The Berlin Gedankenexperiment on the restructuring of Copyright Law and Author's Rights

– Creators – Exploiters – Non-commercial Users – Intermediaries –

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Preface:[1]

1 The concept for a regulatory system concerning creative goods, as elaborated within the Berlin *Gedankenexperiment*, dates back to the third initiative of the "Internet & Gesellschaft Collaboratory" (2010-2011).

2 Back then, a panel of experts took the initiative and developed a set of *Guidelines* for a copyright law in the digital world, which took the form of a regulatory system for creative informational goods[2] (see final report of the 3rd. Initiative, p. 99 et. seq)[3]. The idea was to develop a new form of regulation that would withstand the challenges of the year 2035 (that means a time perspective of about 25 years).

3 From the outset the *Guidelines* were considered a working hypothesis, which should be discussed, reconsidered and redefined. This task was taken up by a newly composed working group that concluded its work in 2015. With the Berlin *Gedankenexperiment* this group submits a thoroughly reviewed version of the *Guidelines* of 2011.[4] The *Gedankenexperiment* at hand is thus a further stage of development of the first version of the *Guidelines*.[5]

4 The project´s work was based on a "blank page approach". The project team was asked to imagine that copyright law had never existed and that we could, in fact, create a new legal concept, fit for the digital world. We tried to prevent that the conceptual work would be influenced by the current legal situation, e.g. by the status quo and the boundaries arising from international treaties and other frameworks. Nevertheless, the considerate reader will notice that there are a number of references to present deficits and comparisons to the current copyright regime. In some cases these references might apply more to authors´ rights regimes than to copyright regimes, in others the opposite might be true. It should be noted, however, that the criticism of the present situation is not the focus of this paper. It is rather a means to illustrate and underpin the arguments for the newly suggested approach.

5 Akin to the *Guidelines*, the *Gedankenexperiment* constitutes a contribution to the discussion on the restructuring of copyright law in the digital age. However, the *Gedankenexperiment* does not come up with concrete legislative proposals; instead it outlines a regulatory concept. In particular, it is meant to determine actors and their particular interests and assign them roles and abstract rights and duties.

6 Within this framework, suggestions for essential, regulatory aspects of copyright law are made, for example regarding exclusive rights of creators and exploiters[6]. However, no specific evaluative decisions regarding points of detail are made. To answer these is not the aim of the *Gedankenexperiment* – but can and should be the task of follow-up projects.

A. Preamble

I. Regulatory Purpose

7 The *Gedankenexperiment* serves to conceptualize a framework of an institutionalized balance of interests in the form of a regulatory system that governs the creation, commercialization, use and mediation of creative goods. This regulatory system will foster creativity, art, culture and entertainment and thereby serve the public as a whole. To achieve this aim, individual interests will be guarded by protective, partly exclusive, rights. Guaranteeing such rights is meant to secure income opportunities for creative professionals and provide incentives to invest in creative, immaterial goods.

8 These protective rights, however, have to be implemented in a way that pays due regard to the public interest and to other conflicting interests. In other words, a balance needs to be struck, in which the respective interests receive the greatest possible consideration.

9 The regulatory system is thus more than a means to protect individual rights. It is an instrument that will allow the balancing of diverging interests, which may from time to time collide with one another. Akin

1 This paper was initially written in German. Translation into English by Sylvia Jakob and Till Kreutzer.

2 Original: „Leitlinien für ein Urheberrecht für die digitale Welt in Form eines Regelungssystems für kreative informationelle Güter".

3 <http://dl.collaboratory.de/reports/Ini3_Urheberrecht.pdf>. An English translation of the guidelines (not the whole report) can be found at: <http://www.collaboratory.de/w/Datei:Ini3_Copyright_Excerpt.pdf>.

4 The present project was sponsored by the Internet & Society Collaboratory e.V. (Co:Lab) with 10.000 Euros. The amount was spent on workshops, travel expenses and organization. No expert was paid a fee. We thank the steering committee of Co:Lab for its support. Co:Lab was not involved in the production of the contents and did not influence their development. The present publication reflects the personal opinion of the experts involved and is not necessarily consistent with the position of Co:Lab or of any of the respective institutions for which the experts work.

5 For a better understanding of the *Gedankenexperiment* it is recommended to read the original guidelines.

6 In this context the term „exploiter" is used for commercial users of protected creative goods. These are especially traditional producers such as publishers, labels or distributors and on top of that anybody who needs a license to use a protected work.

to the principle of balancing fundamental rights the *Gedankenexperiment* assumes that none of the involved interests enjoys a structural superiority. Whether one interest should be given priority over another needs to be determined in concrete evaluative decisions. In this context we assume that every legal position assigned by the regulatory system will have to be justified per se. This applies as much to the legal positions of non-commercial users, as to those of creators, exploiters and intermediaries[7]. A right will thus only be granted to the extent that it is justified in relation to the public interest and conflicting individual interests of the other parties involved.

II. Regulatory concept

10 The regulatory system for creative goods distinguishes four relevant groups of actors: creators, exploiters, non-commercial users and intermediaries. Their corresponding rights and duties are separate and separable, thus creating isolated spheres, within which the interests of the differing groups will be assessed. Thereby, distinct rights of creators, exploiters and non-commercial users accrue.

11 Due to the systematic separation, all actors will obtain distinct legal positions, which do not overlap and may not be re-assigned or licensed. The framing of each legal position is based on a thorough assessment of the individual situation of the respective actor. Thereby, one major flaw of current copyright regimes, as identified by the expert group, shall be prevented: If an actor assigns her legal position to another actor, the purpose of the protective right is undermined, as these rights were tailored to the needs of the first actor. This happens often in the relation between authors and exploiters who often have and pursue different interests. The balance of interests is thus jeopardized. A protective system based on these premises cannot establish a true balance of interests, as it is impossible to predict who ultimately owns the rights and who may exercise them.

12 The current copyright law systems, notably the European authors´ rights regime, suffer considerably from this flaw. Officially they are guided by the interests of the author. Political decisions are generally justified in the author's name. Practically, however, most legal positions accruing from the right of the author lie in the hands of exploiters. These legal positions, and in particular copyrights and exploitation rights, are in many cases to a greater or lesser extent contractually assigned or exclusively licensed. Exploiters, however, have other interests as to the exploitation of the work, i.e. in many cases they exercise the rights differently than the author herself might have exercised them. In addition, exploiters have their own legitimate interests for protection, which differ from those of the author and vice versa. Confusing and mixing authors' and exploiters' interests opens space for manipulative arguments, which may foster undesirable developments. These lead to a conflict of values, which may ultimately undermine the copyright law system as a whole.

13 To prevent such inconsistencies the *Gedankenexperiment* abandons the concept of derived rights and assignments. It proposes a strict distinction between authors´ and exploiters' rights. The authors´ rights will focus on the creator and will not be able to be licensed or assigned to exploiters. The latter, in turn, have rights of their own rights, which are tailored to their specific economic needs and which – opposed to authors´ rights – may be traded on the market.

14 The concept resembles the system of copy- and neighboring rights in the current authors´ rights systems. However, there is a fundamental difference due to the inability to re-assign or license legal positions of the author.

15 According to current law it is not only possible, but also necessary for a exploiter to obtain the rights to exploit a creative work from the author. In addition, exploiters have their own neighboring rights e.g. in a film production. Thereby different protective rights accumulate in the position of the exploiter.

16 An example: A composer licenses the copyrights in her work exclusively and for the whole duration of the copyright to a music label. The label thereby obtains the exclusive right to exploit the work, potentially for the coming 100 years or more, depending on how long the author lives. The work, however, is blocked for the exploitation by third parties, unless the copyrights owner (here the label) decides to allow it. In addition, the label has exclusive rights in the recordings that were produced from the composition.

17 Under the *Gedankenexperiment* such rights accumulation is neither possible, nor necessary.[8] Instead, its regulatory system suggests a different approach:

7 "Intermediaries" stands for actors who are not *using* protected material in terms of the law. They do not copy or distribute protected goods but provide the technical infrastructure that enables others (their users) to do so.

8 An exception applies only to those cases in which the creator is simultaneously the exploiter (e.g. in the case of self-publishers).

18 The creator can only grant the label a permission to exploit the work[9] for a limited period of time (e.g. five years[10]). This permission might also be exclusive. During this time the exploiter's initial investment is protected by two legal positions: (1) The contract with the author that prevents her from giving further permissions to publish her work to other exploiters. (2) The exploiter's own right in the published work, which enables them to take legal action against free riders. After the creators' permission has expired, she can allow another producer to use the work or exploit it herself. The exploiter, in turn, can continue marketing their own edition/production of the work, although they might have to cope with competition by other productions. The creator will not only benefit from the first, but also from any following publication by means of contractually agreed remunerations and statutory claims for monetary compensation. Society as a whole, in turn, profits from the resulting free competition.

B. Rights and duties of the creator

19 One of the main principles of the regulatory system is that the creator of a work should own the right in her creation (author's right)[11]. The right is bound to the individual and cannot be assigned nor licensed to third parties, neither exclusively nor non-exclusively, neither entirely, nor in parts. It can only be owned by a natural person.

I. Objective and scope of protection of the author's right

20 The work will be protected as an intangible commodity (as under current copyright law). The exclusive ownership of the work that follows from the author´s right includes both economical and moral rights. The author can therefore decide, if and who may use/exploit her work and under which conditions. The scope of protection ends where interests of third parties – in particular those of the general public – prevail.

II. Relationship between the author's rights and the exploiter's rights

21 In principle, both exploiters and creators have their own rights, which they can exercise independently. The creator cannot assign or license any usage/exploitation rights to the exploiter. Nonetheless, she may grant the exploiter an all-encompassing or limited permission to use/exploit the work for a limited period of time.

22 This is a contractually declared permission to first publish the work or use/exploit the work exclusively and/or non-exclusively for a limited period of time. Legally, the permission does not constitute a license/transfer of individual author's rights *in rem* but a consent under the law of obligations, i.e. under contract law. It can, if the creator agrees, be transferred to third parties. Should a creator grant a exploiter an exclusive permission to use or exploit the work (exclusivity agreement), she can only do so for a limited amount of time. The exclusivity agreement expires, depending on which point in time comes first, either after its maximum term of duration (e.g. 5 years) or with the expiration of the exploiter's right in her own edition/production. Should the exploiter's exploitation right be extended by means of registration (see below IV.4), the exclusivity agreement can also be extended. However, in order to prevent the creator from entering into promises of exclusivity without being able to predict their overall effect on her interests at a later stage, any extension should be accompanied by an additional agreement. For works *made-for-hire* or those which are part of more complex works such as films exceptions could be made from the aforementioned restrictions on the transferability of author´s rights.

23 If the exclusive permission to use/exploit is not extended, it may continue on a non-exclusive basis (depending on the agreement with the author). This would ensure that the exploiter can continue marketing the product, although without being the exclusive exploiter of the work.

24 Promises of exclusivity should be registered in a public registry in order to provide legal certainty. Promises of exclusivity not registered by the exploiter cannot be enforced against third parties.[12]

25 If the exclusivity agreement is registered, one can assume that it is publicly known and effective against any third party independent of their actual knowledge of the exclusivity agreement. *The effect* of

9 See the details of this concept below, sec. II.2.

10 As far as terms of protection or other terms are named in the *Gedankenexperiment* they need to be understood as variable. How long individual protective positions shall be granted or promises of exclusivity be valid, would have to be determined considering various factors, e.g. economic and demographic ones, etc. Such valuation is not part of the Gedankenexperiment.

11 Note the difference: "copyright" versus "author's right".

12 This means the exploiter may use or exploit the work. Without registration, however, she cannot prevent a third party from using or exploiting the work even though the creator promised her exclusivity.

a registered exclusivity agreement is thus similar to exclusive licenses under current copyright law but the negative ramifications of extensive licensing for the author are prevented.[13]

26 Should a competitor violate a registered exclusivity agreement, the exploiter can pursue them on the basis of either unfair competition law or the right accruing from their own production. In turn the creator who violates the exclusivity agreement by allowing a third party to use or exploit the work can be pursued under contract law.

27 **Examples of the effects of the permission to use or exploit a particular work:**

- **Example 1:** An author writes a novel. She grants a publisher the permission to first publish the work and promises him exclusivity for the maximum duration possible (e.g. 5 years). The publisher's exclusive right in his own edition (i.e. the proofread version of the book) might also last for five years since the date of first publication.[14] The exclusivity agreement thus expires simultaneously with the publisher's own right. After its termination the exclusivity agreement automatically transforms into a non-exclusive permission to use or exploit the work. From the date of termination, the author can allow a different publisher to re-publish her novel.

- **Example 2:** (variation): The author promises exclusivity but only for a period of three years after the first publication. Subsequently the creator can allow a different publisher to re-publish her work. This re-publication does not interfere with the first publisher's own exclusive right since it does not have the exclusive right to market the work (i.e. a novel), but only an exclusive right to its own edition of the novel (i.e. the version proofread and arranged by the first publisher).

- **Example 3:** A singer-songwriter allows a record label to produce, publish and market her song for a period of three years exclusively. The label's own exclusive right in the production has a duration of (assumingly) ten years. After the exclusivity agreement expires, the label's own right continues to exist for another seven years. During these seven years the label can exploit its production on the basis of its own exclusive right. After three years however the composer can allow a different label to create a new production, which will again acquire rights of its own. In the years after the expiry of the exclusivity agreement, both productions compete on the market.

- **Example 4:** A film director allows a film producer to exploit her work for a period of three years exclusively. The producer's own right in the production amounts to (assumingly) 10 years. Since the creative achievement of the film director will be inextricably interwoven with the contributions of the other participants in the production (e.g. cameramen) as well as being an inextricable part of the film production as a complex work, the terms of the exclusivity agreement and the producer's own rights should be synchronized. The director will in any case not be able to permit other producers to use her particular creative achievement. For cases like these special rules are needed.

III. Additional protection through copyright contract law

28 Although the power imbalance between creators and exploiters can be mitigated to a considerable degree by restricting extensive exclusive agreements, the need to protect creators against contractual overreaching still subsists.

29 There is, for instance, still a need to guarantee the author an appropriate remuneration and to protect her from entering into excessive promises of exclusivity. Hence there is a need for a strong, albeit balanced, copyright contract law.

30 Furthermore should creators be given the unlimited possibility to grant the general public far reaching, non-exclusive, indefinite and royalty-free permissions to use the work in order to ensure the functioning of open source and open content licenses.

IV. Protection of the alimentation interests through rights to a fair share and adequate compensation

31 In order to safeguard the interests of the general public, the term of protection for exclusive author´s rights should be restricted adequately. Excessively

13 For example the negative consequences of rights diffusion are avoided, *inter alia* because the exclusivity agreement only applies as long as the exploiter's own rights exist and because it can only be exercised vis á vis third parties if it has been registered. This approach prevents the erosion of values underlying the exclusivity right in copyright by avoiding unimpeded, unlimited transfer of rights or licenses to the exploiter.

14 See in relation to the proposition of time frames in this *Gedankenexperiment* the annotation in fn 10.

long exclusive rights obstruct the use of intellectual creations and generate legal uncertainty for re-publications or may even render them impossible since it is increasingly difficult to ascertain who owns the copyright.

32 This leads to the phenomenon of orphan works, excessive pricing and under- or non-usage, caused by the exclusive right´s artificially elevated transaction costs (licensing efforts and royalties). This applies first and foremost to digital exploitation, for which the marginal costs are so low that the likelihood of a re-use by third parties after the expiry of the protection period would normally be very high. However, if exclusive rights are granted excessively and their term of protection is determined too long, the likeliness of re-publication and further use will decrease significantly since there is no economic incentive to re-publish the work.

33 If the transaction costs to identify the rights owner or concluding individual license deals are too high for commercial disseminators or public institutions, many cultural works will disappear sooner or later although there might be a strong cultural interest in their availability and preservation. The protection of the public interest as the main goal of the legal system outlined in the *Gedankenexperiment* requires adequate restrictions of the exclusive rights.

34 As such a more reasonable duration for exclusive author´s rights than it is provided in current copyright systems is proposed. Instead of excessive exclusivity the *Gedankenexperiment* proposes a less invasive instrument of protection for authors. After the expiry of exclusive rights the creators should be legally entitled to profit sharing. Such claims particularly aim to protect the economical interests of the creators.

35 Any author should have a claim to a fair share of the commercial revenues derived from the exploitation of her work. Such a share would allow the creator to participate economically in her work's success, but prevents inflated licensing transaction costs. The difference to exclusive rights is obvious: whoever wants to use or exploit the work can do so without seeking prior permission and may not be prevented from doing so but has to pay the creator a monetary compensation. Hence the monetary compensation has only a narrow limiting effect on the use. Functioning structures to collect and distribute such remunerations provided, the burden for using the material would be manageable. A well-balanced system of exclusive rights and rights to monetary compensation enables an adequately refined protection of the creator and at the same time serves all other parties involved.

V. Protection of idealistic interests – the author's moral rights

36 The creator has moral rights, which protect in particular her interest in being recognized as the author, but also protect the work against distortions and non-authorized primary publications. These moral rights are based on other requirements than the economic exclusivity rights. Therefore they have an independent term of protection and may – similarly to claims for monetary compensation – under certain circumstances be bequeathed.

VI. Duration of the author's rights

37 When assessing the duration of author´s rights, it is important to consider their independent components. First and foremost a distinction should be made between economic protection rights and the author's moral rights.

38 The author's moral rights are inheritable; their duration can be determined (as under current copyright law) by the creator´s lifetime. Moral rights should have a uniform term that should be determined balancing the different interests.

39 For economic exclusive rights and claims for monetary compensation, different terms of protection are proposed. Above all, the exclusive rights allow the creator to control the first publication of her work and the negotiation of the best possible conditions. Their duration should not depend on the category of the work and be assessed according to the principle "as long as necessary, as short as possible". Since the purpose of the exclusive rights is first and foremost directed at the primary publication, their term of protection should be calculated from the moment of first publication.[15]

40 After a certain period of time exclusive rights are transformed into a claim for monetary compensation. This approach allows the creator to continue participating in the economic exploitation of her work. For employed creators exceptions can be made. The claims for monetary compensation should be calculated autonomously and objectively and be equal for all types of creators and works.

41 Since the author's exclusive exploitation rights (and in particular the claims for monetary compensation)

15 That does not mean that the rights only accrue with the first publication, but that the duration of the exclusive rights will only be counted from that point in time. That way it cannot occur that the exclusive rights have already expired, when a creator decides to publish her work long after its creation.

will also serve alimentation interests, they should be inheritable.[16] In order to prevent increasing legal insecurity their duration should not extend beyond a reasonable period. They could, for instance, be limited to 20 years after the creator´s death.

C. Rights and duties of exploiters

42 In the digital world the exploiter still assumes a leading role. He invests in the production and distribution of creative goods and services and is, in many cases, the first to make them available (e.g. film productions). Based on the underlying idea of investment protection for distinct achievements, he ought to obtain an exclusive right on his specific design, edition or production (i.e. his "edition of the respective work"). Being an exclusive right, the exploiter's right is meant to safeguard the amortization of investments and provide financial incentives to make them. The exploiter´s right accrues for the exploiter and is not a right derived from the creator. It can be assigned to third parties – as a whole or in parts. Exploiters obtain the necessary permission to use the work from the creator via promises of exclusivity or non-exclusive permissions (for details see above B.II).

I. Subject matter of the exploiter's right

43 It is the individual achievement of the exploiter which is being protected, i.e. the particular production, edition or issue of the respective work. The subject matter of the exploiter's right is thus the specific implementation of a creative product (e.g. a music recording or a movie).

II. Accrual of the exploiter's right

44 In order to prevent unjustifiable disadvantages for small exploiters, the exploiter's right should accrue automatically and without registration when their edition of the work has been produced. The right accrues, similar to today's neighboring rights, for the one who has made the essential investments and carries the financial risk. The publication of the product is, however, only allowed if the creator had previously granted the necessary permission to use and exploit his work.

16 Even though the duration of the exclusive rights is measured relatively shortly, they should be heritable. In any case it is possible that the creator dies shortly after the creation of the work.

III. Subject matter and scope of the exploiter's right

45 Exploiters have an exclusive right to their product, i.e. in their own specific implementation, edition, assembly, production. They can transfer that right and assign it fully or in parts to third parties or grant exclusive or non-exclusive licenses (as long as the creator agreed to grant a transferrable permission to use her work). Following therefrom, the concept of the exploiter's right corresponds to the concept of neighboring rights. Exploiters can enforce their right against piracy and other non-authorized uses of their goods and services based on their own right. Being a right owner they can claim injunctive relief, removal and damages. Should a competitor violate a registered exclusivity agreement, the exploiter can resort to competition law.

IV. Terms of protection of the exploiter's right

46 The exploiter´s right constitutes first and foremost a protection of investment. Its term should therefore be calculated based on economic facts and assessments. Given that the product of the exploiter enjoys a quasi monopoly that interferes extensively with free competition, the principle of "as long as necessary, as short as possible" should be applied in this context.

47 As to the specification of the term of protection two models can be considered, both of which come with advantages and disadvantages. On the one hand it might be possible to define product specific terms of protection, in order to account for the different diffusion curves on the markets.[17] The advantages of market-oriented differentiation are, however, offset by serious disadvantages as to legal security. The convergence of traditional and new types of works based on multi-media, such as computer games, would raise considerable problems in this model. In addition, in a model based on market-oriented differentiation the terms of protection would have to be continuously changed in order to be able to account for the changing market conditions.

48 In light of these disadvantages it seems that an approach applying uniform terms of protection – i.e. terms of protection which are independent of product and market – should be preferred. In order to calculate an ideal uniform term of protection, one should – just as in patent law – consider the average

17 This approach was preferred in the original guidelines, see final report, p. 117 (<http://dl.collaboratory.de/reports/Ini3_Urheberrecht.pdf>).

amortization period as a guideline. In other words, the term would have to be determined in line with the period of time in which investments into creative products usually pay off.

49 In order to prevent (in individual cases) inadequately short terms of protection, they should be able to be extended by registration. The registration should be subject to considerable yearly fees that should progress in amount the longer the protection lasts. The opportunity to extend the term of protection should be limited in time (e.g. 20 years after publication) in order to avoid the negative effects of excessively long exclusive rights and to reconcile the interests of the general public with the interests of investment protection on the side the exploiters. The registration fees can be spent on cultural purposes or similar.

D. Rights and duties of non-commercial users

50 The duties of non-commercial users[18] ensue from the protection rights of creators and exploiters. Within the scope of the exclusive rights of creators and/or exploiters, the work may not be used without permission. Should legislation guarantee the non-commercial user a right to use the work or the respective production, these rights prevail over the exclusive rights. In other words the exclusive rights are limited in scope.

I. Non-commercial users rights as enforceable personal rights

51 Different from the current system of exceptions and limitations especially in author's rights systems, the *Gedankenexperiment* protects the interests of non-commercial users by own rights. These user's rights are not derived from statutory limitations of the author's or exploiter's rights. They rather are separate and individual legal positions that belong to the non-commercial users.

52 The balance of interests between creators, exploiters and non-commercial users is realized by defining the scope of the exclusive rights on the one hand and the user´s rights on the other. The non-commercial user's interests are thus not subject to limitations of unlimited exclusivity rights, but constitute own subjective rights. They are outside the scope of protection.

53 All rights – i.e. those of the non-commercial users, the creators and the rights owners – are generally considered equal. Hence, the freedom to use is no exception to a general overall exclusivity. Consequently, the non-commercial users´ rights do not form part of the protective exclusivity rights. As such, they cannot be contractually excluded.[19] Being individual rights they can even be enforced, e.g. when citations of films are impossible, because the exploiter sells his copies with technical copy protection measures. Such a system would acknowledge the public interest in legally protected freedoms to use and affirm them with strong legal positions.

II. Relationship between non-commercial users', authors' and exploiters' rights

54 The creation of an independent statutory sphere for non-commercial users´ rights establishes a consistent systematic approach towards balancing of the opposing interests. In addition, this approach prevents inconsistencies by guaranteeing that non-commercial users´ rights are considered equal to the creator's and the exploiter's rights. Should a non-commercial user have a right of citation, she can enforce that right against both creators and exploiters.

III. The implementation of non-commercial user rights

55 As described in the original *Guidelines*[20] non-commercial users´ rights should be implemented by means of a regulatory system, which combines elements of both the continental European author´s right and US copyright law.

56 In practice, this means the establishment of a rule catalogue of typified usage rights (such as the limitation provisions under the present author's right system) in which permitted acts are specifically described, such as the quotation right or private copying. This catalogue however is – other than

18 Non-commercial users are referred to as users who use protected creative goods for their private or the public interest. Non-commercial users are individual members of the public and public institutions like museums, universities, archives and the like.

19 In this model an exclusion of usage rights would lead to the contractual creation of protective rights and the extension of existing protective rights that are not envisaged by the law. Such a "law-perverting" drafting of contracts should (under certain circumstances) be expressly prohibited by law.

20 See p. 112 et seq. of the final report (< http://dl.collaboratory.de/reports/Ini3_Urheberrecht.pdf>).

under the current European copyright law – not exhaustive. It will be complemented with an open norm, i.e. a general clause for constellations, which do not fall under the rule catalogue.

57 This regulatory system ensures on the one hand side legal certainty and on the other, the necessary flexibility in view of the ever-changing digital environment, which may easily upset the balance of interests. As far as it seems appropriate, monetary compensation through levies should be introduced to compensate certain forms of free uses.

58 The open norm only applies to uses which fulfill the criteria of a proportionality test. This could be guided by the four-step test set out in Art. 107 US Copyright Act (fair use).[21] In order to further substantiate the freedoms to use not explicitly mentioned in the legislation and to enhance legal certainty, complementary regulatory means could be established. It might, for instance, be possible to create a regulatory authority which defines permitted acts of usage under the open norm and lays down binding conditions for their applicability (e.g. the duty to pay adequate compensation). It could also assess whether existing freedoms to use are still necessary.

59 Alternatively or even cumulatively, certified user associations could be allowed to take representative action. Legitimized associations could apply for a generally binding decision in front of specialized courts determining whether, and if so, under which conditions an act of use falls under the open norm and thus constitutes a non-commercial users' right. A combination of regulatory instruments, courts, regulatory authorities and legislators would be involved in the further development of the balance of interests, which is so important for the effective regulation of creative goods. The involvement of all these powers in the development of the law can considerably accelerate the advancement of regulation and avoid protracted backlogs of reforms.

E. Rights and duties of intermediaries

60 Intermediaries are those which engage in the widest sense in the storing, making available and searchability of creative goods and services, without being commercial or non-commercial users or creators.[22] These include platform providers, web-hosting and web-sharing services, search engine providers, electronic program guides or similar services. Also telecommunication providers are in this broad sense "intermediaries".

61 Current copyright law does not govern the interests of Internet Service Providers. Since they are – according to jurisdiction and legislation – neither right owners nor do they engage in acts of use relevant under copyright law[23], their rights and duties are regulated outside the law of copyright. Instead they are regulated under Telecommunication Laws and especially under ISP liability rules found e.g. in the E-Commerce Directive of the European Union (2000/31/EC) or the US Digital Millennium Copyright Act.

62 In a new regulatory system for creative goods intermediaries are of systemic importance. That does not mean that intermediaries should be given protective rights of their own. It is a rather a question of balancing their interests against the interests of the other stakeholders involved.

63 As much as the label "intermediary" covers very different services and constellations, it may generally be said that intermediaries can exert an important influence on the commercial exploitation and use of creative goods. This becomes all the more obvious in the case of search engines and platforms. The activities of intermediaries can have a positive impact on creators, exploiters and non-commercial users, for instance when they enhance the findability and visibility of works and thus make them more accessible for a larger target group.

64 The activities of intermediaries, however, can also have a negative impact, for instance when free unlicensed services (such as user generated content platforms) start competing with fee-based offers provided by the right owners, or when an important intermediary obstructs access to creative goods.

21 According to Art. 107 of the US Copyright Act, four factors need to be taken into consideration when assessing whether an act of use constitutes fair use: (1) The purpose and character of the use, including whether such use is of a commercial nature or for non-profit educational purposes; (2) The nature of the copyrighted work; (3) The amount and the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work.

22 For the definition see also fn. 7. An intermediary is thus not somebody who uses works or creative products in terms of the regulatory system (or: copyright) and is thus not subject to licensing obligations. The scope of application of the intermediaries' regulations will therefore have to be defined according to the acts of use and not according to the identity of the user. Since in the online world content and infrastructure services are increasingly converging, it is very likely that providers are in some cases both users, intermediaries and under certain circumstances exploiters. The concrete regulations refer – as is the case under the current copyright law system – to the particular activity.

23 E.g.: A hosting provider does not copy protected works. It rather provides the technical facilities that are used (by end users) to copy.

65 The current legal system has difficulties in defining the role of intermediaries, since the economic principles of an intermediary´s role cannot be captured in a differentiated way under the current mechanism.

66 Under current copyright law, an act is either an act of use not relevant to copyright law – and thus neither requiring permission nor remuneration – or it is an act of use to which copyright applies in its entirety. Economically, intermediaries often lie somewhere in between. Although the intermediary does not "use" the provided goods in the legal sense, he profits nonetheless to a considerable extent of their being made available by third parties (his users), since his services would not be attractive without them.

67 On the other hand the commercial success of intermediaries is mostly based on their own achievements. They render a – for exploiters and authors – free service, which can also be beneficial for them. User generated content platforms such as video services can, for instance, significantly enhance the visibility and potential popularity of the uploaded creative content. The result is a marketing effect that comes for free for the right owners. In short: intermediaries are both beneficiaries and *apporteurs* of benefits in relation to creative goods. In a regulatory system for creative goods both roles need to be captured adequately.

I. The intermediary in the regulatory system for creative goods

68 At a glance, three regulatory areas for intermediaries can be considered in a regulatory system for creative goods:

- A precise definition of the term "intermediary";
- Whether authors and/or exploiters should have a direct claim to a share of the profit or other kinds of remuneration against (certain kinds of) intermediaries (primary liability);
- Whether intermediaries should be liable for right infringing acts of their users (secondary liability).

II. Categories of intermediaries

69 The potential for a conflict of interest between intermediaries, creators and exploiters depends most importantly on the kind of intermediation. Different types of intermediaries can be distinguished. Not all of them are relevant for the regulatory system for creative goods. Only those conflicts need to be solved which may have a negative impact on the interests of the other actors of the regulative system. As far as offers of intermediaries have a positive impact or can be rated neutrally in this regard, no legislative intervention is necessary.

70 The fact that an intermediary facilitates in some way the use of creative goods does not, on its own, point to a conflict of interest. In order to distinguish relevant conflicts of interests from irrelevant causal chains, criteria are necessary, which allow an abstract and general assessment of potential conflicts of interest which may ensue vis-à-vis particular types of intermediaries and which should carry different legal consequences.

71 For an appropriate balance of interest, it seems necessary to differentiate between intermediaries whose offers tend[24] to compete with goods and services from exploiters/creators or may even substitute them ("competing intermediary services"), and those whose offers complement the goods and services of rights owners or even make them possible in the first place ("complementary intermediary services").

72 Complementary services complement the goods and services of exploiters and foster the use and reception of works and are thus generally neutral or even beneficial for right owners. From the overall perspective of an information society they fulfill the important function of lowering information costs.

73 Competing services on the other hand can constitute a threat to the offers of the rights owners. In contrast to complementary services, they profit directly from the use of protected material. Although they do not *use* protected material themselves (in that case they would be non-commercial users or exploiters), they generate added value, e.g. by providing their users with services outside the marketing channels envisaged by creators and exploiters. That may even lead to the substitution of goods and services of the right holders. It thus appears generally necessary to consider intermediaries with potentially competing offers in the balance of interests which the regulatory system for creative goods envisages.

74 An important indicator for the division between competing and complementary offers is the

24 „Tend to", since in special cases every offer may have the contrary effect. A video platform, for instance, may be beneficial for the rights holder due to the advertising effects and the increase in publicity; for others on the other hand it might be detrimental due to its competitive impact. As always in the case of general assessments it is only possible to define general cases and to focus the regulations on them. For special cases exceptions to the general rule could be considered.

"proximity to the content". "Close to the content" are those services, which allow their users to place protected material online and to store and distribute it directly. By contrast services which only provide the means, especially the technical infrastructure, that enable the general use of the Internet are "far from the content". The same applies for services which merely systemize materials already available on the Internet and make them findable.

75 For instance, Internet access providers may be regarded as intermediaries in the sense of the definition, since their activities are a *sine qua non* for every Internet communication including the use of protected works. However, they only provide the technical means that make online communication generally possible. They are thus "far from the content". In addition, the offering of Internet access does not have a negative impact on the interests of creators or intermediaries. The offers of the right owners are thereby not substituted or impeded; instead they need access providers to enable the users to access their services. The fact that illegal acts of use are also being made possible does not change this fundamental assessment.

76 The same applies to other infrastructure and service providers or search engines. Neither do they compete with the offers of intermediaries nor do they replace them. They merely facilitate their searchability. They are therefore not competing against but complementing offers in the sense of the above categorization as long as they do not substitute or compete with the contents to which they point.

77 Counterexamples for services which are "close to the content" are, for instance, file hosters and video and image platforms. Such services can be operated in a way that competes with the offers of creators and exploiters or even replace them. Whether that happens depends on several other factors which cannot be examined in detail at this point, e.g. whether whole works or – as in the case of images – works in their full resolution are published on the Internet, whether access extends to everyone or only to a distinctive, limited user group, whether only own or also other people´s contents can be published, etc.

III. Legitimate and illegitimate intermediation and the consequences

78 Based on the proposed free differentiation the regulatory system for creative goods will be able to define appropriate legal consequences. Whereas intermediaries of complementary offers principally do not appear to require regulation, intermediaries of competing offers should invoke differently graded legal consequences.

79 Certain forms of competing offers may simply not be acceptable, for instance, when the service of intermediation is marginal and the true intention is to freeride and market the works circumventing exclusive rights. In this case the services should be subject to the full range of legal remedies, including injunctions and damages.

80 However, for most intermediaries the competing effect results from the attractiveness of the service, which represents an added value for the user. Such services are legitimate. There is – besides the own interest of the provider – a public interest in these services, so that they fall under the protection of the market and of the law. However, a balance of interest between intermediaries, the general public and the right owners, whose distribution channels may be prejudiced by such offers, needs to be struck.

81 A possible result of such a balancing act could be that providers of legitimate (potentially) competing offers – contrary to those offers providing complementary services – would be given an obligation to pay monetary compensation *in lieu* of their users, e.g. in the form of shares in revenue or an adequate compensation.

82 This could be justified, since they compete with the offers of the right owners or may even replace them, without having to invest in content or licensing. Their business model is based on the use of protected creative content by their users. Experience tells that especially non-commercial users do not only upload their own contents but also third party content – usually without having a license.

83 Unlicensed uses of non-commercial users provided through intermediaries are currently usually not economically compensated. This appears unacceptable in a regulatory system for creative goods. Experience has shown that copyright enforcement towards non-commercial users is not practical and leads to unwanted effects. Monetary compensation paid by intermediaries has the advantage that remunerations can be raised from a central actor and be passed on to the right holders. Decentralized licensing or royalty obligations towards end-users could also be prevented, avoiding mass enforcement against citizens.[25] Since the

25 The contemplated compensation paid in lieu by the intermediary does not necessarily lead to the conclusion that all acts of end-users have to be legalized. Both questions can in principle be assessed separately. Should it, however, emerge that compensatory payments are generally passed on to the users, but they are still being sued, legalization

intermediaries would only be called upon *in lieu* of the end-users, it would be in their discretion to ask users to reimburse them or to find other ways of refinancing[26] the payments made.

84 Such a solution resembles the systems of levies on blank media and storage devices, in which producers, traders and importers are liable for the payments *in lieu* of the end-users. In most European countries the system proved to be effective, at least in principle. In addition, the approach resembles industry specific solutions already established in some areas (such as YouTube's Content ID System)[27].

IV. Responsibility for legitimate intermediary offers with competitive potential

85 The inclusion of intermediaries into the remunerative relationship between right holders and non-commercial users is potentially contrary to their interests. Since their success is based on own achievements and self-created added value, and they do not engage in any act of use themselves, but only profit from the fact that their users do so, they should be granted advantages in return. This could be, for instance, the limitation of liability for use acts of their non-commercial users.

86 It might thus not be far-fetched to reduce the liability of intermediaries to purely reactive duties to act in a framework of notice and takedown procedures. This approach would most probably reduce the challenges currently faced by intermediaries in many parts of the world, where they sometimes face proactive duties to check uploaded content for its legitimacy and may even have to pay damages.

87 On the whole, such a system of monetary compensation and limitation of liability would be beneficial for all parties involved: instead of restricting the uses on platforms and hosting services, revenues would be generated for creators and exploiters. The intermediaries would be included in the remuneration system but not exposed to extended liability. Furthermore the approach would create more legal certainty, which is advantageous for all actors concerned.

would be inevitable. Otherwise the end-users would be charged twice for their uses and could still face legal consequences.

26 It would lie in the discretion of the intermediary to decide whether and, if so, in which form to make use of this opportunity. This would most likely depend on the business model and the technical feasibility.

27 The success of YouTube's Content ID System (see < https://en.wikipedia.org/wiki/YouTube#Content_ID>), which is voluntary for both sides, shows on the one hand that it can be more advantageous for intermediaries to make payments and share revenues than being exposed to legal remedies. In addition, they protect their users and maintain their business model. On the other hand, the active participation in the program (again voluntarily) by music labels and producers shows that such systems are regarded as advantageous also by the right owners. It would be interesting to examine, whether general lessons could be learned from this example. Should this be the case, it might be worth considering turning it into a regulatory approach.