the new opportunities provided by Internet and ICT technologies.

The authors believe that, if the goal is to restore the traditional balance of copyright law in the digital environment, the copyright regime must evolve into a less restrictive system of property rights. Yet, if one considers the legislative reforms undertaken thus far, it appears that the copyright has actually evolved towards a greater degree of exclusivity (Gillespie, 2007). Thus, it is argued that the legal system did not properly '*understand*' or simply '*refused*' to adjust to the specificities of digital technologies. Hence, the authors contend that, in order for the copyright regime to better comply with the new environment in which it operates, it must be radically reformed.

To begin with, it should be understood that the exclusive right of reproduction has progressively gone obsolete on the Internet. In the digital environment, where every use of a work necessarily entails a reproduction thereof, reproduction can no longer be regarded as a good indicator for infringement (De Filippi, 2012b). On the contrary, endowing right holders with the ability to restrain the reproduction of a work implies granting them control not only over the reproduction, but also over the mere consumption of that work - thereby turning *copyright* into some kind of *access right* (Ginsburg, 2003).

Besides, to the extent that users are increasingly reluctant to pay for a good that is neither exclusive nor rival and that is often freely available on the Internet, digital media question the legitimacy of the current copyright regime stuck on preserving the interests of a deprecated industry. The law needs to acknowledge that the 'cultural industries' (as we know them today) will have a hard time surviving on the Internet. Faced with an increasing amount of content (be it commercial content or user-generated-content) freely accessible online (both legally and illegally), the cultural industries will eventually have to evolve and experiment with new business models which are not directly related to the reproduction right (Lessig, 2008).

Finally, the shift from a situation of *information scarcity* to a situation of *information overflow* welcomes the intervention of new intermediaries that feature a completely different relationship to content. On the

one hand, **device producers** are a specific type of intermediaries that merely use content (such as music, movies, e-books, etc) as a means to sell something else (such as music players, e-books readers, and so forth). While such content is absolutely necessary to provide value to the consumer, it does not actually generate value *per se*: its distribution is merely instrumental to the sale of the devices. On the other hand, we observe the emergence of new intermediaries whose purpose is not to provide content, but to arrange a public for that content. Those are the so-called **infomediaries** which assume the important function of gathering, organizing, and linking content and information available on the web.

To conclude, the authors contend that all actors involved in the copyright value chain - be them authors, intermediaries, or end-users - share the common objective of maximizing the value and visibility of digital works. As such, they would all benefit from a reform of copyright law that would actually encourage (rather than constrain) the reproduction and dissemination of creative works (Koelman, 2003). Indeed, if consumption is an indicator of the quality of online content, the broader such content is disseminated, the more it will be able to “acquire” value. Copyright law should therefore be aimed at encouraging - rather than discouraging - the reproduction and dissemination of online works (De Filippi & Jean, 2012). This could be done, for instance, by reforming the law so as to no longer focus on the reproduction and distribution rights, but only and exclusively on reuse rights.

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