Till Kreutzer, Das Modell des deutschen Urheberrechts und Regelungsalternativen. Konzeptionelle Überlegungen zu Werkbegriff, Zuordnung, Umfang und Dauer des Urheberrechts als Reaktion auf den urheberrechtlichen Funktionswandel

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1 **I.** *Till Kreutzer's* study on the existing German copyright system and its fundamental underpinnings, regulatory concepts and possible alternatives is a bold and far-reaching academic enterprise. Essentially, it summarizes and systematizes widespread concerns about the status of the existing copyright system in the academic scene and draws conclusions for a possible future alternative copyright system. This, according to *Kreutzer,* would have to take the changed factual environment of the copyright industries and the increasing importance of the users (also as authors, particularly in the context of user-generated content in the Internet) into due account.

2 To this end, *Kreutzer* first analyses the normative underpinnings of the existing system (also briefly comparing the fundaments of the *droit d'auteur* systems to the different concept of Anglo-American copyright law). Second, he describes the recent development of copyright law with regard to the protection of new subject matter in the digital environment (such as computer programs and databases) as well as the factual expansion of copyright in the digital environment – namely due to the European rules on the relationship between exceptions to copyright and technical protection measures. Third, he draws conclusions from this with regard to the current status of the copyright system, concentrating on four so-called neuralgic zones: conditions of protection, the (initial) assignment of copyright, and the scope and term of copyright protection. On the basis of this analysis that highlights the shortcomings of the current system in dealing with the increasingly industrialised system of the "production" of more or less creative works and with the new (partly creative) forms of use in the Internet, he proposes his fundamental regulatory alternatives in the fourth part of his study.

3 Out of necessity, *Kreutzer* concentrates on copyright law, specifically on the neuralgic spots identified above, in order to focus his already very broad and voluminous study. Nonetheless, given the fact that he substantially proposes a future two-tier system of copyright law that combines author's protection for genuine personal intellectual creations with investment protection for works below this threshold, it might have been recommendable to throw a substantive side glance at German unfair competition law, where a doctrine of protection against unfair copying has been in place throughout the last century (and has been used effectively by the courts as

an investment protection tool). Recently, some authors have proposed that this doctrine be acknowledged and developed into a genuine and transparent tool for investment protection in unfair competition law. These proposals, which have sparked a vivid discussion among unfair competition lawyers, evidently relate to *Kreutzer's* proposals as they represent a fundamental alternative. Therefore, although it was hardly possible for *Kreutzer* to include even this discussion in his already outstandingly comprehensive study, the discussion certainly should be taken into account as a necessary background for discussing and evaluating his proposals.

4 **II.** As for the normative underpinnings of the *droit d'auteur* system, *Kreutzer* quite impressively and correctly points out the shortcomings of a deontological concept centred exclusively on the person of the individual author in the tradition of *John Locke's* property theory. (Indeed, *Locke* himself never wanted to apply his theory to immaterial property; moreover, his own property theory can be re-constructed today in an essentially utilitarian way; cf. Leistner & Hansen, GRUR 2008, 479, 480 et seq.) Instead, utilitarian approaches undoubtedly have to be taken into account. In the most recent literature, these utilitarian approaches no longer follow a "property logic" (trying to internalise all possible positive externalities of intellectual property), but instead emphasize the necessity of limitations to copyright law – safeguarding certain pockets for socially useful services and uses – and essentially reducing the scope of copyright law protection to what is *necessary* to prevent market failure with regard to the production of intellectual property. *Kreutzer* points out that such modern approaches, though they are discussed extensively in literature, are not yet essentially reflected in the existing German copyright law system with its author-centred approach. Furthermore, he analyses the constitutional law framework of German copyright law and comes to the conclusion that constitutional law sets only certain outer limits to a system of copyright law that is orientated more towards investment protection and characterized by a limitation of exclusive protection and an extension of mere liability rights. Indeed, though more recent decisions of the German Federal Constitutional Court suggest that it seems to be willing to take a more active role in copyright law matters, this analysis is certainly convincing.

5 Against this background, regarding the fundamental underpinnings of a future copyright system, *Kreutzer* pleads for an essentially dualistic system that combines strong personality protection for the authors of genuine personal, intellectual creations with a broad system of investment protection for works beyond this threshold. Indeed, the reviewer has already entered here in an indirect academic dialogue with *Kreutzer.* Concerning the diagnosed shortcomings of an exclusively authors-based approach, a slightly similar analysis can be found in Leistner & Hansen (GRUR 2008, 479; for comprehensive and further, partly different, consequences, cf. also Hansen, Warum Urheberrecht?, Nomos 2009). However, from this author's viewpoint, instead of re-introducing a dualistic concept to German copyright law, an integrative system *combining* individual rights-based and utilitarian fundaments of copyright law in an integrative synthesis as the unitary objective of copyright law is the preferable way to adapt German copyright law to the changed digital environment and the accompanying policy discourse pleading for a more balanced copyright law system. Specifically, it is doubtful whether a system of investment protection that effectively unties a broad field of more practical, mundane and industrialised works (such as films and videogames) from the (arguably weaker but still existing) inner link with the personality of the authors and their right to self-determination can really provide for a regulatory development which safeguards the existence of a genuinely creative, multi-faceted cultural and academic development. This will be elaborated further when discussing some of *Kreutzer's* concrete conclusions and policy proposals.

6 **III.** In his study of the recent developments of "digital" copyright law, *Kreutzer's* analysis is remarkably clear-sighted and is shared in the meantime by an increasing number of authors in the German copyright community. The legislative development in the last twenty years represents a phase of legislatorial activity characterised by a series of more or less pointillist measures which, due to heavy lobbying and the lack of a new fundamental concept of copyright in the digital environment (which could have been used as a benchmark and warning post to prevent industry capture of legislation in parts of the field), have effectively and substantially expanded copyright law protection. *Kreutzer* emphasizes the inclusion of new protectable subject matter, such as computer programs and databases, into copyright law, as well as the area of exceptions to copyright and their relationship to the protection of technological protection measures. Indeed, the system has become unbalanced in this latter field particularly, primarily due to the fact that the Information Society Directive lets contractual agreements for online uses (accompanied by technological protection measures and their legal protection) prevail over the effective enforcement of the exceptions to copyright law. This unfortunate development, which potentially allows for a privatization of copyright (if the markets accept such solutions, which might well be doubted), goes far beyond what would have been necessary to implement the WIPO Internet Treaties, and it has been criticised in the meantime by an overwhelming majority of European copyright lawyers.

7 **IV.** What's really new and fundamental about *Kreutzer's* work is the attempt to genuinely propose

a fundamentally alternative copyright system that takes all these developments (which are extensively described in the study and could only be given cursory mention here) into account and to draw the necessary conclusions, including regulatory proposals for the neuralgic spots identified.

8 Essentially, *Kreutzer* proposes a two-tier copyright system. For genuine personal intellectual creations with a certain level of individuality, an author's protection with strong moral rights would remain applicable. For the majority of more commonplace works, traditional *droit d'auteur* copyright would be changed into an investment protection right with a rather low protection threshold and a correspondingly limited scope of protection, namely reducing the exclusive rights to mere liability rights (possibly administered by collecting societies) in many areas. Against this basic background, works would have to be systematized in different groups (allowing for a higher degree of differentiation, in particular with regard to what is an overlong protection term for certain categories of works). Such systematization, according to *Kreutzer,* could possibly follow a regulatory technique of an *a priori* catalogue for certain different categories of works; the *a priori* systematization of a given work in one of the categories could then be disproven by the right holder in court if the conditions for a "stronger" category were present in the case. As a matter of course, this concept is also slightly related to the idea of a copyright register where right holders would have to decide which category and which term of protection should be applicable to their works; however, the existing proposals in that direction are not extensively discussed or supported by *Kreutzer.*

9 The plea for more differentiation in copyright law is certainly justified. In particular, the term of protection is certainly too long with regard to many categories of works, namely (but not only) with regard to computer programs and other more "technical" works. *Kreutzer* convincingly refutes the possible counter-argument that the overlong term of protection is of no substantial harm anyway because most works lose their economic value long before the end of the protection term: First, the example of the problematic issue of orphan works (in particular in the framework of digitisation projects) clearly shows the potential problems of an overlong term of protection. Second, the very design of copyright undoubtedly structures the markets for the use of copyright-protected works; therefore, a longer term of protection might have a structuring influence for investment decisions (under conditions of uncertainty) in that area even if it is statistically of no substantial economical value.

10 As for the condition of protection, *Kreutzer* proposes a different wording which takes into account that the protection very often is no longer granted because of the individual character of the work and the resulting link of the work to the personality of its author; instead, protection is based on certain particular qualities of the work itself. Therefore, according to *Kreutzer,* the condition of protection should be an "own intellectual creation" instead of a "personal intellectual creation". Protection should be excluded if a certain "leeway for creativity" does not exist. Indeed, the European Court of Justice has already followed that terminology and harmonised the criterion of "own intellectual creation" as the European condition of protection in its *Infopaq* judgment (ECJ, Case C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009] ECR I-6569; meanwhile followed by ECJ, Case C-393/09 Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury, Official Journal EU 2011, Nr C 63, 8). Although the criterion was deliberately only harmonised with regard to very specific categories of works in the Computer Program Directive, the Database Directive and in the Term Directive (with regard to photographs), the ECJ effectively horizontalised these pointillist regulatory approaches for all categories of works. In theory, this is an example to support *Kreutzer's* thesis that copyright law is in danger of being derogated because of the inclusion of more and more technical and organizational efforts into the protectable subject matter without differentiation between genuine individual creations and weaker investment protection. In practice, however, the new terminology should certainly allow the Member States to continue their more differentiated approaches with regard to the condition of protection in substance. This is because the ECJ has merely coined a new terminology for the condition of protection that should now be used cohesively throughout the Internal Market; however, Member State courts remain at liberty to specify that condition and to apply it to the facts of the cases before them. Thus, the "danger" that was seen in the *Infopaq* judgment is probably overrated.

11 As for the initial assignment of copyright, the consequences of *Kreutzer's* fundamental approach are clear: For activities that are characterized by an organisational or investment effort, the initial assignment of the right shall be with the investor/organizer. This would approximate European copyright law to the Anglo-American work-made-for-hire doctrine and would undoubtedly simplify matters for all kinds of producers, such as film and video game producers and aggregators of all kinds on the Internet. Actually, *Kreutzer* indeed tries to show in his study that the European system causes practical problems for the large producers in these fields. However, the consequence of initially assigning copyright to the investors for such categories of works seems problematic. First, solutions to the problem of the rights clearance already exist and can also be further developed in the future by way of more differentiated, area-specific provisions of copyright contract law

(which already exist in the area of film producers) as well as by making the system of contractual agreements more flexible with regard to moral rights (see Metzger, Rechtsgeschäfte über das Droit moral im deutschen und französischen Urheberrecht, C. H. Beck 2002, Obergfell, Zeitschrift für Geistiges Eigentum/Intellectual Property Journal 2/2011, 202). Second, one has to bear in mind that the design of copyright law undoubtedly has an impact on the situation of the individual authors (which are needed even with regard to films and video games and the like) and consequently on the *quality* and *diversity* of the works that are produced in a given system (cf. Benkler, 22 Intern. Rev. L. & Econ. 81 (2002); Leistner, Zeitschrift für Geistiges Eigentum/Intellectual Property Journal 4/2009, 403, 410). Taking this into account, the proposal to assign the rights for investment-orientated categories of works to the investors seems highly problematic (cf. similarly Dreier, Computer und Recht 2010, R031-R033). Indeed, first, if this would free investors from the need to acquire the necessary use rights from the individual authors, this would certainly have to be complemented by a corresponding system of obligatory copyright contract law, safeguarding the position of the individual authors contributing to such large collective works. However, such obligatory copyright contract law would then substantially reduce the advantage of having an easier rights clearance system. Moreover, it is far from clear whether such obligatory provisions in copyright contract law would indeed efficiently protect individual authors; the first experiences with the recently revised German copyright contract law have caused a certain scepticism in that regard. Second (and even more importantly), from this author's viewpoint it cannot be excluded that a streamlining of the rights clearance issue along the lines of *Kreutzer's* proposal would indeed lead to a substantially less diverse cultural sector characterised even more by large producers and mass productions. This is because the assignment of rights to the investor would mostly benefit the large producers and could possibly lead to intensified rent-seeking effects in the copyright industries. Against this background, the present German situation might be less "efficient"; however, these inefficiencies might have positive effects by contributing to cultural diversity through the consistent protection of the individual authors' self-determination.

12 To complete the overview of neuralgic spots, we can certainly agree with *Kreutzer's* proposals for a more transparent acknowledgement of the interests of the users and the general public instead of the present system where the exceptions to copyright do not grant genuine enforceable rights to the users. However, even within the present system, a certain more or less "cautious" development in that direction can already be noticed (see comprehensively Stieper, Rechtfertigung, Rechtsnatur und Disponibilität der Schranken des Urheberrechts, Mohr Siebeck 2009). It is doubtful whether it is really necessary to derogate wide areas of copyright law into an investment protection system in order to encourage these already existing approaches.

13 **V.** *Kreutzer* has presented a seminal academic study that does not stop at summarizing the widespread misgivings with the present copyright system, but instead goes on to attempt a fundamental proposal for a new, modern two-tier copyright system. This deserves the highest respect.

14 Many of his diagnoses – concerning *inter alia* the condition of protection (and the extension of protectable subject matter), the term of protection, the provisions on exceptions and their relationship to technical protection measures – are certainly correct. However, his proposed "remedies" can only partly be followed from this author's viewpoint. Undoubtedly, a more differentiated system is needed with regard to different categories of works. Certainly, such a system would have to substantially shorten the term of protection in some areas. Finally, the exceptions to protection should be made more flexible in order to cope with new digital uses on the Internet (cf. Leistner, IIC 2011, 417 et seq. with further references). However, *Kreutzer's* fundamental proposal – i.e. the derogation of wide parts of copyright law into an investment protection right characterised by a low protection threshold, the initial assignment of the right with the investor in many areas and an extended system of liability rules instead of exclusive rights – cannot be followed by this author (similarly Dietz, Zeitschrift für Geistiges Eigentum/Intellectual Property Journal 4/2010, 484). Indeed, here it seems that *Kreutzer* concludes his *normative* proposals from the aptly analysed *factual* situation. However, such a conclusion from the factual level to the normative level is by no means self-evident. Many factual developments, such as the increasing importance of large, industrial film and video game productions, the emergence of sometimes qualitatively doubtful user-generated content on the Internet and the like, have to be questioned with regard to their social usefulness, i.e. their contribution to a diverse cultural and academic landscape. Here, copyright law does not necessarily have to reflect and strengthen *any* of these new developments by making them easier. The example in point is the initial assignment of copyright. Here, *Kreutzer's* proposal would arguably weaken the position of individual authors and contribute to a decrease in cultural and academic diversity if it were not complemented by an obligatory copyright contract law (moreover, with regard to the latter, it must be doubted whether such a copyright contract law can really do the job). In a nutshell, the self-determination of the individual authors of such larger productions and works should not be qualified in order to make the production of such works more efficient; from this author's viewpoint, the existing protection of self-determination of individual

authors in the *droit d'auteur* system is the very guarantee for a vivid and diverse cultural and academic sector. Moreover, this is exactly the point where it would have been useful to think further about possible fundamental alternatives to such a concept. Instead of developing copyright into a genuine investment protection right, the existing possibilities in unfair competition law would certainly also have to be taken into account.

15 This difference between *Kreutzer* and this author shall by no means diminish the outstanding quality of *Kreutzer's* seminal study. Indeed, *Kreutzer's* study will have significant impact for a future copyright law in the digital environment. *Google´s* Collaboratory think tank has already developed more specified scenarios and proposals for a future copyright law on the basis of *Kreutzer's* work (Annual report on 3rd initiative "Urheberrecht für die Informationsgesellschaft", https://sites.google.com/site/colabdev3000/presse/downloads/IGCollaboratory-Abschlussbericht-Urheberrecht-fuer-die-Informationsgesellschaft.pdf). This initiative should at least be considered by the German legislator in the framework of the "Third Basket" of German copyright law revision. Moreover, some of Kreutzer's clear-sighted visions have already become true, such as the European harmonisation of the terminology regarding the condition of protection or the remarkable pressure for new investment protection rights, namely for the benefit of newspaper publishers and the organizers of sports events. However, again, the fact that these developments exist and cannot be denied has to be distinguished from the question of whether they should be actively supported by the legislator.

16 Finally, of course, in the framework of this review it was a particularly intellectually challenging pleasure to discuss *Kreutzer's* own conclusions and policy proposals. However, *Kreutzer's* work is also a very valuable source of information for anyone who wants to be comprehensively informed about the neuralgic spots where present copyright law reaches its limits. On several occasions this author has used the study as a tool for first orientation on problematic issues in one of these fields. This was always a great pleasure as *Kreutzer* writes very clearly and has exploited a vast amount of literature. Therefore, the study will hopefully not only be considered by the German legislator but also referred to by many readers and academics.