Copyright from an institutional perspective:

institutional choice vs. institutional persistence[1]

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That modern copyright law has become complex and unwieldy is almost a truism. Many commentators have noted the growing opacity of this area of law, some going as far as to compare it with the law on taxation.[3] Another proposition that does not need much substantiation is that copyright has vastly expanded during the last decades in at least three different respects: regarding the subject matter covered, as to the scope of the exclusive rights, as well as concerning the term of protection.[4] Appeals have been voiced from many quarters for a more adequate balancing of the interests of right-holders against the interests of users. Yet the views on the optimal (and most cost-efficient) point of balance and on the practical way of achieving it vary widely.

This paper represents an attempt to sketch out an analytical approach to copyright that would hopefully generate some insights into the reasons for the complexity and the alleged imbalance of the present system. The paper would then suggest some applications of the approach, in particular for scrutinizing the rising claims towards introducing new user rights, looking into the genesis of such claims and evaluating the desirability and the possible shaping such rights and of their enforcement. In its

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[3] See Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collecting Rights Organisations' (1996) 84 *Cal. L.Rev.* 1293; Liu, 'Regulatory Copyright', *Boston College Law School Faculty Papers*, 2004, Paper 8. With respect to the Swedish Copyright Act see Koktvedgaard/Levin, *Immaterialrätt* (Stockholm: Nordstedt, 2003).
[4] In the American context the expansion of copyright and the threat such expansion poses for the public domain has provoked a massive reaction. Instead of many see Lessig, L., *Free Culture* (London: Penguin, 2004). For voices from European scholarship see Hugenholtz, B., Code as Code or the End of Intellectual Property as we Know it, rerievable at: http://www.ivir.nl/publications/hugenholtz/maastricht.doc
For the Nordic context cf. Still, V., 'Upphovsrättens expansion' (2003) *NIR* , 44 ff. For a rich historical account on the evolution of international copyright from author to investment protection and the irreversibility of acquired rights see Renman Claesson, in: Schovsbo (ed.), *Immaterialraettens afbalansering* (Kobenhavn, 2003).

objectives, the paper is mostly descriptive and explanatory and only weekly normative. More specific applications of the theoretical framework are at this stage only tentatively outlined.

Institutional choice v. institutional persistence: the analytical framework

The advanced approach builds on two particular strings of institutional theory, namely comparative institutional analysis (in itself a branch of law and economic analysis) and historical institutionalism.[5]

Comparative institutional analysis, as advanced by public policy scholar Neil Komesar[6], proceeds from the basic principles familiar from Coasean analysis.[7] However, Komesar goes further into the enterprise of comparing alternative decision-making processes, namely the market, the judicial and the political process. As a main factor for comparative evaluation he advances participation of affected actors in the respective decision-making process (therefore 'participation-centred' approach).[8]

The use of the broad concept of 'participation' serves to facilitate the extension of the Coasean transaction cost approach from markets to politics and to adjudication. It brings the logic of economic theory closer to public policy and law. Studying the opportunities for participation (and representation) implies on the one hand analysis of the interests involved in a particular policy issue and, on the other hand, analysis of the characteristics of the alternative decision-making processes that enhance or reduce participation. Clearly, participation alters shape depending on the decision-making process. Thus, participation in markets occurs primarily through the process of transacting. Participation in the political process (legislation or administrative process) can take place through a variety of forms among which voting and lobbying are the most important. And finally, participation in adjudication takes the form of

[5] The presentation of the analytical approach in the following chapter builds on Bakardjieva Engelbrekt, A., *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation* (Stockholm, 2003), where the approach has been applied to the comparative cross-national study of fair trading law in Germany and Sweden.
[6] Komesar, *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (Chicago, London: The University of Chicago Press, 1994).
[7] Coase, 'The Problem of Social Cost' (1960) 3 *JLE*, 1 ff.
[8] In its emphasis on participation costs and benefits comparative institutional analysis is of course closely related with transaction cost economics as developed by Roland Coase.

litigation. The focus is on the mass of participants, i.e. consumers and producers for the market process, voters and lobbyists for the political process and litigants for the judicial process.[9]

Participation opportunities are weighed through assessing the costs incurred and the benefits expected from participation of the actors in the respective decision-making process. For the market these are transaction costs and benefits, while for the courts they are litigation costs and benefits. In terms of the political process, such opportunities depend on the costs and benefits of political participation. Benefits and costs of participation thus become the main units of analysis. They account for the relative efficiency of the alternative decision-making processes with regard to a specific law and public policy issue.

Participation costs are subdivided into two main categories, i.e. information and organisation costs. More specifically, the costs of participation depend "on the complexity or difficulty of understanding the issue in question, the number of people on one side or the other of the interest in question, and the formal barriers to access associated with institutional rules and procedures."[10] As organisation costs Mancur Olson had defined: "the costs of communication among group members, the costs of any bargaining among them, and the costs of creating, staffing and maintaining any formal group organisation".[11] Arguably, in the final analysis even organisation expenses boil down to information costs.

The benefits of participation are measured through the per-capita stakes of affected interests. The emphasis on stakes as determinants for the benefit of participation in decision-making processes allows for further refinement of the analysis. The stakes of potential participants differ both in terms of size and in terms of their distribution among the group. One can usefully distinguish between high stakes and low stakes and between concentrated and dispersed stakes. The distribution of the stakes between potential participants in a decision-making process is decisive for the probability of successful participation. An even distribution of stakes on both sides of the

[9] Konesar (1994), 7.
[10] Komesar (1994), 8.
[11] Olson, *The Logic of Collective Action. Public Goods and the Theory of the Group* (New York: Schocken Books, 1965), 47

transaction and a relatively low number of parties involved are suggestive of high benefits and thus of high probability of participation. In contrast, distribution with concentrated stakes on one side and dispersed stakes on the other reflects a problematic, non-optimal transaction situation.

In this aspect Komesar's approach resembles Mancur Olson's classical analysis of collective action. Olson provided a convincing explanation as to why actors would be disinterested in participation in collective action concerning broadly dispersed interests, despite possibilities to improve the situation of the group. Olson argued that due to high costs of organisation and risk of 'free-riding' such behaviour was rational. Olson's pessimistic prediction is that very large groups will normally not, "in the absence of coercion or separate, outside incentives, provide themselves with even minimal amounts of a collective good".[12]

In general, comparative institutional analysis stresses that the dilemmas of institutional choice begin with large numbers. This proposition is familiar from Coasean comparative system analysis. Given small numbers of actors (low transaction costs) markets can be expected to cope endogenously with resource allocation through voluntary transactions.[13] But if there are many actors on one side of the interests involved, transaction costs increase and at least potentially the question arises whether resorting to alternative institutions might reduce allocative inefficiencies. Yet, comparative institutional analysis demonstrates convincingly that large numbers of affected parties constitute a problem in every setting. Similar interest constellations cause analogous problems of organisation and representation. Participation malfunctions in the market setting are reproduced in the political process and in adjudication. In other words, institutions tend to 'move together'.[14] So, rather than searching for the perfect decision-making process, legislators and policy makers should seek to opt for the least imperfect alternative.

Still, some categories of participation malfunction are linked to particular decision-making processes. When studying the political process, Komesar identifies two

[12] Olson (1965), 48.
[13] Of course, even in small numbers situations transaction costs can be high due to information uncertainty, strategic behaviour or other factors.
[14] Komesar (1995), 23.

categories of situations that are particularly conducive to representative malfunction. The first is characterized by the dominance of small, concentrated interest groups (which is in conformity with well-established theories of public choice and interest groups politics).[15] Komesar labels this situation a case of 'minoritarian bias'.[16] The theory predicts that, when public policy issues involve balancing between concentrated high-stake interests and dispersed small-stake interests, the former will prevail in the legislative process as well as in public agency decision-making. This is the result of free riding and low benefits of organization associated with diffuse interest groups[17], but also due to principal-agent problems characteristic of the political and the administrative process.[18] Interest group theories of politics provide empirical evidence of overrepresentation of concentrated interests in the political process, along with the 'capturing' of public agencies by defenders of the very interests they are set to regulate.[19]

Komesar, however, augments the interest group theory with analysis of the role of majorities which allows him to identify a second category of mal-representation, namely 'the tyranny of the majority'. This second category of mal-representation is labelled 'majoritarian bias'. All theorists of public choice recognize some importance for the influence of the majority but do not offer any explanation as to when and why such an influence may produce adverse effects.[20] In order to come to a more satisfactory answer Komesar proceeds to analyse the character of the large group. He offers two explanatory factors that may be decisive for the success of public action despite high numbers. In the first place, the average per capita stakes are important.

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[15] Stigler, 'The Theory of Economic Regulation' (1971) 2 Bell J. Econ. & Mgmt Sci, 3 ff.; Buchanan/Tollison/Tullock, (eds.), Towards the Theory of the Rent-Seeking Society (College Station, TX: A&M University Press, 1980). Buchanan/Tullock (1967).

[16] In contrast to influence, 'bias' is described as a normative or prescriptive issue. "From the standpoint of resource allocation efficiency, minoritarian bias occurs when a concentrated high per capita minority prevails over the dormant low per capita majority even though the total social costs imposed on the losing majority are greater than the total social benefits gained by the successful minority." Komesar (1994), 76.

[17] See Olson, *supra*, note ..

[18] On the theory of agency and the principal-agent problem, see Eggertsson (1990), 40 ff. with further references

[19] See Buchanan/Tullock (1967); Rubin, 'On the Form of Special Interest Legislation' (1975) 21 Public Choice, 79 ff.

[20] Komesar observes some recognition for the interplay between majoritarian and minoritarian forces in Downs: "Proposition 6: Democratic governments tend to redistribute income from the rich to the poor … Proposition 7: Democratic governments tend to favour producers more than consumers in their actions." Downs (1957), 297.

This factor predicts that the greater the mean, the higher the probability that collective action will follow. The second factor is the variance and skewness of the stakes. Uneven distribution of the stakes brings the analysis of the large group closer to that of the small group, since a small subgroup with high stakes will then act as a driving force for collective action. The term 'catalytic sub-group' nicely captures this phenomenon.[21] Finally, there are better opportunities for mobilizing dormant majorities if the issue concerned is simple and easy to be communicated in powerful metaphoric terms.

Finally, the framework proposed by Komesar requires a rigorous analysis of the characteristics of each of the institutional alternatives in terms of effects on participation costs and benefits (institutional design). To take one example, in contrast to the political process, participation in adjudication is typically a costly enterprise, involving litigation fees and requiring sophisticated expert advice. Access to the judicial process is highly formalised through rules on standing, jurisdiction, and choice of law.[22] The judiciary operates on a very limited scale and possesses only limited expertise to decide on highly technical issues. At the same time, the judicial process has the advantages of ensuring direct access, careful and lengthy examination of the issue by a body principally isolated from political pressure and information manipulation. These aggregate characteristics of the judicial process makes it particularly apt to deal with certain situations of skewed distribution of stakes, for instance where the political process suffers from severe majoritarian bias like the violation of minority rights.[23]

Historical institutionalism conceives of institutions in a slightly different way. It highlights the role of institutions as humanly devised constraints, whose main

[21] For a similar argument, see Stigler, 'Free Riders and Collective Action: An Appendix to the Theories of Economic Regulation' (1974) 5 Bell J. Econ. &Mgmt Sci., 359 ff.: "The small number solution has a wider scope than a literal count of numbers would suggest, the size distribution (sales of firm, property of family). The large individuals in a group may therefore properly view themselves as members of a small number industry if their aggregate share of the group resources is large."
[22] Komesar (1994), 126.
[23] Another constellation of interests and stake distribution envisaged by Komesar is the so called skewed 'shifted' distribution. It occurs where dispersed interests ex ante (for instance consumer interests in product liability cases) transform into concentrated high stake interests ex post (e.g. severe individual injury). Also in this situation the judicial process may prove a more attractive decision-making forum than the market or the political process.

function is to reduce uncertainty by providing a structure to everyday life.[24] Institutions thus include formal legal rules, but also informal constraints (such as ideologies and customs) and the enforcement characteristics of both.[25] North highlights institutions' propensity to persist over time. Institutional paths may be followed not because they are efficient but because their change is costly. Moreover, institutions tend to produce incentives for the creation of organisations, which then depend on the institutional framework and contribute to the latter's stability (institutional symbiosis).

Merging the two perspectives appears warranted, because institutional choice alone may generate unrealistic normative advice with a touch of 'social engineering' and in discord with the complex reality of human interaction. A historical institutional perspective demonstrates that institutional choice is contingent on a historical and institutional context that has been shaped through time and is generally resistant to change.

The concerns underlying historical institutionalism and Komesar's participation-centred approach may be said to converge in the category of adaptive efficiency, introduced by North. Adaptive efficiency is a category that supposedly applies to normative evaluations of a variety of institutional frameworks. According to North, adaptive efficiency "provides incentives to encourage the development of decentralised decision-making processes that will allow societies to maximize the efforts required to explore alternative ways of solving problems".[26] Arguably by eliciting participation as a central factor for institutional choice Komesar suggests one way of encouraging such decentralised decision-making processes. Originally developed as a concept of economic theory, adaptive efficiency may equally well relate to established categories in constitutional theory, such as representative democracy and access to justice. It is this link between economic, political and legal theory that, I would submit, makes institutional analysis potentially promising for the study of law.

[24] North, 'Institutions' (1991) 5 *Journal of Economic Perspectives*, 97.
[25] On institutions and institutional change generally, see North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990).
[26] North, 'Institutional Change: A Framework of Analysis', in: Sjöstrand, S.-E. (Ed.) *Institutional Change. Theory and Empirical Findings* (New York: Sharpe, 1993), 35.

The advantage of the proposed approach for the analysis of copyright is that it makes possible a simultaneous comparative analysis of markets, political process, courts and administrative agencies. All of these can be conceived as aggregate institutions and can be analysed in their own terms, having nevertheless a common denominator of comparison. The analysis allows to integrate insights from the theory of public choice and analysis of judicial and administrative governance with market analysis. The potential of these theories to elucidate and improve the economic analysis of copyright (positive as well as normative) has been suggested on multiple occasions. A number of authors have asserted that public choice and analysis of political markets may be more illuminating than standard economic analysis.[27] Similarly Mackaay when discussing the extension of property rights to new objects proposes to shift the focus from trying to shape the optimal scope of substantive rights to designing adequate procedures where through trial and error the rules will be established with the participation of the affected interests and actors.[28] At the same time there seems to be a need for ordering our intuitions about the importance of institutional choice and design, and of institutional participation and interest representation, into a more coherent analytical framework.

Institutional choice in 'classical' copyright

Following institutional choice theory, the focus of copyright analysis should be on the interests involved in the decision-making process and on the potential of different interests to be represented in alternative decision-making fora. While agreeing that there is a need of a balancing act between right-holders' and users' rights, one of the crucial issues should be the choice of institutional decision-making process best equipped to strike this balance. If we trace the history of copyright it could be argued that we can observe a shift in the point of gravity of decision-making from the political to the market to the judicial and back to the political process.[29]

[27] See Kay, J.,'The Economics of Intellectual Property Rights' (1993) 13 International Review of Law and Economics, 337; Towse, Ruth,
[28] Mackaay, Ejan, The Economics of Intellectual Property Rights, in: Wahlgren, P. and Magnusson Sjöberg, C. (eds) *Festskrift Peter Seipel* (Stockholm: Norstedts, 2006), 365-396, at 386 ff.
[29] On the dynamics of institutional choice se Komesar, *Law's Litimits* .

The market for creative works

The very emergence of copyright is usually explained in economic terms as a way to solve the public goods aspect of intellectual creations. The basic argument is known and will be only briefly recapped here. Intellectual creations to a large extent consist of information. One of the most important characteristics of information as a public good is its *non-rivalrous* consumption.[30] Not one, but many people can typically make use of information without its utility being diminished. One can, in other words, both eat the cake and have it.[31] Information is often also described as a *non-appropriable* good. Those who possess information can never lose it by transmitting it. There are, further on, few adequate mechanisms for assuring property rights in information. Information is indivisible and therefore difficult to measure and, respectively, to price. Inspection prior to purchase is impossible without revealing the information, which can make the transaction obsolete. In addition, it is problematic to exclude those who do not pay from the use of the good – so-called *non-exclusivity*.[32]

Clearly, the public good aspects of copyrighted products are not the same for all forms of expression (compare books, music, paintings, software) and are influenced by changing technologies of reproduction, distribution and consumption. Traditionally copyrighted products have represented a mix of tangible and intangible properties.[33] A literary work traditionally materializes in a physical book, where tangible aspects – such as paper quality, luxury cover, format – may influence consumer demand, preferences and price. Importantly, the process of fixation, and respectively of reproduction, has in earlier times been more cost-intensive and thus constituted a considerable deterrent to free-riding.[34]

[30] See Arrow, K., 'Information and Economic Behaviour', in: Arrow, *The Economics of Information. Selected Essays* (Oxford: Blackwell, 1984), at 142 ff.
[31] Arrow (1984), 142; Schäfer/Ott, *Ökonomische Analyse des Zivilrechtes* (Berlin: Springer, 1986), 77.
[32] Landes/Posner, An Economic Analysis of Copyright (1989) 18 *J. Legal Stud.*, 325-363; Van den Bergh, R., 'The Role and Social Justification of Copyright: A "Law and Economics" Approach' (1998) *I.P.Q.*, 17 ff.
[33] See Radin, Margaret Jane, 'Information Tangbility', in Granstrand, *Economics, Law and Intellectual Property* (Boston/Dordrecht/London: Kluwer, 2003) , 395-418.
[34] Landes/Posner, *supra*, note

Arguably, without statutory IP rights there would be a significant problem of sustaining workable markets for intellectual works.[35] In the hope of costlessly using the works purchased by others, a large number of potential users would understate their realistic preferences and willingness to pay for creative works. This would undercut incentives to create and lead to sub-optimal production of such works. "Participation" of potential creators and producers (to use Komsear's term) in such markets would be suboptimal.

The politics of copyright

The above-described difficulties of sustaining markets for creative works have knowingly shifted decision-making to the political (legislative) process. The response has been minimalist. By the express statutory assignment of entitlements in the form of (time-limited) property rights the public good aspects of creative works are "privatised". Transactions are enabled and the free rider problems associated with public goods are tamed. Copyright so conceived allows for a market of creative works to emerge and creates beneficial conditions for participation in such markets.[36]

Yet, the political process has its own logic of participation and entrusting the shaping of copyright to elected politician has its risks and pitfalls. Depending on the constellation of interests involved in different public policy issues – i.e. the number of affected actors and the size of their stakes – we may face a neutral, a majoritarian or a minoritarian interest structure. In particular the latter constellation may bring to significant rent-seeking and bias the delicate legislative shaping of the exact scope of copyright. Excessively strong copyrights may negatively affect user participation in information markets through monopolistic prices (deadweight losses). Likewise, too many and too broad copyrights may raise the costs of production of new works and have a chilling effects on "follow-on" creativity.[37]

[35] Merges, 'On Property Rules, Coase and Intellectual Property (1994) 94 *Colum. L. Rev.*, 2656. See, however Breyer, S., 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 *Harvard L.Rev.*, 281.
[36] Landes/Posner (1989); Van den Berg (1998).
[37] Cf. Landes/Posner (1989).

The copyright regime of today, in the form it was conceived in the second half of the 18th century, emerged as a horizontal system of protection for most kinds of creative works.[38] According to the classical account, at the centre of attention, at least in Continental copyright, was the Author, the individual creator. Copyright legislation was directed at the protection of a relatively small group of creators, diffused among different genres of literature and the arts. As a rule, the beneficiaries from copyright legislation were economically weak and vulnerable. Even today, the income from copyright for the mass of artists and authors would be low to moderate, translating into low benefits of participation into the political process. There are, however, those few successful authors and artists that would generate considerable profits from their creative activity, their case typically enjoying wide popularity.

Thus, when analysing benefits from participation, it would seem that as an interest group creators represent a case of highly skewed distribution of stakes.[39] Following Komesar's prediction in such setting the few high-stake members of the group would represent a strong catalytic sup-group within the larger low-stake group. The small group of successful creators would anticipate high benefits from expanding copyright law and would be highly motivated to influence the legislative process in their favour, accruing benefits to the whole group. Given the character of literary and artistic activity and its status in society, at least since the Enlightenment, this would moreover be a highly visible, eloquent and influential sub-group. Indeed, in the history of continental copyright the role of figures of the stature of Victor Hugo is emblematic.[40] In Sweden, a small, but vocal group of intellectuals around the Swedish Academy have had a similar catalytic effect for the very foundation of Swedish Copyright law.[41]

[38] See Liu, 'Regulatory Copyright', *Boston College Law School Faculty Papers*, 2004, Paper 8
[39] For a convincing analysis of the situation of artists in contemporary creative industries see Towse, Ruth, 'Copyright and Cultural Policy for the Creative Industries', in: Granstrand, Ove, *Economics, Law and Intellectual Property* (2003), 419-438. "The distribution of artists' income is highly skewed, with a few superstars having incoes from fees, sales and royalties."
[40] For a very eloquent account see Hemmung Wirtén, Eva, No Trespassing (Toronto: University of Toronto Press, 2003).
[41] See Petri, Gunnar, Upphovsrätten och dess intressenter, *NIR* (2005), 428, at 431 ff .

In addition, there is high uncertainty as to the prospects for creators of joining the 'lucky few'[42], which may increase incentives to participate in the political process also on the part of small stake holders, typically by lobbying through professional organisations. Importantly, the emergence of collecting societies for the collective management of copyright has had the added value of serving as a platform for interest mobilisation, articulation and political pressuring.[43] These organizations evolved as private ordering institutions to reduce transaction costs, enable risk spreading and promote the effective administration of intellectual property rights.[44] Indeed the story of these organisations is a fascinating example of spontaneous institution-building for coping with transaction costs and collective goods problems.[45] With time collective management organizations have grown into powerful economic entities with not insignificant staff and expenses and having a substantial own interest in influencing the legislative framework.[46]

On the opposite side of the interest constellation, the interests of users of copyrighted works have from the outset been acknowledged in the legislative debate on both sides of the Atlantic, albeit not given similar weight.[47] As any dispersed collective interest, the interest of users is less successful in reaching out to legislative bodies and influencing the outcome of legislation. Yet, at least at times of crucial legislative choices and societal overhaul, the power of the majority may be felt through the disciplining effect of the elective process. It suffices to think of the history of the Statute of Anne and the dramatic events surrounding its subsequent judicial interpretation, succinctly described by Lessig,[48] to realize that the tension between the interests of right-holders (at that time predominantly book-printers) in strong exclusive rights, on the one hand, and the interest of the public in free access to culture and information, on the other, has been well-recognized already in the very

[42] Towse speaks of the 'no-one knows' theorem with reference to Caves, *Economics of the Creative Industries* (Cambridg MA: Harvard, 2000)
[43] See Mancur Olson for other examples of such mixed character organisations, *supra*.
[44] Merges, *Ibid.*
[45] See Merges with reference to the neo-institutionalist literatrure, primarily Elinor Ostrom's Governing the Commons.
[46] See Kretschmer, M., 'The Global Music Industry in the Digital Environment: A Study of Strategic Intent and Policy Responses' (1996-1999).
[47] See Ginsburg, Jane, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 Tulane Law Review (1990), 991.
[48] Lessig, L. (2004), 90 ff. Lessig refers in particular to the case Donaldson v. Beckett of 1774, establishing the principle of limited (non-renewable) copyright and – according to Lessig – giving birth to the "public domain".

early days of the system. Generally, in a horizontal system of copyright, the risk for bias should not be serious, though.

To be sure, even before the present author-centred system of copyright was established, there have been other, more powerful interests lingering in the background. Cultural production, dissemination and consumption has throughout modern history been heavily mediated and dominated by corporate actors. Mediators' have been involved at all stages of the production and dissemination process, from the fixation of creative works into physical carriers (book printers, phonogram producers), through the inception and management of complex works (e.g. stage producers, nowadays music and film producers), to the marketing of creative works (typically publishers). On the side of consumption educational institutions, libraries and broadcasting corporations (to name a few) have mediated cultural consumption, influencing the infrastructure and pattern of consumption. While these organisations typically side with either authors or consumers, they also have their very distinct and particular agenda.

The judicial process

In this paper I can only very briefly approach the judicial process as a decision-making institution in copyright. Courts have had a prominent role in shaping the present copyright system. For more than a century, the judiciary has been the institution enforcing the copyright statutes and fine-tuning the scope of private property rights over intellectual works.[49] In their general institutional characteristics, courts display a number of advantages. Institutional devices such as life tenure, careful selection process, high remuneration and professional training, guarantee that disputes are considered by a competent body, insulated from political pressure.

Regarding interest representation, however, the judicial process may exhibit biases largely mirroring those in the political process. Expertise and independence are ensured at the expense of setting a high threshold for access to the courts in the form of both litigation costs and formal requirements for successful litigation, normally

[49] On the role of courts for developing protection for authors even before the Statute of Anne on the basis of common law, see Lessig (2004).

involving expensive expert advice. Given the design of the copyright system as statutory assignment of entitlements in the form of property rights, it is hardly surprising that litigation has been dominated by right-holders. Common law doctrines of fair use that have evolved as defences in the US context and stipulated as statutory exceptions in the European context, have been restrictively interpreted by the courts as unwanted incursions on the dominant principle of broad author rights.[50] For individual users the loss incurred by strong copyright protection is normally too small to justify the costs of litigation, whereas aggregating the losses in collective litigation is impeded by the complexities of collective action. As a result, the actors and groups who have been vocal in the legislative process are also those having the incentives and resources to litigate copyright cases.

Another institutional characteristic of courts is that they cannot control the influx of cases to be decided. Thus, repeat players, by the information they bring to the courts, influence the interpretation of copyright statutes and the scope of the respective exclusive rights. It is secret to nobody that interpretation of basic copyright doctrines has been decisively shaped by litigation initiated by collective management organisations and individual actors with unmistakable allegiance to the cause of right-holders. Such a tendency has been observed in different national legal contexts.[51]

Collecting societies have notably been at the heart of a number of copyright disputes, often willingly testing the limits of statutory rights. In Sweden graduate students learn about copyright from the textbook case of a radio-shop owner who was sued by the Swedish Composers' Association (STIM) for royalties for letting radio apparatuses being demonstrated to potential buyers, whereby the broadcast could accidentally consist of copyright protected music. The argument that the purpose of this sort of demonstration was not making a musical work available to the public, expressed by the dissenting judges, did not succeed. In Finland taxi drivers have been held liable to royalties for the radio music in their cabs.[52]

[50] See the examples of Swedish and Finnish cases *infra*, note ..
[51] See Still, V., 'Upphovsrättens expansion' (2003) *NIR*, 44 ff.
[52] See Still, Ibid., at 49 with reference to the decision of the Finnish Supreme Court HD 2002:101.

The changing landscape of institutional participation

It would not be exaggerated to say, that the effects of digital technology and of global communication networks on the state of copyright have been among the most heavily discussed subjects in international legal doctrine during the last decade. The debate has many strata and directions. From an institutional perspective, what appears particularly intriguing is to trace the ways in which new technology influences institutional choice and institutional design and the role of organisations in decision-making processes. Arguably, digitalisation and globalisation unsettle previously established institutional equilibria, giving birth to new actors and organisations that challenge the position of incumbents and requiring serious rethinking of institutional choice and design.

Changes in the market of intellectual creation

Digital technology has dramatically enhanced the intangible (information, or public good) aspects of copyright protected works. Certainly, physicality accounts even today for a substantial part of the value of certain categories of works (e.g. paintings, sculptures). Other works, however, have been stripped off their tangible characteristics and reduced (or raised) to pure intangibles (information). Reproduction, in particular of audio-video works, can today occur at (almost) no cost and at hardly any loss of quality. In a different vein, technology again is revolutionalizing the way intellectual products are being distributed and consumed. Internet and P2P networks make possible an instant exchange and simultaneous enjoyment of copyrighted works at gigantic proportions. What characterizes the new mode of distribution is that it is decentralized and non-mediated. The exchange is not B2B and not B2C, but rather C2C, where C stands for both consumer and creator.

These changes in the object of protection and the ways of distribution have influenced substantially the market for intellectual products as supported by the conventional copyright model. Indeed, the problem of excluding free-riders from consuming cultural products they have not paid for is mind-boggling. On the part of large

producers of audio video works claims are made that their participation in this market may be seriously deterred in view of potential losses.[53] Conversely, market concentration in the cultural industries, exacerbated by merging technological platforms, is at the core of fresh market imperfections.

New technologies have also impacted on creativity and that in a multi-faceted way. The 'global village' made possible through the Internet apparently has brought about the triumph of popular culture and homogenisation of consumer preferences on a global scale. This trend is provoked by and in turn enhances the concentration of stakes in the cultural industries. The notorious dominance of the five labels in the music industry is a cogent illustration of this state of affairs. The mass of consumers affected by the allocation and scope of copyrights as exercised by these powerful economic actors has grown exponentially.[54] On the other hand, global communicative networks combined with digitization, have spurred a previously unknown wave of "build on" creativity. The distinction between consumption and production is blurred.

Given these parallel and often incongruent trends in present production, dissemination and consumption patterns, predictions on the future developments of markets in creative works abound and are far from unanimous. While some express misgivings about the continuous concentration and dominance of established corporate actors at the expense of new entrants and cultural diversity, others foresee expansive growth of direct author to consumer exchange of cultural goods and a waning role of intermediaries.[55]

Changes in the political process

The advance of new technologies in the creative industries has already before the digital era significantly influenced the political process in the area of copyright. New ways of (re)production and dissemination of creative works have often led to the emergence of new industries with substantial interests in strong exclusive rights. This

[53] See Ginsburg, Jane, Copyright And Control Over New Technologies Of Dissemination, 101, Colum. Law Rev. (2001), 1613.
[54] Certainly this has been supported by the general raise of the levels of literacy, education and living standard in certain regions.
[55] Gunsburg (2001), *infra.*

has been the story of the phonogram industry, the broadcasting and computer industries, to name the most representative examples, each leading to the statutory grant of new related rights or alternatively to subsuming new subject matter under the general copyright regime albeit with significant modifications (software protection). Generally, from neutral and horizontal area of lawmaking, copyright has transformed into vertical and industry specific legislation where the stakes of the affected industry are high and concentrated, while the stakes on the side of users remain small and dispersed. This transformation has in the European context been to some extent obfuscated by the convenient division between copyright and related rights, but has been well acknowledged in American Copyright Law. [56]

Comparative institutional analysis warns against various deficiencies that may accompany the political process under similar interest structure, the most serious being dubbed 'minoritarian bias'. If, following public choice theory, politicians are conceived as rational "economic men" and benefit-maximizers, then the outcome of the decision-making is predicted to be substantially biased in favour of the powerful and vocal interest group.[57] But one does not need to accept theories of greedy and malevolent politicians in order to be concerned about the outcome of the decision making process. As Komesar underlines, the political process builds upon information and if one group is overrepresented in the political process, it would be this group that would control the flow of information.[58]

In the economic literature a public choice view on copyright has been most clearly expressed by Kay:

> "[T]he copyright legislation we have is much better explained by a public choice perspective than characterized as an outcome of a process of maximizing economic and social welfare. To put it bluntly, copyright law has evolved for the systematic purpose of securing rents for certain organized

[56] See the rich and instructive account by Litman on the legislative history of the American Copyright Act, Litman, J., Copyright and Technological Change, 68 *Oregon Law Review* (1989), 275; Litman, J., Revising Copyright Statutes for the Information Age, 75 *Oregon Law Review* (1996), 19.
[57] Buchanan, J./Tullock, G., *The Calculus of Consent. Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962).
[58] Komesar (1994).

> producer groups, primarily publishers, record companies, and in the last decade, software houses."[59]

Indeed, the outcomes of several waves of legislative interventions in the field of copyright triggered mostly by new technologies confirm the wisdom of such theories. There are numerous accounts about the extensive lobbying pressure exerted by different well organized industry groups in national or supranational legislative proceedings.[60] One notorious example is the frantic lobbying activity of the software industry at the time of negotiating the European Software Directive.[61]

Still, the power of individual copyright industries has in some cases been effectively counterbalanced by the existence of large corporate users with sufficiently high stakes to motivate political involvements (e.g. phonograms vs. broadcasters, juke box operators, and nowadays Intermediary Service Providers). The legislative process in such cases has according to some observers often the character of direct bargaining between the affected industries. Due to complexity of both technology and interest constellations, the law makers practically delegate to the levelling out of differences and striking of a compromise to the bargaining parties. At the end of the day, the lawmaker has limited insight in the subject matter and the exact meaning and implications of the compromise, making it difficult to seriously speak of legislative intent.[62] Collective management organisations, by allowing for the membership of marketers (publishers and producers) under the same roof with authors, have largely sided with the agenda of respective industries, although tensions between authors and producers have found their way to the legislative debate.[63]

The evolution of copyright from a horizontal, industry neutral to a vertical, industry specific direction in the American context has recently been conceptualized as a trend

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[59] Kay, J.,'The Economics of Intellectual Property Rights' (1993) 13 *International Review of Law and Economics,* 337.

[60] See the rich and instructive account by Litman on the legislative history of the American Copyright Act, Litman, J., Copyright and Technological Change, 68 *Oregon Law Review* (1989), 275; Litman, J., Revising Copyright Statutes for the Information Age, 75 *Oregon Law Review* (1996), 19.

[61] See Van den Bergh (1998), 29, quoting Lehmann, M. "The European Directive on the Protection of Computer Programs", in: M. Lehmann/C. Tapper (eds.) *Protection of Computer Programs* (Oxford University Press, 1993), at 177.

[62] Litman (1989), *supra*, note .

[63] For a critical view see Kretschmer, M., 'The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments' (2002) *EIPR*, 126.

toward "regulatory copyright".[64] Rather than assigning property rights entitlements, legislatures directly intervene and regulate specific industries influencing the parameters of competition and economic activity in specific markets.[65] Certain advantages are seen in this approach, for instance tailoring copyright statutes to the specifics of particular industries, greater clarity for the affected parties, compensation for market failures in particular industries. On the negative side, the approach is said to involve growing complexity, decreasing transparency of the goals of the copyright system and of its credibility, and subsequent failures in enforcement.

One significant shortcoming of the above described pattern of interest group politics in the Internet era is that it fails to take account of the considerable interest restructuring on the side of users. As mentioned above, from a relatively small and elitist group of readers and admirers of fine arts, users are nowadays a numerous and diffuse majority of educated persons actively consuming cultural products, exchanging such products via the Internet and willingly transforming digital content to their own needs.[66] Whereas previously the interests of users have been represented, at least by proxy, by corporate mediators such as libraries, universities, broadcasters and other educational and cultural organisations, the unmediated access to copyrighted products enabled by the Internet gives rise to user and consumer interests of a kind that can hardly be shared and adequately represented by other actors.[67]

Importantly, in terms of political participation, users nowadays have an access to a global communication network, which arguably contributes to an emerging awareness of group belonging and of shared interests, and possibly, to growing potential for mobilization and representation in the political process. Indeed, the transposition of the Infosoc Directive in Europe has provoked a previously unknown public debate on

[64] Liu, 'Regulatory Copyright', *Boston College Law School Faculty Papers*, 2004, Paper 8.
[65] Liu, *Ibid.*, See also Lessig (2004), at 104. For an extensive discussion on the notion of "regulation" see Ogus, *Regulation. Legal Form and Economic Theory* (Oxford: Clarendon Press, 1994).
[66] For a discussion and categorization of different types of consumers of cultural products and their respective interests, see Liu, J., 'Copyright Theory of the Consumer' (2002-2003) 44 *Boston College Law Review*, 397 ff.. Liu distinguishes between passive and active consumers, whereby active consumers have an interest in autonomy, communication and creative self-expression. See on the different modes of consumption of culture and on the importance of self-expression, Lessig, L., *Free Culture*, 35 ff. ; Benkler, Yochai, 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access', 52 *Federal Communications Law Journal*, Nr. 3, 561.
[67] Litman (1996), *supra*, note ….

copyright and its effects on users and consumers.[68] In Sweden, a political party, the so called *Piratpartiet* (playing on the titles of anti-piracy associations), was founded attracting not insignificant numbers to its pre-election rallies and non-negligible votes. Notions such as 'the public domain' and 'user rights' entered for the first time seriously the political discourse.[69] In the pre-election campaign political leaders on both left and right sides of the political spectrum were expressing dissatisfaction with the present state of Swedish copyright law and policy, and regret that copyright enforcement is increasingly directed at individual users and divorced from wide-spread Internet practices and user perceptions. Promises were made for remedying the situation and restoring the balance albeit failing to state the more specific legislative action to be undertaken.[70] In this, politicians are conveniently served by international agreements, which limit their opportunities for political and legislative action. Although clearly known to politicians, the constraints posed by such commitments are often spared at the stage of electoral rhetoric.[71]

A new dynamics of the legislative process in the aftermath of the Infosoc Directive, with greater involvement of consumer groups, is reported from many Member States of the European Union.[72] For the first time, it seems, consumer groups have recognized the effect of copyright legislation on their members and have engaged actively in shaping the scope of and in providing counterweight to such rights. In countries with strong consumer association this engagement has been particularly visible, leading occasionally to important compromises and modifications.[73] Interestingly, in the legislative process leading to the transposition of the Infosoc Directive, although the Public Consumer Board (Konsumentverket) and the umbrella organisation of Swedish consumers were consulted they did not emerge as vocal critics of the proposed changes.

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[68] Similar reactions were unleashed in the US by the enactment of the Digital Millenium Copyright Act (DMCA) as well as the Sony Bono Copyright Term Extension Act. The involvement of academics and voluntary groups in the debate has been impressive. Instead of many see Lessig (2004). The Creative Commons initiative can also be seen as an ample example of such engagement.

[69] See articles in Svenska Dagbladet of Hemmung Wirtén, Niklas Lundblad etc.

[70] See speeches by Prime Minister Candidates Persson (social democrat) and Reinfeldt (conservative).

[71] Generally, on using international commitments as justification for inconvenient domestic action see

[72] See IViR Report, Part II, country report on Belgium, Germany, France, to name but a few.

[73] See the active lobbying on the part of the German umbrella consumer association in particular Hoeren, Thomas, Urheberrecht und Verbraucherschutz. Überlegungen zum Gesetz über Urheberrecht in der Informationsgesellschaft, Gutachten im Auftrag von Verbraucherzentrale Bundesverband e. V.

Indeed, the intensified rhetoric of user rights may be seen as a clear sign of majoritarian influence (to be discerned from bias). Copyright has apparently been identified by broad segments of the public as an issue of everyday relevance. The Internet generation has entered voting age and constitutes an important electoral group to be counted with. Given that the main beneficiaries from strengthened copyright are strongly concentrated industries, and that producers often participate and influence the action of collecting societies and thus contaminate the 'author's rights' rhetoric of right-holders, appeals toward constraining industry power and sharpening industry regulation have attracted not insignificant popular appeal.[74] Aggressive anti-piracy campaigns and litigation policies on the part of (corporate) right-holders have only confirmed David v. Goliat perceptions of the conflict.

To be sure, post-election the sometimes promised, but legally impossible refurbishing of copyright law is often substituted for more modest initiatives. Thus, the Swedish government has last year set up an investigating committee under the Ministry of Justice with the mandate "to examine the development of lawful alternatives for access to copyright protected content, to weigh and propose measures for speeding up the development of consumer-friendly lawful alternatives for such access."[75] Whereas the focus on consumer interests is remarkable, the mandate appears limited in terms of prospects for legislative change within copyright. Another typical alternative is to try and shift decision-making to other institutional arena, notably to the administrative process to which I will return in the following.[76]

This is admittedly a very sweeping and crude description of the changes in the political process. More detailed analysis appears warranted of interest constellations and representation on the basis of empirical data and *travaux préparatoires*. Further distinctions of other categories of interests involved in the political process, siding with either authors or users, but having their own agenda may have to be introduced. The role of consumer electronics industry or, nowadays, Internet Service Providers (Intermediaries) as important allies to end consumers has to be integrated in the analysis. My purpose is only to indicate the importance of a close scrutiny of the

[74] See Komesar, on the power of the majority.
[75] Ju 2006/6767/P.
[76] See Komesar (1994).

interests affected by the legislative process and their differential possibilities for participation in the political process.

Changes in the judicial process

Digitisation and global communication networks have changed the structure of copyright use and respectively the pattern of copyright litigation. From disputes between right-holders and corporate users (e.g. broadcasters) typical for the pre-Napster age the centre of litigation gravity is gradually being relocated to disputes between right-holders and end consumers.[77] The responsiveness of courts to alleged consumer interests in access to, transfer and transformation of copyrighted works has varied across jurisdictions.

The P2P cases involve as a rule straight forward cases of unauthorised reproduction and making available of copyrighted content. More difficult is to gather representative empirical data about the incentive structure for participation of users in the judicial process in cases of alleged transformative use. It can however be confidently assumed that high litigation costs impact negatively on the willingness of users to actively test the scope of statutory defences and exceptions from copyright. There is also abundant anecdotal evidence of aggressive pre-litigation tactics on the part of right holders (warning briefs). Lessig tells the story of a college student building a University webpage database, being forced to terminate the activity despite possible fair use exceptions. Both Posner and Lessig in recent publications emphasize the discrepancy between law on the books and law in action and quote instances where a complex and expensive clearing of rights takes place probably without legal ground, but mostly for fear from prospective litigation.[78]

Still, recently there have been significant attempts to tilt the dynamic of the judicial process in a consumer-friendly direction across jurisdictions. In a number of European

[77] Certainly, the lawsuits against intermediate service providers or software developers have had their prominent role in the whole story.The literature on the multiple and differently shaped cases on P2P technologies involving Napster, Kazaa and Grokster is copious. See Reichman (2004).

[78] Both episodes concern the tribes and tribulations of documentary film-makers associated with the clearing of rights on an incidentally captured television broadcast of a cartoon (Simpsons in Lessig's case), Lessig (2004), at 98 and Posner, 'Eldred and Fair Use' (2004) *The Economists' Voice* Vol. 1, 1, Article 2.

countries consumer organisations have challenged certain excesses of the copyright regime, in particular, those associated with the scope of protection of TPM and its relation to copyright exceptions and consumers' interests. Much attention and debate attracted the French litigation saga over the private copy exception in relation to DRM restricting it.[79] While the Paris Court of Appeal offered an exciting and innovative interpretation of the French Intellectual Property Code in the light of the Infosoc Directive allowing a broad recognition of the status of the private copy exception as inviolable and non-restrictable by TPM, the French Supreme Court reversed this decision, thus confirming the conventional view of exceptions as fragile and only conditional viz. the prevalent author rights.[80]

It is instructive that litigation activism in consumer-related copyright law can be noted mostly in countries exponents of strong and active consumer association tradition. Consumer associations represent one institutional response to problems of collective action and have for long enjoyed broad procedural rights. There may be positive synergies from using this institutional know-how for ensuring greater representation of consumer interests in copyright litigation.

Yet, as the outcome from the French case demonstrates, the present design of the copyright system sets serious impediments to such developments. There may indeed be a case for reformulating at least certain of the exceptions to present copyrights as statutory user rights, in order to empower users to invoke these exceptions in a pro-active way.[81] In addition, there may be a need for specific procedural mechanisms for invoking users' rights (not only as limited defence mechanisms in infringement lawsuits but also as an active instrument of asserting these rights) in a collective lawsuit.[82] This would reduce the threshold for access to the courts and would give some leverage to users. New initiatives for collective, group and class action are

[79] Decision of the Supreme Court (Cour de Cassation), First Civil Chamber, 28 February 2006 ; decision of the Paris Court of Appeal Cour d'appel de Versailles 1ère chambre, 1ère section 30 septembre 2004 (EMI / CLCV); Tribunal de grande instance de Paris 3ème chambre, 2ème section Jugement du 30 avril 2004 (Stéphane P., UFC Que Choisir / société Films Alain Sarde et autres). On this case see Geiger, Christoph, ; Valerie ...

[80] For examples from Belgian and German law see IViR Report, Part II.

[81] The idea of a charter of users' rights has been advanced within the framework of the project Intellectual Property Rights in Transition, co-chaired by Prof. Marianne Levin and Prof. Annette Kur. The idea has been fleshed out with concrete proposals by Jens Schovsbo and Tomas Riis in Schovsbo, Jens and Thomas Riis, 'Users' Rights: Reconstructing Copyright Policy on Utilitarian Grounds', (2007) 27(1) *EIPR*, 1..

[82] For such explicit solutions in the context of TPM in Belgu

underway in a number of European countries and at the European level.[83] Such developments may prove of interest to copyright lawyers as well.

Furthermore, special attention should be devoted to the choice between open-ended or closed lists of copyright exceptions (or user rights). The debate in this respect appears to differ on both sides of the Atlantic. For instance, responding to the concerns about excessive length of copyright in the wake of the *Eldred v. Ashcroft* decision of the US Supreme Court, Posner advances a proposal of more extensive application of the fair use doctrine in American law as an instrument of regaining the balance.[84] He acknowledges, however, that one drawback of the doctrine as currently applied by US courts, is its vagueness and unpredictability despite its partial codification. Therefore Posner argues for what he labels a "categorical approach", i.e. precise statutory (?) statement of exceptions that would be much less dependent on judicial interpretation and thus would provide greater legal certainty and predictability. This proposal arguably indirectly acknowledges the importance of shifting the balance of decision-making to the legislative process. What Posner disregards is that any attempt to formulate "categorical" fair use exception may unleash the dynamics of interest group politics and lead to other imperfections.

In the European context, (re)defining the exact scope of statutory exceptions from copyright is also topical in connection with the much delayed transposition of the Infosoc Directive, with is notoriously clumsy list of exceptions. In this context opposite concerns have been expressed, namely that the precise statutory definition of exceptions deprives the system of flexibility and does not allow for equitable solutions *in casu.* Quite independently from the debate on the substance and exact scope of specific exceptions, my point is that attention should be paid on which institution should decide on these important issues in the future.

As a concluding observation, although there are instances of judicial fine-tuning of the scope of copyrights in a consumer friendly direction, occasionally bordering outright judicial recognition of certain consumer rights within the realm of copyright

[83] See Alternative Means for Consumer Redress, Study for the European Commission, University of Leuven, available at
[84] Posner, 'Eldred and Fair Use' (2004) *The Economists' Voice* Vol. 1, 1, Article 2.

law, eventually courts are not inclined to substitute their decision making for that of the legislature. [85] They have at the same time shown reluctance to give full way to hard litigation tactics of right holders, in particular when criminal measures have been invoked against individuals.[86]

The role of the administrative process: a new arena for copyright decision-making?

The self-identification of copyright, in particular within the *droit d'auteur* tradition, has been tightly linked with the pathos of the French Revolution, and with the philosophy of individualism and personality rights. Consequently, copyrights have been conceptualised as private rights, belonging to the realm of private law. The idea of government intervention in copyright, following the initial grant of statutory entitlement, and of involving the administrative process in the shaping and fine-tuning of the scope of rights for particular categories of works tends to provoke almost instinctive rejection by copyright experts. Thus, there is typically no governmental agency, entrusted with enforcement or rule-making in the area.

Less categorical is the private law positioning of copyright in the countries of the common law tradition with their more utilitarian view on copyright as an instrument for stimulating artistic and literary creativity. According to Ginsburg, "[i]n this view, copyright should afford authors control no greater than strictly necessary to induce the author to perform his part of the social exchange."[87] One well known consequence of this view is the role of formalities as "state-imposed conditions on the existence or exercise of copyright." As Ginsburg notes "if copyright is essentially a governmental incentive program, many formal prerequisites may accompany the grant (for example, requiring the author to affix a notice of copyright, or to register and deposit copies of the work with a government agency, before the right will be recognized or enforced)."

[85] For an interesting account on user-friendly litigation and recognition of user rights by Canadian courts see Hamilton, Sheryl, Now it's Personal: Copyright Issues in Canada, in David Taras et al. (eds) *How Canadians Communicate* (Calgary: University of Calgary Press, 2007).
[86] Cf. the Swedish Tommy Olsson case.
[87] See Ginsburg, Jane, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 Tulane Law Review (1990), 991, at .

In both UK and US national/federal Copyright Offices have been responsible for the formalities. These public agencies have retained their existence even after the formality requirements have been abandoned. With the introduction of compulsory statutory licenses and blank tape levies, the prerogatives of these public bodies have expanded, extending even to rule-making. More importantly, with the growing need to ensure a flexible adjustment of copyright to new technologies such offices are seen by many as one institution that can play an important role in fine-tuning the scope of copyright. To account for the increasing regulatory character of copyright, Liu goes as far as to suggest the need of a Copyright Authority in certain cases. [88]

But even in the countries in *droit d'auteur* tradition public agency involvement in the realm of copyright and associated legislative and enforcement practices is not unknown. The role of the administrative process in copyright has been most recently subject to reconsideration in the course of implementation of the Infosoc Directive and in particular the enigmatic provisions on limitations to the protection of TPM (Art. 6(4) Infosoc Directive).

In search for the appropriate mix between public and private institutions

The Infosoc Directive has apparently unsettled the institutional equilibrium in national copyright law. In particular, the need to transpose the vague provisions concerning protection of TPM and their relation to copyright limitations has posed considerable challenges before national law-makers[89] that had to show inventiveness in institutional choice and institutional design. The recently published study commissioned by the European Commission on the state of national implementation of the Directive by the Member States, carried out by the Institute of Information Law in the Netherlands (IViR) demonstrates that a whole array of institutional arrangements has sprung out of the implementation process. These institutions can be placed at different junctures on the scale between private and public.[90] Despite the variety of solutions, one can discern a growing role of public and public-private

[88] See Liu, Regulatory Copyright, supra, note ..
[89] For a convincing critical view on the Directive's provision on TPM see Séverine Dusollier, 'Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise', 34 *Int'l Rev. Industrial Prop. & Copyright L* (2003), 62.
[90] The Implementation of Directive 2001/29 in the Member States, Part II,

institutional schemes in mediating between right holders and users and in assuring a flexible and sustainable balance of rights and interests.

Certainly, some countries are minimalist in providing institutional scaffolding for substantive provisions, giving none or very limited attention to the question of institutional choice and design. For instance in Sweden the law maker simply provides for a right of the beneficiaries to challenge a TPM before the court and to claim a prescriptive injunction, e.g. requiring the court to obligate the right holder to make the exercise of the limitation possible. This provision, by offering a standing to interested beneficiaries to claim injunction before the ordinary courts, represents a clear option for the judicial process in terms of institutional choice. It has been rightly criticised for its vagueness and for limited effect an injunctive relief may have on the right holders. Further on, the assumption that beneficiaries should take the time and efforts of litigation is somewhat unrealistic in terms of costs and benefits of participation in the judicial process.[91]

In Germany, a similar preference for the judiciary can be noted. The German Copyright Act (Urheberrechtgesetz, UrhG) grants the lawful user a right to claim affirmative injunction, obliging the right holder to provide for the exercise of certain exemptions (§ 95b(1) UrhG). The law maker has gone, however, a step further in supporting the individual claim laying down a right to group action for consumer organisations (and other organisational bodies of beneficiaries) to compensate for notorious problems of collective action in litigation involving diffuse low stake interests.[92] A right to claim injunction is introduced in the Act on Injunction (Unterlassungsklagegesetz, UKlG). Under § 2a UKlG the association can only obtain a prohibitive injunction, i.e. an injunction that prohibits the right holder from continuing violation of § 95b UrhG. This recognition of the importance of collective enforcement in the copyright context is impressive. Yet, in legal doctrine doubts are

[91] See comments by Swedish Television and Stockholm University on the Government Bill, Prop. 2004/05:110, 317. Cf. Westman, Daniel, Tekniska åtgärder. Nordiskt genomförande av artikel 6 i infosoc-direktivet, *NIR* (2003), 577.

[92] For a moderately positive assessment of the German approach see Bäsler, Wencker, 'Technological Protection Measures In The United States, The European Union And Germany: How Much Fair Use Do We Need In The "Digital World"?' 8 *Va. J. L. & Tech* 13: "The European/German system helps the user in this regard. Though it does not permit the user to resort to self-help and circumvent the technological measures on his own, it gives him a claim against the copyright holder to furnish him with the necessary means to exercise his rights.", at 69.

rightly expressed as to the effectiveness of this injunction, when shaped only as a negative, cease and desist remedy. [93]

Locus standi to professional and (recognised) consumer associations is granted also under Belgian law, which likewise relies on an affirmative injunctive action on the part of beneficiaries before the court of first instance (Art. 87bis Belgium Copyright Law). In addition standing is granted to the minister in charge of copyright legislation.[94] According to the Severine Dussollier, rapporteur on Belgian law in the IViR study, this right of action has the character of an enjoinment procedure (référe) and should be rapidly decided.

In a number of countries intermediary forms of private/public governance arrangements are set up, seeking mediation and dispute resolution on the basis of co-regulation. Alternatively, existing institutional bodies that previously have been foremost charged with setting licensing fees in compulsory and extended licensing schemes are entrusted with new tasks. Thus, in Finland a special arbitration body is established for tackling disputes between right holders and beneficiaries (users).[95] In Norway and Denmark the existing Copyright License Tribunals have been entrusted with new functions. The Danish Copyright License Tribunal may, upon request, order a right holder who has used effective technological measures to make such means available to a user which are necessary for the latter to benefit from the abovementioned limitations of copyright. If the right holder does not comply with the order within 4 weeks from the decision of the Tribunal, the user may circumvent the effective technological measure, notwithstanding the provision of section 75 c (1) (cf. Section 75 d of the Danish Copyright Act). Similar arrangement exists in Norway.[96]

A quick comparative overview suggests that most active involvement of the state is envisaged by the French implementing provisions (Art. 331-6-22 Code de la propriete intellectuelle, Livre III, Titre III Procédure et sanctions). A special governmental

[93] *Ibid.*
[94] IViR Report, Part II, 134. The following persons can bring such an action before the court: the beneficiaries of the exceptions themselves; the minister in charge of copyright legislation; any professional association (e.g., an association representing libraries or educational establishments) and any association protecting the interests of consumers inasmuch as it is officially recognised.
[95] See Westman, *supra*, note 46, 577. IViR Report, Part II, 134.
[96] IViR Report, Part II, 194, cf. Westman, *supra*, note …, 577.

authority is set up, an Authority of Regulation of Technological Measures (L'Autorité de régulation des mesures techniques, ARTM). The Authority is empowered to rule on any conflict between exceptions and technological measures. It has the general competence to ensure that the exceptions will be observed and to determine the way the exceptions should be respected in applying the TPM, as well as the number of copies that should be made possible. The ARTM acts upon request of any beneficiary of a relevant exception or of an association (personne morale agrée) and generally should strive to facilitate conciliation between parties (Art. L 331-15).

The ARTM has the status of an independent administrative authority (Art. L 331-17). It is composed by way of a (governmental) decree and consists of six members, designated respectively by Conseil d'Etat, Cour de Cassation, Cour des comptes, l'Académie des technologies, Conseil supérieur de la propriété littéraire et artistique (Art. 331-18). The members are appointed for a time-limited mandate of six years which is non-revocable and non-renewable. Apparently, this composition seeks to provide authority, expertise and integrity, rather than representation of affected interests. In this, the Authority is much more a regulatory than a self-regulatory or a co-regulatory body.

When a case has been referred to the Authority, it seeks to achieve conciliation. Upon failure to reach agreement within two months the ARTM must either decline the request or issue a prescriptive injunction, possibly upon penalty of a fine (Art. L-331-15). The decisions of the Authority may be appealed before the Paris Court of Appeal with a suspensive effect.

Clearly, it is still premature to evaluate the performance and effectiveness of these institutional innovations and generally the wisdom of preferring one over the other institutional alternative. For our purposes it suffices to direct the attention to this new dynamic of institution building and to stress the importance of keeping various avenues of participation open and able to accommodate new, previously sidestepped interests. In particular, while the administrative process has the advantages of high expertise and flexibility, there are well documented risks of agency capture. Administrative authorities are sometimes set up as "high visibility arenas" to demonstrate political action on politically sensitive issues, often with majoritarian

flavour. However, at the level of implementation, principle agent problems may deter efficient agency action. Apart from robust mechanisms for governmental and parliamentary accountability, transparency and possibilities for citizen participation in rule making (e.g. by way of public hearings) are possible ways to make agencies keep to their political mandate.[97]

Institutional persistence

Finally, a note on historical institutionalism (North, 1990) is in order. The above overview of diverse institutional responses to important questions of public policy in copyright (namely, TPM in relation to copyright limitations) demonstrate, among other things, the crucial impact of institutional legacies. In Sweden, as mentioned above, the soft corporatist model of collective agreements and negotiations in labour law has influenced copyright institutions. Respectively, no governmental or quasi governmental bodies have emerged in the sphere of copyright.[98] This institutional trajectory is now continued, whereby users are (indirectly) referred to similar arrangements or, in the absence of corporative belonging, to the ordinary courts. Conversely, in other Nordic countries like Denmark and Norway, where a Copyright License Tribunals have been brought to life by previous regulatory dilemmas in copyright, recourse to such bodies for solution of new problems appears only natural.

Germany has been generally averse to government intervention in the sphere of copyright and more generally, in the sphere of consumer protection. Reliance on individual or collective litigation and injunctive action is in line with this institutional tradition. [99] Likewise, strong consumer protection associations have been a distinctive feature of Belgian consumer and market law, finding now its breakthrough in copyright.

[97] On various forms of accountability see Rose Ackerman (1989, 2005)
[98] Petri, *supra*, note …,
[99] On German institutional developments in the areas of unfair commercial practices and consumer law see Bakardjieva Engelbrekt, *supra*, note … More particularly on the resistance to introducing a governmental authority for cross border consumer matters, as required by the the Consumer Protection Enforcement Regulation, see Bakardjieva Engelbrekt, Ibid., at ..; Cf. Micklitz, in: Bernitz/Weatherill, The Unfair Commercial Practices Directive (Oxford: Hart Publishing, 2007)

Finally, France is known as an exponent of a strong regulatory (dirigiste) tradition.[100] More specifically, in copyright the reliance on independent administrative authorities with high authoritative status and with mediating, decision-making and rule-making powers, is familiar in the sphere of regulation of collecting societies.[101]

On a general note, it can be confidently inferred that institutional choice is not only (and not chiefly) influenced by efficiency considerations and by participation concerns as to the specific public policy issues at hand, but rather is significantly coded into an institutional environment and builds on past institutional choices. This is not surprising. The organisations that are repeated beneficiaries of the institutional framework of copyright are well-adapted to enforcement patterns and institutional structures at both judicial and administrative level. They exhibit a marked pre-disposition for keeping the *status quo*, which will involve less adaptation costs and substantial benefits. Such path dependence may occasionally, however, prevent new institutional actors to participate in decision-making processes and thus to infuse information and articulation of their interests in these process, which might eventually lead to inefficient shaping of substantive outcomes.

These are not the only instances where historical institutionalism will offer a useful analytical prism. Within the property right school of economic analysis the theory of broad property rights has been advanced as a preferable starting position.[102] Historical institutionalism shows, however, the power of path dependence and institutional lock in. Once broad property rights have been assigned, the actors and organisations emerge that benefit from those rights. These organisations then define enforcement and are repeated users of the institutional framework of copyright. To subsequently withdraw property rights is likely to meet the resistance of those groups and to generally be constrained by institutional inertia.

Another evidence of institutional persistence concerns collecting societies. Collecting societies have emerged to solve similar problems, but they differ in their history,

[100] See in a different context the conclusions of a number of studies for the World Bank of La Porta et al. under the New Comparative Economics school.
[101] Commission permanente de contrôle des sociétés de perception et de répartition, Art. L-321-13. See also *Etude sur la gestion collective des droits d'auteur dans l'Union Européenne*, Deloitte & Touche ITEC Group, Study for the European Commission,
[102] Merges, 'On Property Rules, Coase and Intellectual Property', op. cit.

status and organisational structure. Despite intense international networking, they are still firmly embedded in the national institutional environment, which to a great degree determines the main modalities of governance, such as transparency, accountability, degree of public control, etc.

One example of how such national histories influence the shape of rights and institutional choice is the Swedish extended licensing scheme. Petri provides a convincing account of Swedish collecting societies being built in many respects on the model of the very developed and powerful Swedish labour movement. The construct of extending collective agreements to non-members, familiar from the soft corporatist arrangements of the Swedish negotiation model has thus served as inspiration for the voluntary licence scheme. The viability of this scheme in the Swedish context may not readily be transferable to other collecting societies in countries with different institutional tradition and history.[103]

At the European as well as at the American level, collective management organizations are carrying out massive lobbying and are responsible for driving copyright's limits to questionable proportions. Any legislative innovation in the area of copyright should count with the considerable leverage these organisations can produce in the political process and the strong conservative power of institutional inertia.

Conclusion

It is impossible in this brief paper to present a full-blown application of the suggested institutional approach to the case of copyright. Here only some tentative implications have been outlined. In general, it appears worthwhile to explore the logic of participation and representation for various interest groups in the market process and to compare this with the political, administrative and judicial process. This should not be viewed solely as a theoretical exercise but has its immediate practical importance.

[103] See Recital 17 Infosoc Directive, recognising the institutional embeddedness of collective administration: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences."

When we discuss proposals of legislative stipulation of users' rights on an equal footing with right-holders, one should not leave out of sight the issue of allocation of decision-making competence, or as Komesar calls it: "deciding who decides". A choice between rights or defences (exceptions), as well as between precise or broad definition of these rights/defences in the statute implies a choice between the courts or the political process as an institution that strikes the balance of interests.

Before we take a stand on this issue we should carefully examine the interests involved and their relative chances for representation in the political and in the judicial process, taking account of the institutional characteristics of courts and legislatures. An institutional choice perspective would further imply closer attention to questions of enforcement and participation in decision-making at all levels.

As mentioned in the outset of this paper, in the theory of historical institutionalism as developed by North, the concept of adaptive efficiency is introduced as a basis for a normative approach towards the evaluation of institutional change. According to North adaptive efficiency is "concerned with the willingness of society to acquire knowledge and learning, to induce innovation, to undertake risk and creative activity of all sorts as well as to resolve problems and bottlenecks of the society through time."[104] Society's ability to solve problems through time is thus dependent on institutional frameworks that permit the maximum generation of 'trials' and that encourage the development of decentralized decision-making processes. This paper can consequently be understood as a call for sustained efforts to ensure the adaptive efficiency of the institutional framework of copyright. The framework should offer a variety of institutional avenues for participation in decision-making processes so that to minimize institutional lock-ins and to accommodate rights and obligations to new technologies and new patterns of production, dissemination and consumption of copyright content.

Finally, quite independently from the institutional choice dilemmas arising in a typically national context, allocation of decision making is even more dramatic if we

[104] North,

look at the international and supranational level.[105] Many law and economics discussions are carried out without acknowledging the many constraints on institutional choice that international agreements have imposed on national decision-making. A debate should be directed to the issues of how to reconcile the clarity and predictability of the international IP system with the need to adjust institutional choice to new political, economic and technological developments. Within the European context the economic advantage of uniform rules have been questioned.[106] Similar reasons, namely the need for constant experimentation and keeping decision-making processes open to new actors and trial and error, may be valid in the IP debate at both EU and the international level.

[105] Generally on the slowness of law to catch up with the internationalisation of market and economic science see Buxbaum, Rechtsvergleichung zwischen Nationaalstaat und internationalen Wirtschaft.
[106] Kerber, Bakardjeiva-Engelbrekt