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ACCOMMODATING THE INTERESTS OF THE COPYRIGHT CONSUMER: NEW INSTITUTIONAL DYNAMICS IN THE WAKE OF THE INFOSOC DIRECTIVE

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Introduction

Until only recently copyright law was considered to have little to do with consumer interests. One can search in vein in copyright treatises, in preparatory works and in records of political debates to find even a brief mention of consumers. Legislative consultations would typically not identify consumers as stake holders in copyright issues. Consumer organisations and public bodies, once such bodies were set up back in the 1960s and 1970s, were hardly ever invited to take a stand on copyright issues.¹ In turn, consumer organisations and agencies have largely remained indifferent to copyright debate.² Certainly, issues of access to literary and artistic works have often been addressed in the political, legislative and scholarly discussion on copyright. Such interests, however, have rarely been defined as consumer interests, but more abstractly as the interest of the public.³

In a way, this mutual disinterest is not surprising. Consumerism, the way it has evolved in today's "affluent society"⁴ has been primarily associated with materialism and the consumption of physical goods. Copy-

¹ This is at least what can be inferred from a quick review of stake holders consulted in preparatory works on Swedish copyright law during the last fifty years.

² See prop. 1998/99:11 Ny skyddsåtgärd vid immaterialrättsintrång. In this Bill it is the Competition Agency that stands for the interests of the individuals (i.e. consumers) in preserving their integrity against the TRIPS related requirement of evidence gathering. See prop. 1993/94:122, Skärpta åtgärder mot immaterialrättsliga intrång, at 120, noting that the National Consumer Board (Konsumentverket, KOV) has been given an opportunity to give its opinion but has abstained from doing so.

³ See instead of many Davis, G., *Copyright and the Public Interest* (Sweet and Maxwell, London 2002) with further references.

⁴ Galbraith, J., *The Affluent Society* (Houghton Mifflin, Boston 1958).

right, as an area of law defining the scope and extent of protection of literary and artistic works, in contrast, is explicitly positioned in the area of intellectual property law (in some countries aptly called “immaterial” law). It is by many seen as touching upon other, higher ranking, values and interests, such as enhancing literal and artistic creativity.

The situation has, however, changed substantially during the last decade. The increasing commoditisation of culture and the expansive growth of the so called creative industries⁵ have had as their natural counterpart the rise of the copyright consumer. Even a casual review of mass media, political documents and scholarly debates confirms an ongoing change in attitudes and mindset. The impact of strengthened copyright on the interests of consumers has become a hot topic in political debates at the national and European level.⁶ Consumer organisations and public consumer authorities are showing growing engagement in copyright issues. Lawsuits involving consumer interests in copyright are beginning to surface in a number of jurisdictions. Finally, in legal doctrine the consumer interest in copyright has been “discovered” as a topic.⁷

This chapter documents the changing role of the consumer interest in copyright law and policy. It investigates the reasons for and the implica-

⁵ See Towse, R., ‘Copyright and Cultural Policy for the Creative Industries’, in: Grandstrand, O. (ed.) *Economics, Law and Intellectual Property* (Kluwer, Boston, Dordrecht, London 2003).

⁶ See for instance the INDICARE project (INformed Dialogue about Consumer Acceptability of DRM Solutions in Europe). The project was financially supported as an Accompanying Measure under the eContent Programme of the Directorate General Information Society of the European Commission (Reference: EDC-53042 INDICARE /28609).

⁷ See e.g. Benkler, Y., ‘From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access’ (2000) 52 *Federal Communication Law Journal* 561–79; Liu, J., ‘Copyright Theory of the Consumer’ (2002–2003) 44 *Boston College Law Review* 397–431; Helberger, N., ‘Copyright from a Consumer’s Perspective’ (2005) IRIS, Legal Observations of the European Audiovisual Observatory, Strasbourg; Hoeren, T., *Urheberrecht und Verbraucherschutz. Überlegungen zum Gesetz über Urheberrecht in der Informationsgesellschaft, Gutachten im Auftrag von Verbraucherzentrale Bundesverband* (LIT-Verlag, Münster 2003); Schweikart, P., ‘Zum Verbraucherschutz im Urheberrecht’ (2005) UFITA Archiv für Urheber und Medienrecht 7–18; Schovbo, J. and Th. Riis (2007) ‘Users’ Rights: Reconstructing Copyright Policy on Utilitarian Grounds’, *European Intellectual Property Review*, (29:1); 1–5; Ottolia, A. (2004) ‘Preserving Users’ Rights in DRM: Dealing with “Juridicial Particularism” in the Information Society’, *International Review of Intellectual Property and Competition Law* (IIC), (35); 491–602; Oksanen V. and M. Välimäki, ‘Consumer Protection Regulation and Copyright – How to Balance a ‘Balanced’ System?’ paper presented at the Annual Congress of SERCI, 2007, available at: <http://www2.hu-berlin.de/gbz/index2.html?/gbz/Events/SERICAC2007Papers.htm>.

tions of such change, proceeding from a participation-centred comparative institutional approach.⁸ Following institutional choice theory the approach implies conceiving of the market, the political process and the courts as alternative decision-making processes. The approach requires comparing the changing conditions for participation of consumers 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* Directive⁹, a dynamic process of institutional adjustment seems to be unfolding in the Member States of the European Union. The article draws attention to a variety of newly emerging private, public and mixed institutional schemes, seeking to accommodate the interest of the copyright consumer. This dynamism is interpreted as 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.

In copyright doctrine the notion “user” is sometimes preferred to that of “consumer”, probably because it better expresses the complex and manifold ways in which creative works are perceived and processed.¹⁰ At the same time the term ‘user’ is too broad and can be seen to encompass apart from end-users, also commercial users, follow-on creators and competitors.¹¹ I have therefore decided to stick to the consumer terminology in order to focus on the interests of end-users in copyright mass markets. The analysis is based on legal material from Sweden, but refers

⁸ Komesar, N., *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (The University of Chicago Press, Chicago, London, 1994).

⁹ 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 *Infosoc* Directive).

¹⁰ The idea of a charter of users’ rights has been advanced within the framework of the project Intellectual Property Rights in Transition, where Marianne Levin, together with Annette Kur, has been a main driving force. The idea has been fleshed out with concrete proposals by Jens Schovsbo and Tomas Riis, see Schovsbo, J. and Th. Riis, ‘Users’ Rights: Reconstructing Copyright Policy on Utilitarian Grounds’ (2007) 29 European Intellectual Property Review 1–5.

¹¹ Proceeding from the broad notion of users Schovsbo and Riis thus plead for instance for recognizing a users’ right to reasonable commercial use, Schovsbo and Riis (2007), *ibid.*

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.

Institutional choice, institutional design and participation

The institutional approach employed in this study 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.¹²

Comparative institutional analysis, as advanced by public policy scholar Neil Komesar, proceeds from the basic principles familiar from Coasean analysis.¹³ However, Komesar goes further into the enterprise of comparing alternative decision-making processes, namely the market, the judicial, the political and the administrative process. As a main factor for comparative evaluation he advances participation of affected actors in the respective decision-making process (participation-centred approach). The possibilities of participation in the alternative decision-making processes are influenced by the costs and benefits of participation, i.e. transaction costs, litigation costs and costs of political participation. The latter depend according to Komesar on the interest constellation characteristic of each public policy issue and more specifically on the distribution and the size of stakes of the affected interests. We can observe a uniform high distribution, a uniform low distribution of stakes, and occasionally a skewed distribution of stakes, where the stakes are high and concentrated on the one side of the interest constellation and small and dispersed on the other side.

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 situation in terms of participation.

¹² The presentation of the analytical approach in the following chapter builds on Bakardjieva Engelbrekt, A., *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation* (Stockholm, 2003), where the approach has been applied to the comparative cross-national study of fair trading law in Germany and Sweden.

¹³ Komesar (1994), n. 8; cf. Coase, R., 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1–44.

One of Komesar's main points is that institutions move together and that imperfections in possibilities for participation in one institution are usually paralleled by difficulties in the other institutions as well. Skewed distribution in one decision making process is often mirrored by a similar distribution in the alternative decision-making fora. So, rather than searching for the perfect decision-making process, legislators and policy makers should seek to opt for the least imperfect alternative.

Historical institutionalism conceives of institutions in a slightly different way.¹⁴ It highlights the role of institutions as humanly devised constraints, whose main function is to reduce uncertainty by providing a structure to everyday life. Institutions thus include formal legal rules, but also informal constraints (such as ideologies and customs) and the enforcement characteristics of both. North highlights institutions' propensity to persist over time. Institutional paths may be followed not because they are efficient but because their change is costly. Moreover, institutions tend to produce incentives for the creation of organisations, which then depend on the institutional framework and contribute to the latter's stability (institutional symbiosis).

Merging the two perspectives appears warranted, because institutional choice alone may generate unrealistic normative advice with a touch of 'social engineering' and in discord with the complex reality of human interaction. The analysis offered by Komesar tends to be 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 uncritically '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.

¹⁴ North, D., *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge 1990); North, D. 'Institutions' (1991) 5 *Journal of Economic Perspectives* 97–112; North, D., 'Institutional Change: A Framework of Analysis', in: Sjöstrand, S.-E. (ed.) *Institutional Change. Theory and Empirical Findings* (Sharpe, New York 1993).

Institutional choice in ‘classical’ copyright

Copyright is usually explained in economic terms as a way to address the public goods aspect of intellectual creations. Intellectual creations to a large extent consist of information, the latter having many characteristics of a public good. One such important characteristic feature of information is its *non-rivalrous* consumption. Not one, but many people can typically make use of one and the same information without its utility being diminished. One can, in other words, both eat the cake and have it.¹⁵ 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*.¹⁶

Arguably, without statutory intellectual property (IP) rights there would be a significant problem of sustaining workable markets for intellectual works.¹⁷ In the hope of costlessly using the works purchased by others, a large number of potential consumers would understate their realistic preferences and willingness to pay for creative works. This would undercut incentives to create and lead to sub-optimal production of such works. “Participation” (to use Komesar’s term) in such markets of potential creators and producers, but also of consumers, would be suboptimal.

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) prop-

¹⁵ Arrow, K., ‘Information and Economic Behaviour’, in: Arrow, K. *The Economics of Information. Selected Essays* (Oxford, Blackwell, 1984); Schäfer, H.-B. and C. Ott, *Ökonomische Analyse des Zivilrechtes* (Springer, Berlin 1986).

¹⁶ Landes, W. and R. Posner, ‘An Economic Analysis of Copyright’ (1989) 18 *Journal of Legal Studies* 325–363; Van den Bergh, R., ‘The Role and Social Justification of Copyright: A “Law and Economics” Approach’ (1998) *Intellectual Property Quarterly* (IPQ) 17–34; Mackaay, E., ‘The Economics of Intellectual Property Rights’, in: Wahlgren, P. and Magnusson Sjöberg, C. (eds), *Festschrift Peter Seipel* (Norstedts, Stockholm 2006).

¹⁷ Merges, R., ‘Contracting into Liability Rules: Intellectual Property Rights and Collective Organizations’ (1996) 84 *California Law Review* 1293–376; see, however, Breyer, S., ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs’ (1970) 84 *Harvard Law Review* 281–351.

erty 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 emerge¹⁸ 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.¹⁹ Excessively strong copyrights may negatively affect user participation in information markets through monopolistic prices (dead-weight 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.²⁰

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.²¹ 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.²² However, there have throughout modern history always been those few successful authors and artists that would generate considerable profits and fame from their creative activity.²³ This highly skewed

¹⁸ Landes and Posner (1989), n. 16; Van den Bergh (1998), n. 16.

¹⁹ Komesar (1994), n. 8.

²⁰ Landes and Posner (1989), n. 16.

²¹ Liu, J., ‘Regulatory Copyright’ (2004) Boston College Law School Faculty Papers, Paper 8, 1–68.

²² Even today, the income from copyright for the mass of artists and authors would be low to moderate, translating into low benefits of participation into the political process. See Towse, R., ‘Copyright and Cultural Policy for the Creative Industries’, in: Granstrand, O. (ed.) *Economics, Law and Intellectual Property* (Kluwer, Boston, Dordrecht, London 2003).

²³ For a convincing analysis of the situation of artists in contemporary creative industries see Towse, *Ibid.*: “The distribution of artists’ income is highly skewed, with a few superstars having incomes from fees, sales and royalties.” For a very eloquent account of the early days of copyright see Hemmungs Wirtén, E., *No Trespassing* (University of Toronto Press, Toronto 2003). In Sweden, a small, but vocal group of intellectuals around the Swe-

distribution of stakes in the interest group of creators is beneficial for the group's representation in the political process, since the few high-stake members of the group form what is known as catalytic sub-group having strong incentives to give voice to the interests of the group. The same skewed distribution within the group accounts partly also for the relatively high rate of organisation of creators in collective interests organisations.²⁴ These organizations evolved as private ordering institutions to reduce transaction costs, enable risk spreading and promote the effective administration of intellectual property rights.²⁵

On the opposite side of the interest constellation, the interests of consumers and users of copyrighted works although acknowledged in the legislative debate on both sides of the Atlantic, have not been given similar weight.²⁶ As any dispersed collective interest, the interest of copyright consumers is less successful in reaching out to legislative bodies and influencing the outcome of legislation. However, in a horizontal system of copyright, the risk for bias should not be serious. In addition, the interests of consumers are as a rule supported by large corporate users mediating copyright consumption (e.g. libraries, educational institutions).

The changing landscape of institutional participation

It would not be exaggerated to say, that the effects of digital technology and of global communication networks on the state of copyright have been among the most heavily discussed subjects in international legal doctrine during the last decade. The debate has many strata and directions. From an institutional perspective, what appears particularly intriguing is to trace the ways in which new technology influences institutional choice and institutional design and the 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 in-

dish Academy have had a similar catalytic effect for the very foundation of Swedish copyright law. See Petri, G., 'Upphovsrätten och dess intressenter' (2005) *Nordiskt Immateriellt Rättsskydd* (NIR) 428–442, 431.

²⁴ In his classical account on the problems with collective action Olson advances the so called "by-product" theory of large pressure groups with reference to labour unions and professional associations. Olson, M., *The Logic of Collective Action. Public Goods and the Theory of the Group* (Schocken Books, New York 1965). 132.

²⁵ Merges (1996), n. 17.

²⁶ Ginsburg, J., 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991–1023.

cumbents, requiring serious rethinking of institutional choice and design.

Copyright consumers in the digital market

Traditionally copyrighted products have represented a mix of tangible and intangible properties, meaning differences in their public good aspects.²⁷ A literary work traditionally materializes in a physical book, where tangible aspects – such as paper quality, luxury cover, format – may influence consumer demand, preferences and price. Importantly, the process of fixation, and respectively of reproduction, has in earlier times been more cost-intensive and thus constituted a considerable deterrent to free-riding.²⁸

Digital technology has dramatically enhanced the intangible (information, or public good) aspects of copyright protected works.²⁹ 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 revolutionizing the way intellectual products are being distributed and consumed. Internet and peer to peer (P2P) networks make possible an instant exchange and simultaneous enjoyment of copyrighted works at gigantic proportions. What characterizes the new mode of distribution is that it is decentralized and non-mediated. The exchange is not B2B and not B2C, but rather C2C, where C stands for both consumer and creator.

These changes in the object of protection and the ways of distribution have influenced substantially the market for intellectual products as supported by the conventional copyright model. Indeed, the problem of excluding free-riders from consuming cultural products they have not paid for is mind-boggling. On the part of large producers of audio-visual works claims are made that their participation in this market may be seriously deterred in view of potential losses.³⁰

²⁷ Radin, M. J., 'Information Tangibility', in: O. Granstrand (ed.) *Economics, Law and Intellectual Property* (Kluwer, Boston, Dordrecht, London 2003).

²⁸ Landes and Posner (1989), n. 16.

²⁹ Long, C., 'Information Costs in Patent and Copyright' (2004) 90 *Virginia Law Review* 465–549.

³⁰ Ginsburg, J., 'Copyright and Control Over New Technologies of Dissemination' (2001) 101 *Columbia Law Review* 1613–47.

The answer to the machine has, predictably, proved most probably to be in the machine. Given the general clumsiness and inertia of the legal system in providing effective protection, producers have resorted to technological protection measures (TPM) and different digital rights management (DRM) models to tame the wilderness of the Net, harness the potential of the new communication networks and recoup part of their investments.

New technologies have also impacted on creativity and that in a multi-faceted way. The 'global village' made possible through the Internet apparently has brought about the triumph of popular culture and homogenisation of consumer preferences on a global scale. This trend is provoked by and in turn enhances the concentration of stakes in the cultural industries. The notorious dominance of the 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.³¹

On the other hand, the network environment has made possible P2P networks, which by the unmediated direct communication between consumers have threatened this oligopolistic industry structure. Indeed, more than the pure diverting of income from purchases, normally complained of, the real threat of these networks may be in preventing the big labels from controlling and shaping consumer preferences in a desired direction.³² Global communicative networks combined with digitization, have moreover spurred a previously unknown wave of "build on" creativity. The distinction between consumption and production is blurred.³³

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.³⁴

³¹ Certainly this has been supported by the general raise of the levels of literacy, education and living standard in certain regions.

³² In a similar sense Netanel, N. W. 'Impose a Non-commercial Use Levy to Allow Free Peer-to-peer File Sharing' (2003) *Harvard Journal of Law and Technology* 1-84, 27: "Indeed, copyright industry efforts to quash, rather than license P2P file sharing appear to be driven by a desire to extend into the digital marketplace the dominance that a handful of firms currently enjoy over hard copy distribution."

³³ Benkler (2000), n. 7; Liu (2002-2003), n. 7.

³⁴ Ginsburg (2001), n. 30.

What is clear is that the digital environment raises new consumer expectations and identifies new types of consumer interests. Thus Liu classifies the interests of consumers into autonomy, communication and creative self-expression. Whereas some of these interests may be satisfied by the market, this may not always be the case. In particular, the concentration in the entertainment industries combined with the control of producers over the marketing of copyright works through technical protection measures seems to be averse to new forms of spontaneous marketing where consumers gain power in shaping preferences in previously unknown ways. Much of the power of present-day entertainment industries comes not from the pure production of music, but from a combination of music and marketing, influencing consumer preferences by a variety of marketing techniques. Platforms allowing file-sharing and communication are therefore perceived as subversive viz. such established marketing patterns and make investment in music production much more uncertain. Therefore there is a great likelihood that spontaneous communication will be resisted by copyright producers.³⁵

Copyright consumers in the political process

The advance of new technologies 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 (e.g. software protection). 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.³⁶

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 transforma-

³⁵ Liu (2002–2003), n. 7, 426.

³⁶ Kretschmer, M., 'The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments' (2002) *European Intellectual Property Review*, 126–137.

tion has in the European context been to some extent obfuscated by the convenient division between copyright and related rights, but has been well acknowledged in American Copyright Law.³⁷

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 (so called ‘minoritarian bias’).³⁸ As Komesar underlines, the political process builds upon information and if one group is overrepresented, it would be this group that would control the flow of information to decision-makers.³⁹ 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.⁴⁰

To be sure, even before the present-day rightholder-centred system of copyright was established, there have been other, more powerful interests lingering in the background and determining the equilibrium. Cultural production, dissemination and consumption has throughout modern history been heavily mediated and dominated by corporate actors.⁴¹ As mentioned above, on the side of consumption educational institutions, libraries, broadcasting corporations and nowadays Intermediary Service Providers (to name a few) have mediated cultural consumption, influencing the infrastructure and pattern of consumption. These large corporate users have sufficiently high stakes to motivate political involvement. They have in many cases effectively counterbalanced the power of individual copyright industries. While these organisations typi-

³⁷ Litman, J., ‘Copyright and Technological Change’ (1989) 68 Oregon Law Review 275–361. Litman, J., ‘Revising Copyright Statutes for the Information Age’ (1996) 75 Oregon Law Review 19–48; cf. Renman Claesson, K., ‘Från kreatörsskydd till investeringskydd’, in: Schovsbo, J. (ed.), *Immateriella rättens afbalansering* (Jurist- og Økonomforbundets Forlag, København 2003).

³⁸ Buchanan, J. and G. Tullock, *The Calculus of Consent. Logical Foundations of Constitutional Democracy* (University of Michigan Press, Ann Arbor, 1962); see also Buchanan G., R. Tollison and G. Tullock (eds.) *Towards the Theory of the Rent-Seeking Society* (A&M University Press, College Station, TX, 1980).

³⁹ Komesar (1994), n. 8.

⁴⁰ There are numerous accounts about the extensive lobbying pressure exerted by different well organized industry groups in national or supranational legislative proceedings. 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. See Van den Bergh (1998), n. 16, 2; cf. Litman (1989); Litman (1996) n. 37. See more generally for a public choice view on copyright Kay, J., ‘The Economics of Intellectual Property Rights’ (1993) 13 International Review of Law and Economics 337–48.

⁴¹ Litman (1989), n. 37; Cohen, J., ‘Lochner in Cyberspace: The New Economic Orthodoxy of Rights Management’ (1998–1999) 97 Michigan Law Review 462–563.

cally side with end-consumers, they also have their very distinct and particular agenda.

The legislative process in such cases has according to some observers often the character of direct bargaining between the affected industries.⁴² 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.⁴³

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. From a relatively small and elitist group of readers and admirers of fine arts, consumers 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.⁴⁴ 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.⁴⁵ Importantly, in terms of political participation, copyright consumers nowadays have an access to a global communication network, which serves as a powerful channel for political discontent at virtually no costs. This undoubtedly 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.⁴⁶

Indeed, the transposition of the *Infosoc* Directive in Europe has provoked a previously unknown public debate on copyright and its effects

⁴² Dinwoodie, G. and R. Dreyfuss, 'TRIPS and the Dynamics of Intellectual Property Law Making' (2004) 36 Case Western University Review 95–122.

⁴³ Litman (1989), n. 37.

⁴⁴ For a discussion and categorization of different types of consumers of cultural products and their respective interests, see Liu (2002–2003), n. 7. 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, Benkler (2000), n. 7.

⁴⁵ Litman, 1996, n. 37; Liu (2002–2003), n. 7.

⁴⁶ See the examples given by Oksanen and Välimäki (2007), n. 7.

on users and consumers.⁴⁷ A new dynamics of the legislative process in the aftermath of the *Infosoc* Directive, with greater involvement of consumer groups, is reported from many Member States of the European Union.⁴⁸

In Sweden, famously, a political party, the so called *Piratpartiet* (The Pirate Party, playing on the names of anti-piracy associations), was founded 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.⁴⁹ It attracted not insignificant numbers to its pre-election rallies and non-negligible votes in the latest Swedish elections of 17 September 2006.⁵⁰ More generally notions such as ‘the public domain’ and ‘user rights’ have entered seriously the public discourse.⁵¹

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.

⁴⁷ Similar reactions were unleashed in the US by the enactment of the Digital Millennium 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, L. *Free Culture* (Penguin, London 2004). The Creative Commons initiative can also be seen as an ample example of such engagement, see Merges, R., ‘A New Dynamism in the Public Domain’ (2004) 71 *University of Chicago Law Review* 183–203.

⁴⁸ See Westkamp, G., *The Implementation of Directive 2001/29 in the Member States*, Part II, IViR, Report commissioned by the European Commission DG Internal Market, 2007, retrievable from: www.ivir.nl (hereinafter IViR Report, Part II), cf. country reports 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.

⁴⁹ See at <http://www.piratpartiet.se/>.

⁵⁰ See Valmyndigheten, 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/financial-post/comment/story.html?id=9fe42daa-c7c0-408a-90c5-eae4e83139da> (7 October 2007).

⁵¹ 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.

In countries with strong consumer associations this engagement has been particularly visible, leading occasionally to important compromises and modifications. One example is the early awareness of the German Verbraucherzentrale about the relevance of the current copyright debate for consumers.⁵² The European Consumers' Organisation (BEUC) has likewise given high profile to a so called digital rights agenda.⁵³ 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.⁵⁴ 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.⁵⁵

The pressure exerted by the digital consumers has not left established political parties and actors unaffected. In the Swedish pre-election campaign 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 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.⁵⁶ 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.⁵⁷ Still industry representatives

⁵² See the active lobbying on the part of the German umbrella consumer association, in particular the expert analysis by Hoeren (2003), n. 7.

⁵³ BEUC has also launched a consumer digital rights campaign through the site: http://www.consumersdigitalrights.org/cms/index_en.php.

⁵⁴ Digital Rights Management, Position Paper, BEUC/X/25/04/2004, available at: http://www.consumersdigitalrights.org/mdoc/DRMBEUCX0252004_59695.pdf.

⁵⁵ See the Digital Rights document at the pages of the Sveriges Konsumentråd.

⁵⁶ See about the position of the two Prime Minister Candidates Persson (social democrat) and Reinfeldt (center-right) on file-sharing in the pre-election campaign, Sista mötet före valet (Last meeting before the election), *Svenska Dagbladet*, 11 September 2006. Dagens Nyheter, 09-08-2007.

⁵⁷ The practice of using international commitments as shields against popular discontent at inconvenient domestic political action is well documented in the political science literature on European integration. See Marks, G., Hooghe, L. and Blank, K., 'Integration Theory, Subsidiarity and Internationalisation of Issues: The Implications for Legitimacy' (1995) EUI Working Papers, RSC No. 7, 26.

have expressed discontent with this political play with majoritarian flavour leading, in their opinion, to a further withering of popular respect for the copyright system.⁵⁸

The intensified rhetoric of user rights may be seen as a clear sign of majoritarian influence 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, calls for constraining industry power and sharpening industry regulation have attracted not insignificant popular appeal.⁵⁹ 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." (Ju 2006/6767/P). Whereas the focus on consumer interests is remarkable, the mandate appears 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 arenas, 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 may have to be introduced. The role of consumer electronics industry or, nowadays, Internet Service Providers (Intermediaries) as important allies to end consumers has to be integrated in the analysis. My purpose is

⁵⁸ See Ds 2007:29.

⁵⁹ Cf. Komesar (1994), n. 8.

only to indicate the importance of a close scrutiny of the interests affected by the legislative process and their differential possibilities for participation in the political process.

Copyright consumers in the judicial process

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.⁶⁰ At the same time, expertise and independence of the courts are ensured at the expense of setting a high threshold for access 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, and the institutional characteristics of the judicial process, it is hardly surprising that copyright litigation has been dominated by right-holders. Thus, the actors and groups who have been vocal in the legislative process are also those having the incentives and resources to litigate copyright cases. For individual copyright consumers and users the loss incurred by strong copyright protection is normally too small to justify the costs of litigation, whereas aggregating the losses in joint proceedings is impeded by the absence of statutory formulated consumer (or user) rights and the absence or complexities of collective action.

Another institutional characteristic of courts is that they cannot control the influx of cases to be decided.⁶¹ 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 relentless litigation initiated by collective management organisations and corporate right-holders. Common law doctrines of fair use and fair dealing and statutory exceptions in the European context, have often been restrictively interpreted by the

⁶⁰ Komesar (1994), n. 8.

⁶¹ Komesar (1994), n. 8.

courts as unwanted incursions on the dominant principle of broad author rights.⁶²

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 evidence difficulties. Moreover, antagonizing end-users, ultimately the customers and market for copyright works, is clearly not in the interests of right-holders.

The individual copyright user as a litigation target

With the advance of peer-to-peer technology and the active processing of digital content by end-users the litigation strategies in particular of the music and film industries have changed significantly. The centre of gravity of litigation has gradually been relocated from disputes between right-holders and corporate users (e.g. broadcasters) to disputes between right-holders and end-consumers. Right-holders have been 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.⁶³

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.⁶⁴ This appears to be the last shackle in a complex

⁶² For examples from Finnish case law see Still, V., 'Upphovsrättens expansion' (2003) NIR, 44, 49 with reference to the decision of the Finnish Supreme Court HD 2002:101. For American analyses and examples see Posner, R., 'Eldred and Fair Use' (2004) *The Economists' Voice*, available at <http://www.bepress.com/ev/vol1/iss1/art3>; from Swedish case law cf. NJA 1986 s 702 interpreting radio apparatuses demonstration in a radio shop with incidental music broadcasts as making available to the public with ensuing royalty obligations.

⁶³ 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); *BUMA & STEMRA v. Kazaa*, Appellate Court Amsterdam, (Mar. 28, 2002).

⁶⁴ 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. *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.L.R. (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 Sverige* of 12 June 2007;

chain of measures to stifle unauthorized Internet distribution of copyrighted material, foremost music and film.

A less visible but least as significant part of right-holders litigation strategies is the use of aggressive pre-litigation tactics notoriously by warning briefs.⁶⁵ High litigation costs and prospective sanctions impact negatively on the willingness of consumers and users to actively test the scope of statutory defences and exceptions from copyright, whereby lawsuits are often settled.⁶⁶ In general, the strengthening of copyright protection and the clarification of many previously uncertain aspects of the legality of file-sharing through the *Infosoc* Directive, and the respective national laws implementing it, certainly contribute to the regained self-confidence of the copyright industries.

The responsiveness of courts to the litigation pressure by copyright industries has varied across jurisdictions. In a number of cases courts have required higher threshold of evidence for copyright infringement or have refused to impose policing obligations on Internet Service Providers.⁶⁷ A number of proceedings have, however, been successful and sentences against file-sharers have already entered into force.⁶⁸ 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.⁶⁹ To use Hamilton’s apt title, “now it’s personal”.⁷⁰

cf. in France Ministère public v. Aurélien D., Cour d’appel d’Aix en Prvence 5ème chambre des appels correctionnels, decision of 5 September 2007, available at <http://www.legalis.net>.

⁶⁵ For anecdotal evidence see Lessig (2004) 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.

⁶⁶ The losing defendant Jamie Thomas mentioned above, n. 64, was said to be the only one among many defendants not accepting a settlement.

⁶⁷ Cf. Svea Hovrätt, Dom 2006-10-02, Mål nr. B 8799-05.

⁶⁸ For a review of cases accross jurisdictions see Plesner Mathiesen, J., ‘Fildelning’ (2007) Nordiskt Immatteriellt Rättsskydd (NIR) 46–55.

⁶⁹ Cf. Antipiratbyrå, Svea Hovrätt, Dom 2006-10-02.

⁷⁰ Hamilton, S., ‘Now it’s Personal: Copyright Issues in Canada’, in: D. Taras et al. (eds) *How Canadians Communicate* (University of Calgary Press, Calgary 2007); cf. also Cohen (1998–1999), n. 40; Netanel (2003), n. 7.

Attempts to redefine the balance: the battle on user rights

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.⁷¹ 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.⁷²

Within the first track in particular, a series of proceedings have been launched by consumer associations questioning the scope of protection of TPM and their relation to copyright limitations and consumers' interests. Much attention and debate attracted the French litigation saga over the private copy exception and its relation to DRM restricting it.⁷³ As is well known, the Paris Court of Appeal produced excitement within 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. This decision was, however, only a temporary victory for supporters of broad user rights. The French Court of Cassation, reversed the decision, thus confirming the conventional view of exceptions as fragile and only conditional viz. the prevalent author rights.⁷⁴ Although similar proceedings are reported by other European

⁷¹ Hellberger (2005).

⁷² 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 see Fagin, Pasquale, Weatherall, n. 82.

⁷³ See Decision of the Supreme Court (Cour de Cassation), First Civil Chamber, 28 February 2006; decision of the Paris Court of Appeal Cour d'appel de Versailles 1ère chambre, 1ère section 30 septembre 2004 (EMI / CLCV); Tribunal de grande instance de Paris 3ème chambre, 2ème section Jugement du 30 avril 2004 (Stéphane P., UFC Que Choisir / société Films Alain Sarde et autres).

⁷⁴ Geiger, Ch., 'Copie privée. L'exception de copie privée ne peut être mise hors d'usage par des mesures techniques' (2005) 38 *La semaine juridique*, 28 September 2005, 1753–7. Geiger, Ch., 'The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment' (2006) 37 *International Review of Intellectual Property and Competition Law* (IIC) 74–81; Ngombe, L. Y., 'Technical Measures of Protection versus Copyright for Private Use. Is the French Legal Saga Over' (2007) 29 *European Intellectual Property Review* 61–65. For examples from Belgian and German law see Hellberger (2005), n. 7.

jurisdictions, there is in general scepticism that the European judiciary will embrace expansive user rights interpretations of current copyright laws.

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 rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."⁷⁵

It remains still to be seen whether this judicial activism will be left unchallenged by legislators and stake holders.

The outcome from the French saga, may indeed indicate that there is 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. In addition, there may be a need for specific procedural mechanisms for invoking users' rights, in particular in the context of TPM, not only as limited defence mechanisms in infringement lawsuits but also as an active instrument of asserting these rights in a collective lawsuit or through representative action.⁷⁶ This would reduce the threshold for access to the courts and would give some leverage to users.

Furthermore, 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.⁷⁷ He acknowledges, however, that one drawback of the doctrine as currently applied by US courts, is its vagueness and unpredictability despite

⁷⁵ *BMG CANADA INC. v. John Doe et al.* 2005 FCA 193, cf. Hamilton (2007), n. 70; cf. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* 2004 SCC 45 (SCC).

⁷⁶ For such explicit solutions in the context of TPM see developments in Belgium, IViR Report Part II below.

⁷⁷ Posner (2004), n. 62.

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 its notoriously rigid list of exceptions.⁷⁸ In this context opposite concerns have been expressed, namely that the precise statutory definition of exceptions deprives the system of flexibility and does not allow for equitable solutions *in casu*. Quite independently from the debate on the substance and exact scope of specific exceptions, my point is that attention should be paid on which institution should decide on these important issues in the future.

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 consumers on the basis of insufficient information on TPM.⁷⁹ 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 their 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

⁷⁸ Dusollier, S., ‘Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise’ (2003) 34 *International Review of Intellectual Property and Competition Law* (IIC) 62–75.

⁷⁹ See Cour d’appel de Versailles, 30 September 2004; Cour d’appel de Versailles, 15 April 2005.

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.⁸⁰ 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 sanctions. Whereas this model is attractive for the low costs and high leverage that can be exerted by public authorities, enforcement may be more slow 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.⁸¹ In particular, the possibility of collective consumer action in antitrust proceedings is being considered by the Commission.⁸² Such developments may prove of interest to copyright lawyers as well.

⁸⁰ See Ds 2007:29 Musik och film på Internet – hot eller möjlighet (Music and film on the Internet – threat or possibility), Government Investigation, 317, retrievable from <http://www.regeringen.se>; see also <http://www.konsumentverket.se/mallar/en/pressmeddelande.asp?lngArticleID=4815&lngCategoryID=675>.

⁸¹ Stuyck et al., An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial procedure, Study for the European Commission, SANCO 2005/B5/010, University of Leuven, 2007, available at: http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm.

⁸² For proposals in the US American context informed by Komesar's institutional choice theory see M Fagin, F Pasquale and K Weatherall, 'Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution' (2002), Boston University Journal of Science and Technology Law, (8) 451–572.

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.⁸³ They 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.⁸⁴

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

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

Less categorical is the private law positioning of copyright in the countries of the common law tradition with their more utilitarian view on copyright as an instrument for stimulating artistic and literary creativity. According to Ginsburg, “[i]n this view, copyright should afford authors control no greater than strictly necessary to induce the author to perform his part of the social exchange”.⁸⁵ 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

⁸³ See the French case, *supra*, note 31. For an interesting account on user-friendly litigation and recognition of user rights by Canadian courts see Hamilton (2007), n. 70.

⁸⁴ See in Sweden the early case NJA 1996 s 79. Cf. NJA 2000 s 292 (Tommy Olsson) concerning linking to MP3 files with unauthorised music; Svea Hovrätt, Dom 2006-10-02, Mål Nr. B 8799-05 concerning making available of a certain film file via the Internet. The charges were dismissed due to insufficient evidence that the file was made available from the IP address of the defendant. See, however, RH 2006:80 concerning the cracking of a computer programme and its distribution to more than 100 servers. Svea Hovrätt (Appeal Court) imposed a penalty.

⁸⁵ Ginsburg, J., ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’ (1990) 64 *Tulane Law Review* 991–1023, 993.

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".⁸⁶

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.⁸⁷

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).

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 that had to show inventiveness in institutional choice and institutional design.⁸⁸ 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

⁸⁶ Ginsburg, *ibid.*, 994.

⁸⁷ Liu (2004), n. 21.

⁸⁸ Dusollier (2003), n. 78.

the implementation process.⁸⁹ 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 interests.

Certainly, some countries are minimalist in providing only institutional scaffolding for the substantive provisions and giving very limited attention to the question of institutional choice and design. For instance in Sweden the law maker simply stipulates 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 (Art. 52 lit. f Swedish Copyright Act). 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.⁹⁰

In Germany, a similar preference for the judiciary can be noted. The German Copyright Act (*Urheberrechtsgesetz*, *UrhG*) grants the lawful user a right to claim affirmative injunction, obliging the right holder to provide for the exercise of certain exemptions (§ 95b(1) *UrhG*). The law maker has gone, however, a step further in supporting the individual claim laying down a right to group action for consumer organisations (and other organisational bodies of beneficiaries) to compensate for notorious problems of collective action in litigation involving diffuse low-stake interests.⁹¹ 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 enjoins the right holder from continuing the violation of § 95b *UrhG*. This recognition of the importance of collective enforcement in the copyright context is impressive. Yet, in legal doctrine doubts are

⁸⁹ See *IViR Report Part II*; see also Hugenholtz et al., *The Recasting of Copyright and Related Rights for the Knowledge Economy (Final Report, Institute for Information Law (IViR), 2006)*.

⁹⁰ See comments by Swedish Television and Stockholm University on the Government Bill, Prop. 2004/05:110, 317. Cf. Westman (2003), n. 95.

⁹¹ Bäsler, W. 'Technological Protection Measures In The United States, the European Union and Germany: How Much Fair Use Do We Need In The "Digital World"?' (2005) 8:13 *Vanderbilt Journal of Law & Technology* 69.

rightly expressed as to the effectiveness of this injunction, when shaped only as a negative, cease and desist remedy.⁹²

Locus standi to professional and (recognised) consumer associations is granted also under Belgian law, which relies on an affirmative injunctive action on the part of beneficiaries before the court of first instance (Art. 87bis Belgium Copyright Law). In addition standing is granted to the minister in charge of copyright legislation.⁹³ According to Severine Dusollier, rapporteur on Belgian copyright law in the IViR study this right of action has the character of an enjoinder procedure (*référé*) and should be rapidly decided.⁹⁴

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 is established for tackling disputes between right holders and beneficiaries (users).⁹⁵ In Norway and Denmark the existing Copyright License Tribunals have been entrusted with new functions. The Danish Copyright License Tribunal may, upon request, order a right holder who has used effective technological measures to make such means available to a user which are necessary for the latter to benefit from the abovementioned limitations of copyright. If the right holder does not comply with the order within 4 weeks from the decision of the Tribunal, the user may circumvent the effective technological measure, notwithstanding the provision of section 75 c (1) (cf. Section 75 d of the Danish Copyright Act). Similar arrangement exists in Norway.⁹⁶

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 trig-

⁹² See Schweikart (2005), n. 7; cf. Bäsler (2005), *ibid.*; Bechtold, S., 'Digital Rights Management in the United States and Europe (2004) 52 *American Journal of Comparative Law* 323–382.

⁹³ 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.

⁹⁴ IViR Report, Part II, *Ibid.*

⁹⁵ Westman, D., 'Tekniska åtgärder. Nordiskt genomförande av artikel 6 i infosoc-direktivet' (2003) *Nordiskt Immateriellt Rättsskydd (NIR)*, 559–79; IViR Report, Part II, 134.

⁹⁶ IViR Report Part II, 194; cf. Westman (2003), *ibid.*, 577.

gered for the purpose of transposing the *Infosoc* Directive eventually led 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).⁹⁷ 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.⁹⁸ 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”.⁹⁹ 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 propriété 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 agréée*) and generally should strive to facilitate conciliation between parties (Art. L 331-15).

The ARTM has the status of an independent administrative authority (Art. L 331-17). It is composed by way of a governmental decree and consists of six members, designated respectively by *Conseil d'Etat, Cour de Cassation, Cour des comptes, l'Académie des technologies, Conseil supérieur de la propriété littéraire et artistique* (Art. 331-18). The members are appointed for a time-limited mandate of six years which is non-revocable and non-renewable. Apparently, this composition seeks to

⁹⁷ See §§ 14–14 e Urheberrechtswahrnehmungsgesetz, UrhWahrG (Law on the Administration of Copyright).

⁹⁸ The present levies have remained unchanged since 1985.

⁹⁹ See BT-Plenarprotokoll 16/108, 11157.

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 side-stepped interests. In particular, while the administrative process has the advantages of high expertise and flexibility, there are well documented risks of agency capture. Administrative authorities are sometimes set up as “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.¹⁰⁰ At the level of implementation, principal-agent problems may deter efficient agency action.¹⁰¹ Apart from robust mechanisms for governmental and parliamentary accountability, transparency and possibilities for citizen participation in rule making (e.g. by way of public hearings) are possible ways to make agencies keep to their political mandate.¹⁰² 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.

¹⁰⁰ Trubek, D., ‘Environmental Defense. Interest Group Advocacy in Complex Disputes’ in: Weisbrod, B., J. Handler and N. Komesar (eds), *Public Interest Law: an Economic Analysis of Institutional Innovation* (University of California Press, Berkeley 1978); 151–94; Trubek, D., ‘Public Advocacy: Administrative Government and the Representation of Diffuse Interests’, in: Cappelletti, M. and B. Garth (eds), *Access to Justice*, (Vol. III, Sijthoff and Noordhoff, Alphen aan den Rijn 1979).

¹⁰¹ Bernstein, M., *Regulating Business by Independent Commission* (Princeton University Press, 1950); Eggertsson, T., *Economic Behaviour and Institutions* (Cambridge University Press, Cambridge, 1990).

¹⁰² Rose-Ackerman, S., ‘Progressive Law and Economics – And the New Administrative Law’ (1988) 98 *Yale Law Journal* 341–368; Rose-Ackerman, S., *From Elections to Democracy. Building Accountable Government in Hungary and Poland* (Central University Press, Cambridge 2005).

The above described institutional dynamics seems to confirm 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.¹⁰³ 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 above mentioned 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 Swedish Consumer Board.¹⁰⁴ 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 a special complaint department (a “wailing wall”, in Swedish “klagomur”) for dealing with such issues.¹⁰⁵

Some time ago, when I presented preliminary thoughts on a participation-centred approach to copyright within the framework of the IPT project, the working group led by Marianne Levin briefly discussed the idea of a Copyright Ombudsman, but we all considered it a very distant and highly unlikely alternative. Incredible as it then sounded, the time seems to have come to take the copyright consumer seriously.

¹⁰³ Komesar, N., *Law's Limits. The Rule of Law and the Supply and Demand of Rights* (Cambridge University Press, 2001).

¹⁰⁴ Ds 2007:29, 315.

¹⁰⁵ Ds 2007:29, 314.

Consumer protection within or outside copyright?

Many of the arrangements above demonstrate the attempt to accommodate in the fabrics of modern copyright law novel concerns that have previously been tackled outside the copyright realm. It appears that with the opening of copyright to regulation of TPM a decisive step has been made from defining entitlements to regulating and shaping specific market models. Once this step is taken, it is only natural that pressure mounts to take into account also other, in and of itself non copyright-specific, concerns, such as consumer information concerning TPM, the contractual conditions accompanying DRM, the quality of the service offered. Many rightly doubt that these concerns can be best responded to with the tools of copyright. Therefore the attention turns to alternative legal disciplines such as antitrust and consumer protection laws.¹⁰⁶ At the same time, integrating consumer concerns in copyright law may have the positive effect of keeping copyright law and copyright lawyers in touch with the business reality in which they operate.

The above overview of diverse institutional responses to important questions of public policy in copyright (namely, TPM in relation to copyright limitations) demonstrates, among other things, the crucial impact of institutional legacies. In Sweden 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.¹⁰⁷ 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.¹⁰⁸

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.¹⁰⁹ Likewise, strong con-

¹⁰⁶ See Fagin, Pasquale, Weatherall (2002), n. 82; Netanel (2003), n. 32.

¹⁰⁷ Cf. Petri (2005), n. 23.

¹⁰⁸ Westman (2003), n. 93.

¹⁰⁹ On German institutional developments in the areas of unfair commercial practices and consumer law see Bakardjieva Engelbrekt (2003), n. 12, 500–504, 616 ff.

sumer 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.¹¹⁰ 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 from the sphere of regulation of collecting societies.¹¹¹

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

Conclusion

In this analysis it is impossible to discuss the problem of consumer interests in copyright in all its complexity. My purpose has only been to demonstrate that when we discuss proposals of legislative stipulation of users' rights on an equal footing with right-holders, one should not leave out of sight the issue of allocation of decision-making competence, or as Komesar calls it: "deciding who decides". A choice between rights or defences (exceptions), as well as between precise or broad definition of

¹¹⁰See 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., 'The Quality of Government' (1999) *Journal of Law, Economics and Organisation*.

¹¹¹Commission 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.

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, in the judicial and in the administrative process, taking account of the institutional characteristics of courts and legislatures. The institutional characteristics and design of these processes may prove crucial for fostering participation and accommodation of new consumer and user interests as they emerge.

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”.¹¹² Society’s ability to solve problems through time is thus dependent on institutional frameworks that permit the maximum generation of ‘trials’ and that encourage the development of decentralized decision-making processes.

This contribution 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.

In an article on “virtual copyright” Schollin evaluates the future of DRM systems as substituting the copyright regime on the basis of value legitimacy and formal legitimacy.¹¹³ The above analysis suggests that whatever the mix of public law, private law and market governance schemes, their legitimacy will have to be evaluated also against what can be named participatory legitimacy. Administrative procedures and public-private co-regulatory schemes may have a role if they ensure participation of users and consumers in the shaping of copyrights and exceptions, where alternative decision-making schemes such as market and technology, preclude such participation.

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

¹¹²North (1990), n. 14, 80.

¹¹³Schollin, K., ‘Virtuell upphovsrätt’ (2004–2005) *Juridisk Tidskrift* 61–81.

even more dramatic if we look at the international and supranational level.¹¹⁴ Many law and economics discussions are carried out without acknowledging the many constraints on institutional choice that international agreements have imposed on national decision-making. A debate should be directed to the issues of how to reconcile the clarity and predictability of the international IP system with the need to adjust institutional choice to new political, economic and technological developments. Within the European context the economic advantages of uniform rules have been questioned.¹¹⁵ Similar reasons, namely the need for constant experimentation and keeping decision-making processes open to new actors and trial and error, may be valid in the IP debate at both EU and the international level.

¹¹⁴ Generally on the slowness of law to catch up with the internationalisation of market and economic science see Buxbaum, R. 'Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft' (1996) *RabelsZ* 201–230.

¹¹⁵ Kerber, W. and S. Grundmann, 'An Optional European Contract Law Code: Advantages and Disadvantages' (2006) 21 *European Journal of Law and Economics* 215–236.

Kerber, W., 'Policy Learning in Europe: The "Open Method of Coordination" and Laboratory Federalism' (2007) 14 *Journal of European Public Policy* 227–247.