Review of Economic Research on Copyright Issues, 2007, vol. 4(2), pp. 65-97

COPYRIGHT FROM AN INSTITUTIONAL PERSPECTIVE: ACTORS, INTERESTS, STAKES AND THE LOGIC OF PARTICIPATION

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Abstract. This article investigates recent developments in copyright, proceeding from a participation-centred comparative institutional approach (Komesar, 1994). Following institutional theory, the approach implies conceiving of the market, the political process (legislatures and administrative agencies) and the courts as alternative decision-making processes in the area of copyright law and policy. It emphasises the importance of institutional choice, based on careful comparison of the modalities for participation of different interests in these processes.

Novel digital and information technologies influence the conditions for participation in copyright decision-making at all levels and unsettle previously established institutional equilibriums. In the wake of the *Infosoc* Directive, a dynamic process of institutional adjustment seems to be unfolding in the Member States of the European Union whereby a variety of private, public and mixed institutional schemes for interpretation and enforcement of the new digital copyright are emerging, seeking to reconcile the interests of a variety of old and new stakeholders. This dynamism is interpreted as a search for appropriate decision-making institution to mitigate the consequences of an expansive legislative copyright policy as materialized in the *Infosoc* Directive and to re-establish a balance of rights and obligations. It is argued that the institutional design of these schemes and the modalities for actor participation will be crucial for their sustainable success and seem therefore to deserve more careful scrutiny. At the same time, the conservative force of institutional legacies is emphasized as a factor deterring institutional innovation.

1. Introduction

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 of taxation (Merges, 1996; Liu, 2004).[1] 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.[2] Appeals have been voiced from many quarters for a more

The work on this article was initiated within the project Intellectual Property Rights in Transition, hosted by Stockholm University under the joint management of Marianne Levin and Annette Kur. I would like to thank the participants in the project for stimulating discussions and encouragement. Thanks are also due to Marieanne Alsne for commenting on an earlier draft of this article and to an anonymous reviewer for valuable suggestions.

[1] With respect to the Swedish Copyright Act see Levin (2007).

[2] 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 (2004). For

adequate balancing of the interests of right holders against the interests of users (Benkler, 2000; Schovsbo and Riis, 2006). Yet the views on the optimal (and most cost-efficient) point of balance and on the practical way of achieving it vary widely.

This article represents an attempt to sketch out a framework for copyright analysis that can hopefully generate insights into the reasons for the complexity and the alleged imbalance of the present system as well as provide some normative guidance for future reform of copyright law and institutions. The article investigates recent developments in copyright, proceeding from a participation-centred comparative institutional approach (Komesar, 1994). Following institutional choice theory the approach implies conceiving of the market, the political process (legislatures and administrative agencies) and the courts as alternative decision-making processes. The approach requires comparing the changing conditions for participation in the market for creative works, in the political process, where the scope of the exclusive rights is being redefined, and in the judicial process where copyright is being enforced and fine-tuned.

Novel digital and information technologies influence the conditions of participation in all decision-making processes and unsettle previously established institutional equilibriums. In the wake of the *Infosoc* Directive,[3] a dynamic process of institutional adjustment seems to be unfolding in the Member States of the European Union whereby a variety of private, public and mixed institutional schemes for interpretation and enforcement of the new digital copyright are emerging, seeking to reconcile the interests of a variety of stakeholders. This dynamism is interpreted as a search for appropriate decision-making institution to mitigate the consequences of an expansive legislative copyright policy as materialized in the Infosoc Directive and to re-establish a balance of rights and obligations. It is argued that the institutional design of these schemes and the modalities for actor participation will be crucial for their sustainable success and seem therefore to deserve more careful scrutiny.

The analysis is based on legal material from Sweden, but refers to case law and preparatory works from a number of other European jurisdictions as well. Far from representing a systematic comparison, the objective is to capture possible common trends at the European level.

2. The analytical framework

The advanced approach builds on two particular strings of institutional theory, both belonging to what is known as new institutional economics, namely comparative institutional analysis and historical institutionalism.[4]

2.1. **Participation-centred comparative institutional approach.** Comparative institutional analysis in this paper builds on the approach advocated by public

voices from European scholarship see Hugenholtz (1999). For the Nordic context cf. Still (2003); Renman Claesson (2003).

[3]Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter referred as the Infosoc Directive).

[4]The presentation of the analytical approach in the following chapter builds on Bakardjieva Engelbrekt (2003), where the approach has been applied to the comparative cross-national study of fair trading law in Germany and Sweden.

policy scholar Neil Komesar (1994). Komesar proceeds from the basic principles familiar from transaction cost economics (Coase, 1960; Demsetz, 1969). The market and the political process, but also the courts, are conceived as aggregate decision-making processes and as institutional alternatives for solving different law and public policy issues. As Komesar points out, these are large and complex institutional processes, which consist themselves of sub-institutions that might be treated separately. Thus, depending on the subject of analysis, one may productively separate the administrative process from the political process, as indeed I do later on in this paper (Komesar, 1994, pg. 9). As a main factor for comparative evaluation Komesar advances participation of affected actors in the respective decision-making process (the 'participation-centred' approach).

The use of the broad concept of 'participation' serves to facilitate the extension of the Coasean transaction cost approach from markets to politics, to public administration and 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 public 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 (legislative 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 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 (Komesar, 1994, pg. 7).

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" (Komesar, 1994, pg. 8). As organisation costs Mancur Olson (1965, pg. 47) 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". Arguably, in 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 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 transaction situation.

In this respect 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" (Olson, 1965, pg. 48).

In general, comparative institutional analysis stresses that the dilemmas of institutional choice begin with large numbers. This proposition is again 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.[5] But if there are many actors on one side of the interest 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, in the administrative process and in adjudication. In other words, institutions tend to 'move together' (Komesar, 1994, pg. 23). 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 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 (Stigler, 1971; Buchanan and Tullock, 1962; Buchanan, Tollison and Tullock, 1980). Komesar labels this situation a case of 'minoritarian bias'.[6] 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

[5] Of course, even in small numbers situations transaction costs can be high due to information uncertainty, strategic behaviour or other factors.

[6] 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, pg. 76).

interest groups (Olson, 1965), but also due to principal-agent problems characteristic of the political and the administrative process (Eggertsson, 1990, pg. 40). 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 (Buchanan and Tullock, 1962; Rubin, 1975).

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'. According to Komesar all theorists of public choice, including authoritative names like George Stigler (1971) and Anthony Downs (1957, pg. 297) 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. In order to come to a more satisfactory answer Komesar proceeds to analyse the character of the large group. He offers several 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. 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 within the group. 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 (Komesar, 1994, pg. 70, 82; Stigler, 1974, pg. 362). Finally, there are better opportunities for mobilizing dormant majorities if the issue concerned is simple and easy to be communicated in powerful metaphoric terms (Komesar, 1994, pg. 82).

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, 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 (Komesar, 1994, pg. 126). 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.

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. A particular form of shifted distribution occurs when the political process intervenes in defence of a dispersed majority and thus converts a skewed distribution into a high uniform distribution of stakes (Komesar, 1994, pg. 136).

2.2. **Historical institutionalism.** Historical institutionalism conceives of institutions in a slightly different way. It highlights the role of institutions as humanly devised constraints, whose main function is to reduce uncertainty by providing a structure to everyday life (North, 1991). Institutions thus include formal legal rules, but also informal constraints (such as ideologies and customs) and the enforcement characteristics of both (North, 1993, pg. 36).

Unlike other institutional economists who treat organizations as institutions, North insists on distinguishing between the two in order to enable stringent analysis of their interaction.[7] The distinction is crucial, since in this way the analytical approach is capable of capturing not only processes of institutional stability and inertia but also processes of change at incremental or more dynamic pace. Organizations are conceived as "groups of individuals engaged in purposive activity." They are designed by their creators to maximize wealth, income, or other objectives defined by the opportunities afforded by the institutional structure of society (North 1993, pg. 36). This broad definition covers the classical market organization, the firm, but likewise the guild, the political party, the Congress or the executive agency.

The core of the theory of institutional change advanced by North could be summarized as aiming to explain "how the past influences the present and the future, the way incremental institutional change affects the choice set at a moment of time, and the nature of path dependence" (North, 1990, pg. 3). One of the main puzzles that drive North's analysis is the dramatic divergence in economic performance and development between different countries in the world (North, 1990, pg. 6). According to the evolutionary theory of economic development elaborated by Alchian, competitive markets should over time prompt convergence towards efficient institutions (Alchian, 1950). North rebuts this theory, demonstrating empirically that institutions are not necessarily evolving towards increased efficiency in a classical Pareto sense. Quite to the contrary, inefficient institutions prosper and divergence between developing and developed countries in efficiency terms even increases.

North explains the puzzle by highlighting the constraining force of institutions and their 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).

Institutions open new opportunities for gains from trade and thus give rise to organizations and institutional agents who are willing to make use of these new opportunities. In the words of North:

> The organizations that come into existence will reflect the opportunities provided by the institutional matrix. That is, if the institutional framework rewards piracy then piratical organizations will come into existence; and if the institutional framework rewards productive activities then organizations – firms – will come into

[7]Oliver Williamson in his early work does not distinguish between institution and organisation (Williamson, 1985). In the school of sociological institutionalism a joint treatment of institutions and organizations is represented by March and Olsen (1989). They include in the definition of institutions not only "social norms and culturally stabilized systems of meaning but also social entities that are capable of purposive action.". On the definition of institution and the distinction with organisation and corporate actors see Scharpf (1997, pg. 38).

> existence and engage in productive activities. (North, 1994, pg. 361)

The other side of the interaction between institutions and organizations is the ensuing risk of symbiotic relations between organizations and institutional frameworks, leading to situations of institutional lock-in, i.e. pronounced resistance to change despite efficiency losses.

2.3. **Merging the two perspectives.** 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. The analysis offered by Komesar is abstract and ahistorical. Or rather, like much law and economics analysis, it is informed by the institutional realities of the US American context, but assumptions about the characteristics of the political, judicial and administrative process are then 'universalised'. In contrast, historical institutionalism demonstrates that institutional choice is contingent on a historical and institutional context that has been shaped through time, is often country-specific and is generally resistant to change. It sets a research agenda of careful empirical study of comparative institutional choice and design across jurisdictions.

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 (1990, pp. 80-81). 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" (North, 1993, pg. 35). 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.

The advantage of the proposed approach for the analysis of copyright is that it makes possible a simultaneous comparative analysis of markets, political processes, administrative agencies and courts as alternative decision-making processes for copyright policy issues. All of these can be conceived as aggregate institutions and can be analysed in their own terms, having nevertheless participation as a common denominator of comparison. The analysis allows us to integrate insights from the theory of public choice and 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 of copyright (Kay, 1993; Towse, 2003b). Similarly, Mackaay when discussing the extension of exclusive intellectual property rights to new objects of protection 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 (Mackaay, 2006,

pg. 386). 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.

3. 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 key issues should be the choice of institutional decision-making process best equipped to strike this balance. To put it in Komesar's terms the crucial question is "deciding who decides" (Komsear, 1994, pg. 3). 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.[8]

3.1. **The market for creative works.** The very emergence of copyright is usually explained in economic terms as a way to resolve problems stemming from the public goods aspects 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. 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 (Arrow, 1984, pg. 142; Schäfer and Ott, 1986, pg. 77). 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* (Landes and Posner, 1989; Van den Bergh, 1998; Mackaay, 2006).

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 (Radin, 2003). A literary work typically 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 (Landes and Posner, 1989).

Arguably, without statutory IP rights there would be a significant problem of sustaining workable markets for intellectual works (Merges, 1994; see however, Breyer, 1970). 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

[8] On the dynamics of institutional choice see Komesar (2001).

sub-optimal production of such works. "Participation" of potential creators and producers (to use Komsear's term) in such markets would be suboptimal.

3.2. **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 original 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 (Landes and Posner, 1989; Van den Bergh, 1998) and creates beneficial conditions for participation in such markets.

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 (Komesar, 1994). 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 effect on "follow-on" creativity (Landes and 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 (Liu, 2004). 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 (Towse, 2003a) 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.[9] 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 Pierre Beaumarchais, and later on, on the international arena, Victor Hugo, is emblematic

[9]For a convincing analysis of the situation of artists in contemporary creative industries see Towse (2003a): "The distribution of artists' income is highly skewed, with a few superstars having incomes from fees, sales and royalties."

(Ginsburg, 1990; Hemmungs Wirtén, 2003). 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 (Petri, 2005, pg. 431).

In addition, there is high uncertainty as to the prospects for creators of joining the 'lucky few',[10] 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. Collecting societies can themselves be treated as private ordering institutions to reduce transaction costs, enable risk spreading and promote the effective administration of intellectual property rights (Merges, 1996), and as such be conceived as part of the market. Indeed the story of these organisations is a fascinating example of spontaneous institution-building for coping with transaction costs and collective goods problems. In this analysis, however, collecting societies will be regarded as organisations and institutional actors, participating in markets, legislative and adjudicative processes (North, 1993). With time collective management organizations have grown into powerful economic entities with not insignificant staff and expenses, broad membership coverage and having a substantial own interest in influencing the legislative framework (Kretschmer, 2002). In his classical work on collective action Olson advances the so called "by-product" theory of large pressure groups with reference to labour unions and professional associations (Olson, 1965, pg. 132). Collecting societies can be seen to fit both descriptions.[11]

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 (Ginsburg, 1990). 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 (Komesar, 1994). 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 (2004, pg. 90),[12] 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 early days of the system. Generally, however, in a horizontal system of copyright, the risk for bias should not be serious.

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 (Litman, 1989;

[10]Towse (2003a) speaks of the 'no-one knows' theorem with reference to Caves (2000).

[11]Petri (2005) 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, including reliance on 'soft corporatist' negotiation procedures for conflict settlement.

[12]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".

Cohen, 1998-1999). 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.[13] While these organisations typically side with either authors or consumers, they also have their very distinct and particular agenda.

3.3. **The judicial process.** Here 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. 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 (Komesar, 1994).

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 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 statutory exceptions in the European context, have been restrictively interpreted by the courts as unwanted incursions on the dominant principle of broad author rights.[14] 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 absence of statutory rights and 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 (Komesar, 1994). 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 corporate actors with unmistakable allegiance to the cause of right-holders. Such a tendency has been observed in different national legal contexts (Still, 2003).

Collecting societies have been at the heart of a number of copyright disputes, often willingly testing the limits of statutory rights. In Sweden graduate students

[13]For a more detailed analysis of different categories of actors in the copyright field see Kretschmer (1999b; 2003).

[14]For examples of Swedish and Finnish cases see Still (2003). For American analyses and examples see Posner (2004).

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 (NJA 1986 s 702). The argument that this sort of demonstration was not to be considered as copyright relevant public performance expressed by the dissenting judges did not prevail. In Finland taxi drivers have been held liable to pay royalties for the radio music in their cabs.[15]

At the same time, it is important to note that in the pre-digital era individual consumers have rarely been targets of copyright litigation. Even though copyright infringements by consumers have not been lacking, right-holders' litigious strategies were rather directed at corporate users such as hotels, broadcasters and entertainment establishments. Prosecuting mass small-scale infringements by end-users is costly, if not impossible due to evidentiary difficulties. Moreover, antagonizing end-users, who ultimately represent the customers and market for copyright works, is clearly not in the interests of right-holders.

4. The changing modalities of institutional participation: the case of digital copyright

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 changing pattern of participation 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, requiring serious rethinking of institutional choice and design.

4.1. **Changes in the market of intellectual creation.** Digital technology has dramatically enhanced the intangible (information, or public good) aspects of copyright protected works (Long, 2004). 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-visual 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 character and the ways of distribution of creative works have influenced substantially the market for intellectual products as supported by

[15]See Still (2003, pg. 49) with reference to the decision of the Finnish Supreme Court HD 2002:101. Whereas this decision is certainly in line with the established jurisprudence treating music broadcasting in hotels as making available to the public, the rationale behind these doctrines seems to deserve additional scrutiny. In particular, the music broadcast in a taxi should be seen as serving more the personal use of the taxi driver rather than entertaining a client.

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-visual works claims are made that their participation in this market may be seriously deterred in view of potential losses, leading possibly even to the collapse of such markets (Ginsburg, 2001).

The "answer to the machine" has proved most probably "to be in the machine" (Clark, 1996). Given the general clumsiness and inertia of the legislative system in providing effective protection, producers have resorted to technological protection measures (TPM) and different digital right management models to tame the wilderness of the Net, harness the potential of the new communication networks and recoup part of their investments. At the same time, merging technological platforms exacerbates market concentration in the cultural industries and 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 (Kretschmer, Klimis and Wallis, 1999a). This trend is provoked by and in turn enhances the just mentioned concentration of stakes in the cultural industries. The notorious dominance of the four big 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.[16] 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 (Benkler, 2000; Liu, 2002-2003).

Given these parallel and often incongruent trends in present patterns of cultural production, dissemination and consumption, 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 (Ginsburg, 2001; Kretschmer, Klimis and Wallis, 1999a, 1999b; Kretschmer, 2003).

4.2. **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 robust exclusive rights. This 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 (notably 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

[16]Certainly this has been supported by the general raise of the levels of literacy, education and living standard in certain regions.

by the convenient division between copyright and related (neighbouring) rights, but has been well acknowledged in American Copyright Law (Litman, 1989; Litman, 1996; Renman Claesson, 2003).

Comparative institutional analysis warns against various deficiencies that may accompany the political process under similar interest structure, the most serious being the above discussed '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 (Buchanan and Tullock, 1962). 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 over-represented in the political process, it would be this group that would control the flow of information (Komesar, 1994).

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 producer groups, primarily publishers, record companies, and in the last decade, software houses." (Kay, 1993, pg. 337).

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 (Litman, 1989; Litman, 1996). One notorious example from the European legislative process is the frantic lobbying activity of the software industry at the time of negotiating the European Software Directive (Van den Bergh, 1998, pg. 29).

Still, the power of individual copyright industries has in some cases been effectively counterbalanced by the existence of large corporate users (e.g. content aggregators and content distributors) with sufficiently high stakes to motivate political involvements (e.g. juke box operators, broadcasters, 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 (Dinwoodie and Dreyfuss, 2004). Due to complexity of technology and interest constellation, the law makers practically delegate 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 (Litman, 1989). 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 (Kretschmer, 2002).

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 toward "regulatory copyright" (Liu, 2004). Rather than assigning property rights entitlements, legislatures directly intervene and regulate specific industries influencing the parameters of competition and economic activity in specific markets (Liu, 2004; Lessig, 2004).[17] 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, as well as decreasing transparency of the goals of the copyright system, 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 and the changing incentive structure for organisation and participation. 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.[18] 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 (Litman, 1996).

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 (Oksanen and Välimäki, 2007).

Indeed, the transposition of the *Infosoc* Directive in Europe has provoked a previously unknown public debate on copyright and its effects on users and consumers.[19] A new dynamics of the legislative process, with greater involvement of consumer groups and the public, is reported from many Member States of the European Union.[20] In Sweden, famously, a political party, the so called *Piratpartiet* (The Pirate Party, playing on the names of anti-piracy associations), was founded

[17]For an extensive discussion on the notion of "regulation" see Ogus (1994).

[18]For a discussion and categorization of different types of consumers of cultural products and their respective interests, see Liu (2002-2003). 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 (2004, pg 35); Benkler (2000).

[19]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, Merges (2004).

[20]See IViR Report, Part II, country report on Belgium, Germany, France, to name but a few. In the US legislative initiatives to empower the Federal Trade Commission with broader rights in the area of digital products were made, see the Bill for a Digital Media Consumers' Rights Act of 2005, H.R. 1201.

to give voice to the dissatisfaction of many, mainly young people, from the present, as they see it overly restrictive, regime of copyright law. The party vows a membership of 5221, which is comparable with the membership of youth sections of established political parties. It managed to attract not insignificant numbers to its pre-election rallies and non-negligible votes in the latest Swedish elections of 17 September 2006.[21] More generally, notions such as 'the public domain' and 'user rights' have entered the public discourse.[22]

Another change in the pattern of participation is that for the first time, consumer organisations have recognized the effect of copyright legislation on their members and have engaged actively in legislative lobbying. In countries with strong consumer association this engagement has been particularly visible, leading occasionally to important legislative compromises and modifications. One example is the early awareness of the German Verbraucherzentrale about the relevance of the current copyright debate for consumers and its attempts to tilt the German transposition of the *Infosoc* Directive in a consumer-friendly direction (Hoeren, 2003).[23]

The European Consumers' Organisation (BEUC) has likewise given high profile to a so called digital rights agenda.[24] In a position paper on digital rights management of 2004 BEUC formulated a number of consumer rights that according to the organisation shall be respected in the digital environment, among others right to private copy, right to privacy and private data protection, right to free speech, right to maintain the integrity of private property, etc.[25] Facilitated by Europeanisation and communication technologies, documents by such Europe-wide organisations tend to produce network effects and be reproduced and echoed by national consumer organisations.[26]

The pressure exerted by the digital consumers has not left established political parties and actors unaffected. In the Swedish pre-election campaign of 2006 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

[21]See Valmyndigheten, (the Swedish Electoral Authority) at http://www.val.se/val/val2006/slutlig/R/rike/ovriga.html. Cf. the following excerpt from Canadian Post: "Thanks to proportional representation, youths around the world are turning to a political movement and a political party that can speak to their needs and aspirations: the Pirate Party. Now the fastest growing political party in the world, the Pirate Party offers youth the right to download pirated music and movies –a basic human right, it argues. The Pirate Party – which says it will support any ideology in a coalition government, as long as it gets its way on free downloads – is credited with influencing the Swedish election last year. This year it surpassed the Swedish Green Party in members, and in 2009 it is expected to be the Hot New Thing in European Union-wide elections." 4 October 2007. Available at: http://www.canada.com/nationalpost/financialpost/comment/story.html?id=9fe42daa-c7c0-408a-90c5-eae4e83139da (7 October 2007).

[22]See articles in the influential Swedish daily newspaper *Svenska Dagbladet* by Hemmungs Wirtén, Kunskapsbanken havererar, 13 July 2004; Niklas Lundblad, Alexandra Hernadi, 26 June 2007.

[23]Interestingly, in Sweden, where consumer policy relies to a higher degree on public institutions, the Public Consumer Board (Konsumentverket, KOV) did not emerge as critic of the proposed changes in the legislative process of transposition of the *Infosoc* Directive. The same applies to the umbrella organisation of Swedish consumers, although they too were consulted.

[24]BEUC has also launched a consumer digital rights campaign through the site: http://www.consumersdigitalrights.org/cms/index_en.php

[25]Digital Rights Management, Position Paper, BEUC/X/25/04/2004, available at: http://www.consumersdigitalrights.org/mdoc/DRMBEUCX0252004_59695.pdf

[26]See the Digital Rights document at the pages of the Sveriges Konsumentråd.

that copyright enforcement is increasingly directed at individual users and divorced from wide-spread Internet practices and user expectations. Promises were made for remedying the situation and restoring the balance albeit failing to state the more specific legislative action to be undertaken.[27] 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. Nevertheless, industry representatives have expressed discontent with this political play leading, in their opinion, to a further withering of popular respect for the copyright system.[28]

The intensified user rights rhetoric employed by politicians may be seen as a clear sign of majoritarian influence (and occasionally probably tipping to a majoritarian bias) in the political debate on copyright. 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 (Kretschmer, 2002), appeals toward constraining industry power and sharpening industry regulation have attracted not insignificant popular appeal (cf. Komesar, 1994). Aggressive anti-piracy campaigns and litigation policies on the part of (corporate) right-holders have only confirmed the 'David v. Goliath' perceptions of the conflict.

To be sure, post-election the sometimes promised, but legally impossible refurbishment 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.".[29] Whereas the focus on consumer interests is remarkable, the mandate is limited in terms of prospects for legislative change within the domain of copyright proper. 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 section.

This is admittedly a rather 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* in selected jurisdictions. Further distinctions of other categories of interests involved in the political process, siding with either authors or users, but having their own agenda will have to be introduced. The role of consumer electronics industry or, nowadays, Internet Service Providers (Intermediaries) as important allies to end

[27]See about the position of the two Prime Minister Candidates Persson (social democrat) and Reinfeldt (conservative) on file-sharing in the pre-election campaign, Sista motet fore valet (Last meeting before the election) , *Svenska Dagbladet*, 11 September 2006. cf. *Dagens Nyheter*, 09-08-2007.

[28]See Ds 2007:29 Musik och film på Internet – hot eller möjlighet (Music and film on the Internet – threat or possibility, Government Investigation Report).

[29]See Ju 2006/6767/P, Utredningsdirektiv, Uppdrag angående upphovsrätten på Internet, 2006-08-15 (Guidelines of investigative commission concerning copyright on the Internet), Sweden.

consumers has to be integrated in the analysis. Extensive empirical studies mapping the structure of the music industry and the array of actors involved already exist (Kretschmer, Klimis and Wallis 1999a; 1999b; 2002). The data and findings of such studies can certainly be productively employed in a participation-centred analysis of copyright policy. My purpose here is only to indicate the importance of a close scrutiny of the interests affected by the legislative process and their differential possibilities for participation.

4.3. **Changes in the judicial process.** Digitisation and global communication networks, by changing the structure of copyright use, have powerfully affected the pattern of copyright litigation as well. 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 (Hamilton, 2007; Cohen, 1998-1999; 2004-2005). Right-holders have been admittedly slow and hesitant with the assault on the end-user. In the matter of file-sharing the preferred targets of litigation have again been corporate defendants such as ISPs and developers of file-sharing technology.[30] More recently, however, users in a number of jurisdictions have become the direct target of court proceedings by collecting societies or producers, either on an individual basis or in summary so called "John Doe" proceedings.[31] This appears to be the last shackle in a complex chain of measures to stifle unauthorized Internet distribution of copyrighted material, foremost music and film.

A less visible but at least as significant part of right-holders litigation strategies is the use of aggressive pre-litigation tactics notoriously by warning briefs. Whereas P2P cases involve as a rule straightforward cases of unauthorised reproduction and making available of copyrighted content, aggressive tactics combined with high litigation costs may negatively affect the incentives for user participation in the judicial process also in cases of legitimate (e.g. transformative) use. Although empirical data are scarce, it can be assumed that high litigation costs dissuade users from actively testing the scope of statutory defences and exceptions from copyright.[32]

The responsiveness of courts to the litigation pressure by copyright industries has varied across jurisdictions. In a number of cases courts have required higher

[30]See A&M Records, Inc v. Napster, Inc, 239 F. 3d 1004, 1011 (9th Cir. 2001); Metro-Goldwyn-Mayer Studios, Inc. v Grokster, Ltd., 259 F Supp. 2d. 1029 (C.D: Cal 2003); MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913 (2005); But see BUMA & STEMRA v. Kazaa, Appellate Court Amsterdam, (Mar. 28, 2002).

[31]See most recently, the first successful proceedings by BMG Sony, et al, against a private file-sharer, Jamie Thomas, self-supporting mother of two, who was sentenced to pay 225 000 USD for the file-sharing of 24 songs, SvD, 9 October 2007. Cf. BMG Canada, et al., v. John Doe, et al. 2004 FC 488. BMG Canada, et al., v. John Doe, et al., 39 C.P.R. (4th) 97, 252 D.LR. (4th) 342 (FCA). Cf. two decisions of Swedish Appellate courts: Svea Hovrätt, Dom 2006-10-02, Mål Nr. B 8799-05 and Hovrätten för Västra Sverge of 12 June 2007; cf. in France Ministère public v. Aurélien D., Cour d'appel d'Aix en Prvence 5éme chambre des appels correctionels, decision of 5 September 2007, available at http://www.legalis.net.

[32]For anecdotal evidence see Lessig (2004, pg. 98) and Posner (2004). Lessig tells the story of the 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.

threshold of evidence for copyright infringement or have refused to impose policing obligations on Internet Service Providers. A number of proceedings have, however, been successful and sentences against file-sharers have already entered into force (Plesner Mathiesen, 2007). Although representatives of copyright industries state that they are "unwilling litigators", the cases reveal also the systematic deployment of professional staff on the part of the industry to trace Internet information flows and potentially illegal exchange of copyrighted material. To use Hamilton's apt title, "now it's personal" (Hamilton, 2007, cf. Cohen, 1998-1999; Netanel, 2003).

Partly as a response to the concerted tactics on the part of copyright industries, recently there have been significant attempts to tilt the dynamics of the judicial process in a consumer-friendly direction across jurisdictions (Helberger, 2005). In a number of European countries concerted strategies on the part of consumer organisations can be observed aiming at challenging the expansion of the copyright regime and the ensuing arguably adverse effects for consumers. The strategies have been unfolding on two main tracks, the first one directed at the core of copyright law and the second one, seeking to mitigate the consequences from copyright excesses through intervention by intersecting laws, notably consumer protection laws.[33]

Within the first track, recently in a number of European 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. While the Paris Court of Appeal caused excitement in copyright circles by offering a bold 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,[34] the French Supreme Court reversed this decision, thus confirming the conventional view of exceptions as fragile and only conditional viz. the prevalent author rights (Geiger, 2005; Geiger, 2006; Ngombe, 2007).[35]

Although similar proceedings are reported by other European jurisdictions, there is in general scepticism that the European judiciary can and will embrace expansive user rights interpretations of current copyright laws.[36] The outcome from the French saga demonstrates that the present design of the copyright system sets serious

[33]Here I do not address competition law, which is another possibility for curbing undesired effects of copyright laws and industry concentration in emerging practices of digital rights management. For an interesting analysis from a comparative institutional perspective see Fagin, Pasquale and Weatherall (2002).

[34]See Decision of the Paris Court of Appeal, Cour d'appel de Paris, 4ème chambre, section B, 22 April 2005 reversing the decision of the first instance court Tribunal de grande instance de Paris 3ème chambre, 2ème section, 30 April 2004 (Stéphane P., UFC Que Choisir / société Films Alain Sarde et autres).

[35]See Decision of the Supreme Court (Cour de Cassation), First Civil Chamber, 28 February 2006 reversing and remitting the case back to the Paris Court of Appeal in another composition and finally Cour d'appel du Paris, 4ème chamber, section A, 4 April 2007 following the reasoning of the Cour de Cassation. For examples from Belgian and German law see Helberger (2005).

[36]This judicial restraint, broadly supported by legal doctrine, can be contrasted with the position taken by the Canadian Supreme Court. In the context of proceedings, which admittedly dealt with corporate users (libraries) and not end-consumers, the Canadian Court boldly asserted: "The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, supra, has explained, at p. 171: "User

impediments to such creative judicial interpretation. There may indeed be a case for reformulating at least certain of the present exceptions to copyright into statutory user rights, in order to empower users to invoke these exceptions in a pro-active way.[37] In addition, specific procedural mechanisms for invoking users' rights, in particular in the context of TPM, may need to be considered, not only as limited defences in infringement lawsuits but also as active instruments of asserting these rights, for instance in collective lawsuit or through representative action.[38] This would reduce the threshold for access to the courts and would give some leverage to users.

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 (Posner, 2004). 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 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* (Dusollier, 2003). 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.

Within the second track, consumer organisations, but also public consumer bodies, have been challenging not the admissibility of TPM in the light of copyright exceptions, but rather the marketing and contractual practices employed in different models of digital rights management and their compliance with consumer law. In particular, the fairness of contractual clauses in mass market licences and the inadequate information on the use and effect of TPM (notably impossibility to run a CD or DVD on different platforms due to lacking interoperability) have been at the core of litigation. In a number of lawsuits the French consumer organisation *Que choisir* has successfully claimed injunction and compensation for infringement of the collective interest of the consumer on the basis of insufficient information

rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."

[37]The idea of a charter of users' rights has been advanced within the framework of the project Intellectual Property Rights in Transition by Annette Kur and Marianne Levin. The idea has been fleshed out with concrete proposals by Jens Schovsbo and Tomas Riis (2007).

[38]For such explicit solutions in the context of TPM in Belgium see below.

on TPM.[39] The organisation has used the procedure of Art. 421.7 French Consumer Code (Code de la consommation) stepping in the proceedings on the side of a private party.

In turn, the Consumer Ombudsmen in the Nordic countries (Sweden, Denmark and Norway) have initiated a concerted action in regard to iTunes Global Music Store, run by Apple. In June 2006 each of the Ombudsmen sent a separate but similar letter to Apple criticizing its digital music service for employing a number of unfair terms in their standard terms contracts. Two contract terms were criticized in particular, namely reserving for the company an unqualified right to change the terms and conditions of sale and a broad non-liability clause.[40] According to follow up information by the Norwegian Ombudsman the letters prompted negotiations and some changes on the part of Apple of certain of its mass contracts.

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, but also where the procedural system provides incentives for such organizations to sue and recoup costs. Consumer associations represent one institutional response to problems of collective action and have for long enjoyed broad procedural rights in Europe. There may be positive synergies from using this institutional know-how for ensuring greater representation of consumer interests in copyright litigation. In countries with public consumer agencies, the dominant model is rather negotiations and persuasion in the shadow of sanction. Whereas this model is attractive for the low costs and high leverage that can be exerted by public authorities, enforcement may be slower to respond to changing consumer preferences and problems.

At the same time, here too there is a risk for majoritarian bias and distorted incentives for participation that have to be carefully weighed against the advantages of improved access to justice. New initiatives for collective, group and class action are underway in a number of European countries and at the European level (Stuyck et al, 2007). In particular, the possibility of collective consumer action in antitrust proceedings is being considered by the Commission.[41] Such developments may prove of interest to copyright lawyers as well.

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 law, eventually (European) courts are not inclined to substitute their decision making for that of the legislature. The courts have at the same time shown certain reluctance to give full way to hard litigation tactics of right holders, in particular when criminal measures have been invoked against individuals. However, the attitudes may be changing.

4.4. **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

[39]See Cour d'appel de Versailles, 30 September 2004; Cour d'appel de Versailles, 15 April 2005.

[40]See Ds 2007:29 Musik och film på Internet – hot eller möjlighet (Music and film on the Internet – threat or possibility), Government Investigation, pg. 317, retrievable from http://www.regeringen.se.

[41]For proposals in the US American context see Fagin, Pasquale and Weatherall (2002).

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 (1990, pg. 993), "[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". 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)" (Ginsburg, 1990, pg. 994)

In UK, Canada 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 for a Copyright Authority in certain cases (Liu, 2004).

But even in the countries in the *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).

5. In search for the appropriate mix between public and private institutions

The *Infosoc* Directive has apparently ultimately 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 (Dusollier, 2003) 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 (Westkamp, 2007; Gibault et al, 2007). These institutions can be placed at

different junctures on the scale between private and public. Despite the variety of solutions, one can discern a growing role of public and public-private institutional governance schemes in mediating between right holders and users and in assuring a flexible and sustainable balance of rights and obligations.

Certainly, some countries are minimalist in providing only 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 the limited effect an injunctive relief may have on the right holders. Further on, the assumption that beneficiaries would take the time and efforts of litigation is somewhat unrealistic in terms of costs and benefits of participation in the judicial process.[42]

In Germany, a similar preference for the judiciary can be noted. The German Copyright Act (Urheberrechtgesetz, UrhG) grants the lawful user a (individual) 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 (Bäsler, 2003, 69). 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 rightly expressed as to the effectiveness of this injunction, when shaped only as a negative, cease and desist remedy (Bechtold, 2004; Bäsler, 2003).

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. 87*bis* Belgium Copyright Law). In addition standing is granted to the minister in charge of copyright legislation.[43] According to Severine Dusollier, rapporteur on Belgian copyright law in the IViR study this right of action has the character of an enjoinment procedure (référe) and should be rapidly decided (Westkamp, 2007).

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 have previously 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

[42]See comments by Swedish Television and Stockholm University on the Government Bill, Prop. 2004/05:110, 317. Cf. Westman (2003).

[43]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.

is established for tackling disputes between right holders and beneficiaries (users) (Westman, 2003, pg. 577; Westkamp, 2007, pg. 134). 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 (Westkamp, 2007, pg. 194; cf. Westman, 2003, pg. 577).

Interestingly, the transposition of the *Infosoc* Directive has in some countries brought about institutional changes going far beyond the scope of the Directive. Thus in Germany, the legislative process triggered for the purpose of transposing the Infosoc Directive eventually lead to extending of the competences of the existing Arbitration Body for copyright disputes. This body, which has been mainly concerned with disputes over licensing fees applied in compulsory licenses schemes is now authorised to also settle disputes on blank-tape type of statutory levy schemes, which are to be set in a self-regulatory manner (§ 54 UrhG).[44] The level of the levies had previously been fixed in the copyright statute itself; a solution which was severely criticized as extremely inflexible given the cumbersome and slow change through the legislative process.[45] When presenting the Government Bill to the Bundestag the Federal Minister of Justice called the substitution of the legislative process by self-regulation in this field "a paradigm shift".[46] It deserves mentioning that the new § 14 Abs. 5 UrhWahrG guarantees certain federal-wide umbrella consumer organisations the right to submit written observations before the Arbitration Body in proceeding on § 54 UrhG. Amendments are introduced in the structure, manner of appointment and mandate of the members of the Arbitration Body.

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 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*

[44]See §§ 14-14 e Urheberrechtswahrnehmungsgesetz, UrhWahrG (Law on the Administration of Copyright).

[45]The present levies have remained unchanged since 1985.

[46]See BT-Plenarprotokoll 16/108, 5 July 2007, 11157.

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 this plethora of 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.

In his comparative institutional analysis, Komesar advances a 'two-force model' of the political process, demonstrating the combined effects of majoritarian and minoritarian influence (and bias) in the political process. This model explains the frequent instances of delegation of decision-making power from parliament to administrative agencies, in cases where a policy has widespread (diffused) benefits and concentrated costs. Assuming that parliamentary action is better known to constituents than the action of administrative agencies or bureaucracies, Komesar suggests that parliaments are more likely to act under majoritarian influence than an agency. In this line of reasoning, it is sensible for a Parliament "to pass legislation that presents the appearance of a diffused benefit/concentrated cost (majoritarian victory while at the same time allocating the details and implementation to the less observable and more complex administrative process" (Komesar, 1994, pg. 95). Under this model, the concentrated interests in the administrative process will be able to compensate and at least in part 'neutralise' the adverse effects of majoritarian legislation.

In a similar vein, Trubek speaks of high and low visibility political arenas, criticising the system of representation of diffuse interests by administrative government in the US context. Administrative authorities are sometimes set up as "low visibility arenas" shifting debate on politically sensitive issues with majoritarian flavour from highly visible parliamentary processes to the more obscure realm of complex agency regulation (Trubek, 1978; Trubek, 1979, pg. 457). At the level of implementation, principal-agent problems may deter efficient agency action (Bernstein, 1955; Eggertsson, 1990). The ongoing institutional realignment in copyright law appears to largely confirm these theories.

There are different ways for making agencies keep to their political mandate. 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 as alternative or complementary devices (Rose-Ackerman, 1988; Rose-Ackerman, 2005). It appears that in the haste of law reform

attention to these more mundane issues of institutional design, which however, are crucial for future decision-making, do not receive the needed attention.

The above described institutional dynamics seems to corroborate yet another proposition advanced by comparative institutional theory, namely that institutional choice is never static and given once and for all. There is constant fluctuation in the supply and demand of rights and in the perceptions of malfunctioning of alternative decision-making process. This fluctuation accounts for occasional shifts of decision-making competences between institutional arenas (Komesar, 2001). The dynamics is in addition accelerated by the strengthened international dimension of the IP regime. It appears that when clenched between rigid international standards and dissatisfied vocal national interest groups, the recourse to institutional innovation is one way out of the deadlock.

Returning to Sweden, unlike the Government Bill of 2004 (amending the Copyright Act and transposing the Infosoc Directive) the recent government investigation on legal and consumer-friendly alternatives for music and film on the Internet, did not remain indifferent to institutional issues. The investigation proposes the setting up of a reference group for improved information on copyright issues, and – notably – for monitoring the consumer-friendliness of available internet services for film and music and of the DRM systems employed. It is suggested that the group apart from representatives from the Ministries of Justice, Culture and Education and of authors, artists and producers, should also include representatives for consumers and users, among others the Consumer Board.[47] More carefully the investigation notes an interest among representatives of consumer organisations for an easily accessible body to address their questions and complaints. The investigation therefore muses upon the possibility to establish an ombudsman or special a complaint department (a "wailing wall", in Swedish "klagomur") for dealing with such issues.[48]

6. Institutional choice and path dependence

Finally, the constraints on institutional choice imposed by past institutional legacies have to be emphasized (North, 1990). The above overview of diverse institutional responses to important questions of public policy in copyright (in particular, 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, notably the function and place of collecting societies. Respectively, no governmental or quasi governmental bodies have emerged in the sphere of copyright (Petri, 2005). 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 (Westman, 2003).

[47]See Ds 2007:29 Musik och film på Internet – hot eller möjlighet (Music and film on the Internet – threat or possibility), Government Investigation, pg. 315, retrievable from http://www.regeringen.se.

[48]Ds 2007:29. pg. 314.

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.[49] Likewise, strong consumer protection associations have been a distinctive feature of Belgian consumer and market law, finding now its breakthrough in copyright.

Finally, France is known as an exponent of a strong regulatory (dirigiste) tradition.[50] More specifically, the reliance on independent administrative authorities with high authoritative status and with mediating, decision-making and rule-making powers, is in French copyright familiar in the sphere of regulation of collecting societies.[51]

On a general note, it can be 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 hardly 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 predisposition 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 (Merges, 1994). 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 in different countries to solve similar problems, but they differ in their history, status and organisational structure. Despite intense international networking, they are still firmly embedded in their national institutional environment, which to a great degree determines the main modalities of governance,

[49]On German institutional developments in the areas of unfair commercial practices and consumer law see Bakardjieva Engelbrekt, 2003, pp. 500-504, 616 ff.

[50]See in a different context the (controversial) conclusions of the ambitious comparative study for the World Bank by a group of scholars from the so called New Comparative Economics school under the leadership of Andrei Shleifer: "Compared to common law countries French origin countries are sharply more interventionist (have higher top rates, less secure property rights and worse regulation)." La Porta et al. (1999).

[51]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.

such as transparency, accountability, degree of public control, etc. (Kretschmer, 2002; Gilliéron, 2006).

One example of how such national histories influence the shape of rights and institutional choice is the Swedish extended licensing scheme. As mentioned above, Swedish collecting societies have in many respects been modelled after the structure and principles governing the 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 extended licensing scheme in Swedish (and Nordic) copyright. 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.[52]

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 (Kretschmer, 2002; Gilliéron, 2006).

7. Conclusion

It is impossible in this brief paper to present a full-blown application of the suggested institutional approach to the case of digital 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.

When we discuss proposals of legislative stipulation of users' rights on an equal footing with rights holders, one should not leave out of sight the issue of allocation of decision-making competences, 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" (North, 1990, pg. 80). Society's ability to solve problems

[52]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."

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 in a typically national context, allocation of decision making raises even more thorny questions if we look at the international and supranational level.[53] 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. The future debate should be directed to the issues of how to reconcile the clarity and predictability of the international IP system with the need to nurture institutional diversity and to keep institutional frameworks responsiveness to changing interests in tact with new political, economic and technological realities.

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[53] Generally on the slowness of law to catch up with the internationalisation of market and economic science see Buxbaum (1996).

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