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**The concept of intellectual property in Germany -
between culture production and creative industries. (draft)**

Paper to the DIME Conference:
The creative industries and intellectual property
London, May 2008

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1 Introduction

A blog entry in the American online issue of the magazine, 'reason', provides a critical, but precise, description of the ambivalent role of copyright in the international cultural field. Copyright, as the entry states, is on the one hand a "corrupt government imposed monopoly", but on the other, "allowing the creator to profit from his investment in time, labour and money" (reason online, March 20, 2008). The article involves locating the position of German copyright in this area of conflict, the demands which are made, and the present legal reality to be found. The background to this is the attempt which has been made to adjust German copyright in stages since 2002. The objective of this process is to do justice to the dramatic changes in the production of intellectual property since the last amendment to German copyright in 1965. Since communication technology and economic dynamics have long surpassed national boundaries, such national regulatory concepts have to be made pursuant to EU standards, which are intended to bring about a harmonization of the European Economic Area. The following will examine the links between the reformation of copyright law and structural changes in the cultural sector. To appreciate why the current reform of German copyright is making such slow progress, a brief analysis of the historical development of copyright in Germany is required, and its specific role as a regulatory framework in the context of cultural production.

2 German copyright and its integration in cultural policy

With regard to the German cultural sector, copyright has an important function in terms of regulatory policies. The protection of intellectual property is composed pursuant to the French example of "droit moral", as a personality right. In contrast to the situation in common law states, not only immaterial property per se is protected, but, in accordance with the idea, the creative personality, the author of the piece, is assured special protection for his work. Why this is so, and the reason why this legal regulation is of such significance in Germany becomes clear when one considers the specific scenario concerning cultural policies in Germany.

Germany is typified by a European continental appreciation of culture. The concept of originality stemming from Romanticism, which had a historical influence on the term, is of central importance. Artistic works are the

original product of the creative work of their authors, and thus a direct expression of their subjectivity. On account of such potential, a special societal quality is attached to cultural goods. The cultural sector has a positive standing, it incorporates cultural heritage and contributes to national identity. In the course of the industrial development in society, 'culture' was pressed into a type of societal 'niche', in terms of a collective 'emotional shelter' , (Marcuse 1965), in which the general rules of emerging industrial capitalism were extensively invalidated. As a result, most national states in Europe have developed a conservative and paternalistic relationship to culture (cf. Wagner/Zimmer 1997; Lazzarato 1999).

However, in the Federal Republic of Germany, this classical model of a 'cultural state' has been penetrated by liberal regulations (Göschel 1997, 246). Support for culture remains a public task and should never remain a (sole) interest of the private sector, but for concrete cultural policy, 'state abstinence' applies. The reason for this lies in the historical experience made with the forcible coordination and political instrumentalizing of culture and media on the part of the National-Socialist Regime. After 1945, freedom of art and freedom of expression are granted constitutional rights in the German constitution under the influence of the (western) allies (Article 5 German Constitution).

Therefore, because state intervention is excluded, copyright has always been an important regulatory factor in the field of culture production. In the course of structural change in the cultural sector, copyright law became, at least indirectly, an object for the negotiation and assertion of cultural and political interests and ideals. As a result of the emerging and successively growing so-called cultural industry, German copyright was fundamentally amended in 1965. Broadcasting in particular, and also the fields of music and film which were aimed at a mass public, as well as the entire advertising industry, had enhanced the spectrum of artistic and publishing products handled for commercial purposes. The response to this development was to introduce the principle of non-assignability of copyrights (§29.2 UrhG). While former law had allowed copyrights to be assigned, the new law emphasized the focus on personal rights. The new copyright comprises two dimensions of protection for artistic and publishing work: firstly, against

distortion of contents or other ideal misuse of the work or piece of art (issue of personal rights); secondly, against inadmissible material exploitation or participation in the economic success of the piece of art (issues concerning assets and exploitation) (cf. Fohrbeck/Wiesand/Woltereck 1975, 328). German copyright thus protects intellectual property across the entire life of the author, and 70 years after the author's death.

The reform of 1965 underlines the protection of producers of cultural work, and at the same time, bridges the traditional cultural concept of Romantic originality and a tendency to 'industrialized' cultural exploitation. In the course of the 1970s, this legal assumption serves a new development in terms of cultural policy. Influenced by the up rise of a progressive social climate, the cultural policy mandate is redefined by the social-liberal government coalition, which had been in office since 1969. In terms of an 'active guarantee of artistic freedom', a state commitment to the protection of cultural life is declared, and thus also to the creation of a pertinent framework (Wagner/Zimmer 1997, 17). Further expansion of the German welfare state, as was intended at that time, and a social-democratic, anti-elitist appreciation for culture resulted in a bundle of political objectives and strategies, which can be characterized as 'cultural policy of the industrial society'.

This new cultural policy is targeted to expand the established concept of cultural life. It is based on an enhanced cultural term which is removed from the traditional perception of culture, which is concentrated on aesthetic production and mediation. Stronger reference to general life and societal action led to the concept of 'socio-culture' (Wolf-Csanády 1996, 56). Cultural policy then gains new significance as a cross-dimension of the welfare state reform, or linked to political social, economic and educational objectives (Göschel 1997). Artists and publishers also move more into focus of cultural policies. They are seen as agents of the cultural freedom and freedom of opinion, which cultural support is to address in terms of an individual-related 'public support of artists'.

On account of the fact that the constitution does not allow state intervention, the question of the role of copyright within this context was re-addressed. The introduction of a 'law relating to copyright contracts' was demanded, in

order to secure factual assertion of copyright within the scope of contractual relations between producers, i.e. artists and publishers, and parties exploiting. This approach wasn't successful. Instead, the exploitation and resale rights derived from copyright were used as an instrument of social and economic security for authors and artists.

3 Copyright as an instrument of support for artists

Linked to copyright, the exploitation right regulates the economic participation of the producer in further exploitation of his work. Normally so-called royalties are agreed for all manageable applications. All reproduction and secondary exploitation forms which are not manageable, however, are the responsibility of collecting societies. The standards for these were the first collecting societies in the field of music, which were founded back in the mid-nineteenth century in France. In Germany there are six collecting societies, each related to a specific line of art. Among the best-known is GEMA, responsible for music (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte). The collecting society, Wort, has been responsible for the category of textual production since the end of the 1970s (Melichar 2000, 3).

Copyright defines which forms of secondary exploitation fall in the scope of the collecting society. For example, by way of granting legal license, use of photocopy machines, video rent and so-called cable transmission via radio and TV is allowed, and the authors are attributed an appropriate payment. The task of the collecting societies is to collect charges from the unit manufacturers, rental companies or channels, and to distribute these to the authorised representatives registered, in accordance with a certain code. Depending on the reproduction form, different systems of calculation apply. Lyrics, radio and TV programmes are rated far higher than reports or translations, in order to compensate the imbalance between quality and time expenditure of performance and quantity or programme duration. In addition, distribution plans regulate the division ratio between author and publisher. For example, for fictional literature there is a 70 per cent share for the author and 30 per cent for the publisher, for non-fiction books and scientific literature there is a share of 50 per cent for both parties.

Copyright also provides for partial usage of income of the collecting societies for social and cultural tasks. This can be seen legally in the so-called Natives Treatment. In principle this involves a trade-off, so that foreign producers benefit from German exploitation law, if their work is exploited in Germany, even if they might be granted less protection in their country of origin. To compensate this, a small part of the distributions flows into funds which are intended to support German artists and publishers. In 1972 a new form of charge is introduced in the course of a so-called small copyright amendment, the library royalty. Libraries and similar facilities are included for lending out books, sound carriers, video cassettes (§27 Urh G). This new charge is introduced with the specific aim of improving the social situation of authors in terms of the aforementioned concept of cultural policy in the industrial society. 50 per cent of income from public libraries flows into a Provision Organisation, the 'Author's Provision', which is to contribute to the pension of freelance authors.

Seen from a historical perspective, the bureaucracy involved in financing author's provision appears hard to understand. Especially if one considers that such means come from publicly financed libraries. However, this approach can be explained by seeing the library royalty in terms of a social policy in the form of copyright, thus legitimizing political action. The special (cultural) value of literature is emphasized, representing an indefeasible property of the author. The cultural and scientific work of the author and its societal value become tangible and calculable by way of lending processes documented by libraries. The market and the charges relating to demand, and responsibilities of the collecting societies in the distribution, ensure that neither distribution nor criteria could be controlled by inadmissible state intervention in terms of cultural policy.

4 Structural changes in the cultural sector

In the 1980s and 1990s the expansive structural change in the cultural sector continues. The conservative government in office since 1982 under Helmut Kohl seeks to decrease state intervention, and pursues a reserved, passive stance in the field of cultural policy. With regard to copyright only minimal amendments are made during this period, which are intended to regulate new exploitation forms. The law concerning private copying is reformed,

with regard to the mass product of music compact cassettes at that time, and photocopying technology. At the beginning of the 1990s the product piracy and counterfeiting law is expanded. However, in principle the legal status quo remains unchanged. Against a backcloth of a moderate market which then began to boom at the start of the 1990s, the proceeds situation for producers and exploiters of intellectual property appear to be sufficiently favourable, with the result that the discussion concerning copyright drifts into the background. In addition to technological development and international influence, economic growth contributes to further structural change.

Within this development commercialism and market rationality increasingly infiltrated the cultural sector. While previously a 'public borne' cultural landscape was assumed, there has now been a shift in location from the cultural sector as a public cultural service to the private-commercial domain. The information and media industry as well as the design and music industry prosper, while in the arts the positive influences soon falter due to the increase in economic priorities at the start of the 1990s. Digitalization and the international links of the media market organized on a private, economic basis cause a 'secularization' of the media from the national niche of culture. The 'digital revolution' drives forward the transfer from mono-medial exploitation of artistic and publicist performances to media-overlapping exploitation. Audio-visual media, newspapers and magazines, the book trade and music are in the hands of globally operating media concerns. Overall, capital considerations and the 'shareholder value' gain importance in media production (Hautsch, 1999: 15).

Even though, an important reciprocity structure of the cultural sector is removed. 'Author' and 'utilizer' were traditionally seen as a moral ('ständische') community of interest, which could only guarantee cultural freedom together. In the 1970s this relationship was elaborated as the 'solidarity consensus' of the cultural field. In the 1990s, however, these traditional bonds became a victim of economic developments. In their place singular and temporary commitments emerge, which are based on project work and mostly comply with pragmatic and economic rules. There is a change in role on both sides of the contractual relationships. For example, the classic publisher, who traditionally filled the dual role of media

entrepreneur and publicist personality, develops increasingly into a manager, thinking in economic terms. And the functional role of the newspaper editor or the publishing lector, which implicated a dual obligation to the publishing house or the company and the freelance authors, now disappears and is replaced by calculated economic rationality. Outsourcing measures increasingly exacerbate this development.

With increasing economization of cultural production, the imbalanced relation of power between authors and exploiters of intellectual property worsens. But the situation becomes even tighter after the slacking of the media boom and the collapse of the 'new markets' at the end of the 1990s.

5 Conflict concerning the law relating to copy right contracts

Against this background, the question concerning the regulation of contractual relations between authors and exploiters, already demanded back in the 1970s, once again comes to the fore. The demand for copyright associations after the introduction of the 'law relating to copyright contracts' initially, however, dies down unanswered. Only after the Kohl government is replaced by the red-green government coalition in 1998 is a reform of copyright and the introduction of a law relating to copyright contracts again placed on the agenda (BT 14/8058 2002). It is intended to eliminate the widespread practice of exploitation companies of undermining copyright protective norms (§ 29 line 2 UrhG). Contractual clauses in which exploitation companies claim all known usage rights for themselves, and deny authors the chance of gaining economic benefit from the growing opportunity of multiple exploitation, are legally annulled. In 2002 the 'Law concerning the strengthening of the contractual position of authors and practising artists' comes into effect.

The legally worded 'claim to reasonable payment', however, becomes the centre of dispute between interest groups, exploiters and producers. The exploitation companies bemoan a restriction of their 'contractual freedom'. Publishers raise the argument of publishing variety, which is to be undermined by the necessity to pursue market-oriented publishing policy. They demand more consideration for the marketing chances of works, since this would otherwise lead to disadvantages for unknown and young authors.

In addition, economic and location arguments are brought forward against the regulation. Publishing companies threaten to relocate their production locations (cf. Börsenverein 2001).

However, the law amendment is implemented for the authors, with the argument that this contributes 'to an improvement of the social and economic position of creative persons'. The legislator does not make any execution rules, though, leaving negotiations for a 'reasonable payment' to the contractual parties. In the end, the amendment of the law relating to copyright contracts achieves its target, but very slowly, and with considerable restrictions. It only exerts minimal influence on the exploitation of the massive imbalance of power between exploiters and authors. Exploitation companies in the publishing field specifically set up an umbrella association for this issue in Germany, and only agree with authors' associations after sometimes years of negotiations concerning payment standards. In the field of literary translations, which traditionally has a very weak, marginalized status, negotiations have still not yet been concluded.

6 Repositioning of copyright in a European context

Now European directions are changing the constellation of copyright law for the nation states. On a European level the so-called information and knowledge society forms the core of the development model for the 21st Century (c.f. European Commission, 2001). This involves the transformations brought about by the expansion of the modern communication means of Fordist industrial society into a societal formation, in which information and knowledge have become the central precondition for societal development, and the most important productive factor (UNESCO, 2005). Copyright laws and pertinent intellectual property rights represent an important regulatory instrument for this concept of the knowledge society. Therefore, EU directives passed in 2001, tackle the question of copyright legislation from two sides: of special importance is the harmonization of the European domestic market in view of the technological development of information industries. In addition, however, there is another overlapping political direction of impact which implies requirements for the development and safeguarding of the 'democratic knowledge society' (c.f. Steinbicker, 2001).

The perspective of information and knowledge society enhances the context into which national copyright laws have been embedded up until now. Actors, such as the electronic equipment industry and the consumer, who had previously played a secondary role, are becoming more important. The electronic equipment industry in particular represents an extremely strong economic interest. In arguing against charges levied on units used for copying, and defined in the exploitation rights of intellectual properties, this emphasizes the argument about the intensive price war on the international electronic market. The financial dues are seen as a further weakening of the national economy and an alignment to the real sales price is demanded. In addition the new technical possibilities are to serve the interest of the general public by providing open access to information. For example, to fulfil their education requirements, libraries are able to make their stocks accessible in digital form.

In essence the question here is the access to knowledge as a public property and core resources of the knowledge and information society on the one hand, and the protection of intellectual property on the other (cf. Poltermann, 2002: 19; Grassmuck, 2002: 2). The aim of the national implementation of the EU framework directives is declared to be a 'fair compromise between intellectual property and the knowledge society' (Bundesministerium für Justiz, 2004: 1). In fact the interests of the author and the artist in comparison to the economically strong actors of utilizers and the electronic industry, and in comparison to consumers in general, are losing importance. This can be seen in the omission of the author's personal rights, the 'droit moral', within the scope of the adjustment attempts.

The position of individual authors under copyright legislation is embedded in different legal traditions and appreciations of cultural works and performances in the European member states. Interpretations and classifications range between the UK, adoption of the common law tradition, and France and Germany, as countries which act on the Roman legal tradition. Different to the concept of author's personal rights or the 'droit d'auteur', the Anglo-Saxon frame of copyright law prioritizes traditionally economic imperatives. Therefore it only provides a protection for investment, which mainly relates to the production companies, and

which accordingly allocates the character of a service to artistic and publicist work. So the continental European model constitutes a special moral right on the part of the individual person and attributes even a societal relevance to cultural professions, neither of which appears in the Anglo-Saxon concept of copyright law.

EU directives, however, exclude the dimension of author's rights, which means that these are still to be dealt with as a national issue. The justification for this is that no trade barriers or distortions of competition will result if this continues and so authors rights' come under the subsidiarity principle (c.f. Alemdjroro, 2005). It can be assumed that the incompatibility of legal constructions of intellectual property rights play a decisive role here. Overall, the context for consideration is enhanced by means of the EU legal directives, but the role and the position of cultural professions in the international information and knowledge society is not resolved. However, defining a new frame across national markets and cultural traditions to exploit intellectual properties as in the concept of knowledge society but without re-defining the position of the authors there in, implies first of all the assertion of the Anglo-Saxon model of cultural work, promoted by the more and more dominant, internationally acting media companies.

In the German context the regulation requirements stemming from the EU directives have been affected in two stages. At first, relatively uncontroversial elements were implemented which were raised by technical development, particularly with regard to the Internet. In this first 'basket' of laws, supporting regulations were passed for measures which prevent unauthorized distribution, for example, Digital Rights Management technology. It was the second 'basket' which contained regulation requirements with regard to contradictory dimensions of the media which necessitated structural change. The priority here was the adjustment of the payment system to the technical development of digital, multiple copying, and especially the problematic issue of private copies (Bundesministerium für Justiz, 2004).

The lack of EU directives regarding the protection of the author is, however, structured in the national implementation in the German context in such a

way that the interests of the industry are almost inevitably paramount. The principle of non-transferability of copyright emphasized in the recently passed amendment, the 'law to improve the contractual position of the authors' (Bundesgesetzblatt, 2002) mentioned above is questioned, because of its contradictory implications concerning the frame of regulation which is supported at the European level. Following the intention to facilitate consumers' access to information, the German government is considering allowing the transfer of rights for future unknown types of use of works and performances to the utilizing companies. With the consequence that it would be even easier for the utilizing companies to use performances and works, without 'appropriate' participation of the authors involved. This would affect especially works which are to be found in archives. Protection for the authors against the utilizers as the stronger contractual partners is only provided by the obligatory claim for payment and rights to revocation (Bundesministerium für Justiz, 2004: 19).

The processes of interpretation of the EU directives and new interpretations and precedents of German copyright law have continued now for several years. Questions of detail lead to controversial discussions between the federal government and the federal council, the electronic industry, the media industry, consumer organizations, the collective society (which takes up and distributes charges for utilization of intellectual properties) and the authors associations. Conflicts are resulting from an increase of demands and interests and unsolved questions about the exposure to intellectual properties against the background of internationalized information industries and demands for open access by consumers to knowledge, as a requisite for the development of the knowledge society. The situation of cultural professions is affected by new competing objectives of copyright regulation, whereas the protection of the individual intellectual work loses priority (Bundesrat, 2006).

It is interesting to see that a split of interest is now appearing amongst the authors and producers of intellectual and creative works. Whereas scientific authors in general are particularly interested in open access to their works and findings of research, authors associations in the field of cultural professions are understandable afraid of expropriation of their properties (c.f. Sieber and Hoeren, 2005).

6 Conclusions

In relation to the German context, the initial question as to whether copyright makes a problematic contribution to monopolization and exploiter power, or can be seen as a legitimate security for creative work, has always been answered towards creative work. An emphatic respect for the figure of the creative author is deeply embedded in German appreciation of culture. In the course of the emergence and development of the culture industry, artists and producers were seen as decisive actors for the preservation and practical implementation of artistic, cultural and intellectual freedom. The definition embedded in German copyright concerning intellectual property as an inalienable personal right, which has even endured the expansion and commercial development of culture production, therefore transports a societal value. The focus is more on the actors, not the industry, on cultural values, not economic issues. The extent to which individual autonomy of producers has really been sufficiently supported as a result of copyright legislation has to be questioned with regard to empirical data (cf. Schnell 2007). The blockade on the part of exploiters against the introduction of standards relating to copyright contracts showed that legal instruments no longer suffice the regulatory objectives. With respect on the German context it seems to be clear that, at least for the most of the authors and artists, the copyright protection of intellectual property rather became a symbolic signifier for their outstanding social status, then it really provides sufficient protection of their personal investment. Moreover with the onset of the 21st century, which is discussed as the emergence of the so-called knowledge, the access to information and cultural achievements on the one hand and legal protection of creative work on the other, seem to collide. In effect a solution of these contradictory developments must meet ever more complex requirements.

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