Rethinking of Copyright Institution for the Digital Age

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Articles

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In the last few years, diverse calls and proposals for strengthening copyright protection and making copyright enforcement more efficient have been put forward by various interest groups in numerous countries around the world. Many of them have even already been adopted. In this short essay I will argue for a more cautious approach towards designing new laws, which are to address controversies brought by digital reproduction and communication technologies to the protection of copyright holders' legitimate interests, than those currently adopted in many jurisdictions, including Japan. To do so, the following inquiry points out several aspects which are often overlooked for various reasons, but which are essential for designing an efficient, operational and feasible institution of copyright in the digital era.

1. Limitations of Natural Law Justifications Supporting Strong Copyright Protection

The first aspect which needs to be taken into account is that justifications supporting strong copyright protection are often very limited. Conventionally, several types of arguments are used to justify granting authors with exclusive rights to the original and creative results of their intellectual labor.[1] Some arguments stem from natural law theories;[2]

1) For excellent overviews of various justifications for granting and protecting intellectual property rights, see Tom. G. Palmer, Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects, 13 Harv. J.L. & Pub. Pol'y 817 (1990); Peter Drahos, A Philosophy of Intellectual Property (Dartmouth, 1996); Intellectual Property: Moral, Legal, and International Dilemmas (Adam D. Moore ed., Rowman & Littlefield Publishers, 1997); William W. Fisher, Theories of Intellectual Property, in New Essays in the Legal and Political Theory of Property 168 (Stephan R. Munzer ed., Cambridge University Press, 2001); Wendy J. Gordon, Intellectual Property, in The Oxford Handbook of Legal Studies 617 (Peter Cane and Mark Tushnet eds., Oxford University Press, 2003).

2) See, e.g., Justin Hughes, The Philosophy of Intellectual Property, 77 Geo. L.J. 287 (1988); Wendy J. Gordon, A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 Yale L.J. 1533 (1993).

others are based on utilitarianism stressing the importance of granting authors with exclusive rights in order to give the authors sufficient incentives to continue in creating works of authorship.[3] It is important to examine explanatory power of these theories, since they considerably affect an answer to the quintessential question in adapting and reconfiguring copyright laws adequately and efficiently for the digital age, which is: Why and when copyrights should be granted and protected by law?

In countries with civil law traditions like Japan, the concept of author's rights[4] is traditionally deemed to rely on two types of natural law theories. One derives from John Locke's writings on justifying property rights to tangible things.[5] This line of justification is based on the premise that each person is naturally entitled to own the results of her creative intellectual labor. Although Locke did not expressly deal with justifying property rights to intangible goods, some scholars advocate the application of Lockean labor theory also to intellectual property, including copyright, to a certain degree.[6] The other type of natural law theories puts forward that an individual is naturally entitled to own their creations, because they partially or completely reflect or embody her personality.[7] To put it more bluntly, while the former focuses on individuals' creative activities leading to the creation of artistic, literary and scientific works,

3) See generally, William M. Landes and Richard A. Posner, The Economic Structure of Intellectual Property Law (Belknap Press of Harvard University Press, 2003); Mark A. Lemley, Ex Ante Versus Ex Post Justifications for Intellectual Property, 71 U. Chi. L. Rev. 129 (2004).

4) The civil law jurisdictions employ the term "authors' rights" in its variations provided by individual national languages, such as "droit d'auteur" in French, "Urheberrecht" in German or "chosakuken" in Japanese.

5) See John Locke, Two Treaties of Government 285-302 (Peter Laslett ed., Cambridge University Press, 1988) (1698).

6) See, e.g., Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 Ohio St. L.J. 517 (1990); Adam D. Moore, Intellectual Property and Information Control: Philosophic Foundations and Contemporary Issues (Transaction Publishers, 2004).

7) See, e.g., Drahos, supra note 1, at 73-94; Hughes, supra note 2, at 330-65; Jeanne L. Schroeder, Unnatural Rights: Hegel and Intellectual Property, 60 U. Miami L. Rev. 453 (2006).

the latter emphasizes the role of such works in the creation and development of authors' personality.

Although some scholars suggest that the abovementioned natural law theories fit even better to intangible results of human intellectual labor than tangible things, they have several insurmountable flaws to satisfactorily justify granting exclusive rights under current national copyright laws or proposed amendments.[8] The main reason is that any acquisition of natural rights as justified by these theories collides with the natural rights of other individuals. As I presented severe criticism of natural law theories in details elsewhere,[9] the following enquiry puts forward only a few most critical points which cannot be adequately answered by these theories.

The first, so-called Lockean labor theory of property is premised on the freedom of human action. To put it more bluntly, each individual has the right to act freely and when she works at the expense of her freedom of action, she should be entitled to own the fruits of her labor.[10] However, if the creators were granted with intellectual property rights such as copyrights under the Lockean labor theory, such natural rights would considerably restrict others' freedom of action.[11] The justification for copyrights and other intellectual property rights based on the Lockean property theory is therefore internally contradictory.

A further challenge which must be faced by the Lockean labor theory is

8) See, e.g., Alex Gosseries, How (Un)fair is Intellectual Property?, in Intellectual Property and Theories of Justice 3 (Alex Gosseries, Alain Marciano and Alain Strowel eds., Palgrave Macmillan, 2008).

9) See Yoshiyuki Tamura, Chitekizaisanhōseisakugaku no kokoromi, Intell. Prop. L. & Pol'y J., March 2008, at 1 (2008), reprinted as A Theory of the Law and Policy of Intellectual Property: Building a New Framework, Nordic J. Com. L., No.1 (2009) (translated by Nari Lee), available at http://www.njcl.utu.fi/1_2009/article1.pdf (last visited Aug. 31, 2009).

10) See Locke, supra note 5, at 287-88, §27.

11) Cf. id., at 288, §27 ("For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once enjoyed to, at least where there is enough, and as good left in common for others.").

presented by its "spoilage limitation". Locke's theory is premised on the existence of nature which God has given to all humanity in common.[12] The imminent faith of many tangible things is that they get spoiled sooner or later. If they were not properly used and consumed, their spoilage would go against the God's instructions. As imminent spoilage justifies the claims for property in the fruits of human labor, the consent from other members of concerned community is not necessarily required. Unless someone works on, and utilizes, natural resources, they would get spoiled. Such person does not therefore deprive others of anything held in common. Unlike tangible things, intangible goods eligible for intellectual property are not reduced by possession. They can be used without excluding others of access to them. Furthermore, the spoilage problem does not occur in case of intangibles covered by copyrights and other intellectual property rights. In sum, it is difficult to justify the foundation of copyright by the Lockean labor theory of property. Accordingly, copyright protection and its strengthening must be buttressed by a different justification.

Another natural law theory conventionally deemed justifying the grant of exclusive rights to the authors of artistic, literary and scientific works stems from the writings of Georg Wilhelm Friedrich Hegel.[13] It originated with the emergence of geistiges Eigentum theory in Germany.[14] Hegel justifies the institution of property by arguing that the property is essential for an individual in order to develop her personality in the external world.[15] Nevertheless, people can live without intellectual property rights. Put in other words, intellectual property rights are not indis-

12) Id., at 286-87, §26.

13) See Georg Wilhelm Friedrich Hegel, Philosophie des Rechts: nach der Vorlesungsnachschrift K.G. v. Griesheims 1824/25 209-11, 230-38 and 240 (Karl-Heinz Ilting ed., Frommann-Holzboog, 1974).

14) For an overview of the development of geistiges Eigentum theory, see, e.g., Heinrich Hubmann, Das Recht des schöpferischen Geistes : eine philosophisch-juristische Betrachtung zur Urheberrechtsreform 70-71 (W. de Gruyter, 1954).

15) See Hegel, supra note 13, at 238.

pensable for an individual to develop her personality. As intellectual property rights clash with the creation and development of personality by other members of society, Hegel's theory cannot justify intellectual property rights including copyrights as natural rights.

To sum up, the natural law theories are not satisfactory as comprehensive justifications for copyrights and other intellectual property rights. Inevitably, the utilitarian perspective should be considered in addition to natural law theories. In fact, I argued elsewhere that the utilitarian incentive theory is an appropriate foundation for intellectual property rights under certain conditions and circumstances.[16] The incentive theory is based on the proposition that unless free-riding is prevented to a certain degree, the public will suffer loss by decreased intellectual creation, because the motivation to create new literary, artistic and scientific works will be significantly reduced.[17] The incentive theory thus justifies granting intellectual property rights, including copyrights, only when such grant enhances society-wide welfare.

2. Adjustment of Copyright Institution to Technological Progress and Social Environment

The second aspect which should be taken into account in adapting copyright laws to the digital era is that the copyright institution has been regularly adapted to fit the technological progress and social environment. This institution should not be considered as inflexible and rigid. Conversely, it should be understood as requiring regular adjustments to new technologies and changes in social environment under certain con-

16) See, e.g., Yoshiyuki Tamura, Theory of Intellectual Property Law, Intell. Prop. L. & Pol'y J., August 2004, at 1 (2004) (translated by Yasufumi Shiroyama); Yoshiyuki Tamura, Chitekizaisanhō (Intellectual Property Law) 7-22 (Yuhikaku, 4th ed. 2006).

17) See, e.g., William M. Landes and Richard A. Posner, The Economic Structure of Intellectual Property Law 11, 20-22, 213-214 (Belknap Press of Harvard University Press, 2003).

ditions and circumstances. This view is also supported by more than 300 years of copyright law's history,[18] in which the three waves of different threats to the copyright holders' legitimate interests and of copyright law's respective adjustments and responses can be distinguished according to the type of technology and use of copyrighted works.[19]

The origins of today's copyright law are closely related with the introduction of printing press. The first wave faced by the copyright institution can then be characterized by massive use and diffusion of printing technology. When the printing technology had been broadly spread and used for commercial activities, the problem of book piracy emerged. The need to protect the publishers against competing cheaper editions of second comers led to the establishment of modern copyright institution at the beginning of eighteenth century in England.[20] Since the publishers were granted by exclusive rights allowing them to prohibit copying of manuscripts registered by them, it is only natural that these rights were and are still called copyrights in English speaking countries.

The copyright institution as designed at its formation functioned with minor adaptation[21] sadequately until the middle of twentieth century.

18) See, e.g., Augustine Birrell, Seven Lectures on the Law and History of Copyright in Books (Rothman Reprints, 1971) (1899); Brad Sherman and Lionel Bently, The Making of Modern Intellectual Property Law (Cambridge University Press, 1999); B. Zorina Khan, The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920 (Cambridge University Press, 2005); Christopher May and Susan K. Sell, Intellectual Property Rights: A Critical History (Lynne Rienner Publishers, 2006); Ronan Deazley, Rethinking Copyright: History, Theory, Language (Edward Elgar, 2006).

19) For a more detailed analysis of the three waves of copyright law's development, see, e.g., Yoshiyuki Tamura, Intānetto to chosakuken: chosakukenhō no daisan no name (Internet and Copyright: The Third Wave of the Copyright Law), 1999 Amerikahō 202, 211-214 (1999).

20) See, e.g., Lyman Ray Patterson, Copyright in Historical Perspective (Vanderbuilt University Press, 1968); Mark Rose, Authors and Owners: The Invention of Copyright (Harvard University Press, 1993); Ronan Deazley, On the Origin of The right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775) (Hart Publishing, 2004).

21) See generally Benjamin Kaplan, An Unhurried View of Copyright (Columbia

Copying of copyrighted works until that time required considerable investment. For this reason, the group of those, who were able to make reproductions of copyrighted works, was limited to entities which did so for commercial purposes. The consumers of copyrighted works could not afford to print books or to produce sound or audiovisual recordings of high quality at that time. Hence, although the exclusive rights granted by modern copyright laws were collectively called copyrights in common law jurisdictions and author's and neighboring rights in civil law jurisdictions, their actual function was limited to regulating and restricting competition from business entities who were not holding the required exclusive rights. This situation had two advantages with regard to the design of copyright law. First, monitoring of copyright compliance was relatively easy. The copyright institution functioned effectively especially due to the limited group of affected entities—those using copyrighted works for commercial purposes.[22] Second, the freedom of private individuals was not restricted by direct enforcement of copyrights against those using copyrighted works for non-commercial purposes.[23]

However, the situation was completely changed by introducing various analogue reproduction technologies, such as photocopying machines, tape recorders and VCRs, in the second part of twentieth century. The second wave of copyright law's development can therefore be characterized by massive use of analogue reproduction technologies by individuals for non-commercial purposes. As the reproduction technologies entered to the private sphere of copyrighted works' consumers, the character of

University Press, 1967); Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox (Stanford University Press, rev. ed. 2003).

22) In this regard, collecting societies collective administering exclusive rights of dispersed copyright holders played an important role; see generally Collective Management of Copyright and Related Rights (Daniel Gervais ed., Kluwer Law International, 2006); Godstein, supra note 21, at 63-103 (describing the history of creating ASCAP in the United States).

23) See, e.g., Jessica Litman, Digital Copyright 18-19, 177-78 (Prometheus Books, 2001).

copyright was suddenly altered entirely. It started to extensively regulate and interfere with activities of private individuals. At the same time, it should be underlined that although the freedom of individuals' activities was restricted by copyright law, it was quite difficult for the copyright holders to efficiently monitor whether individual users of analogue reproduction technologies infringe their copyrights in any way. This drastically impaired the effectiveness of copyright enforcement against new types of users and uses of copyrighted works. As a countermeasure adopted in many civil law countries, the focus of their national copyright laws was shifted to areas where a limited number of actors could still be found. The good examples are the grant of rental rights to copyright holders[24] and the introduction of various levy systems for private copying.[25] These measures were based on the fact that the number of record rental shops and manufactures or distributors of analogue reproduction equipments or media were still limited.

Before any adequate and efficient solution to the threats brought by the second wave to the copyright holders' legitimate interests was found, the third wave has emerged by the invention and spread of digital technologies and the Internet at the end of the twentieth century. The digital technologies allowed private individuals to make perfect copies of digitized copyrighted works. Furthermore, the Internet enabled millions of individuals to distribute such perfect copies to unlimited number of strangers without difficulty. Before the introduction of Internet, the

24) See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994); WIPO Copyright Treaty, art. 7, Dec. 20, 1996, 828 U.N.T.S. 3, available at http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf (last visited Aug. 31, 2009) [hereinafter "WCT"]; WIPO Performances and Phonograms Treaty, arts. 9 and 13, Dec. 20, 1996, 36 I.L.M. 76 (1997), available at http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf (last visited Aug. 31, 2009) [hereinafter "WPPT"].

25) See, e.g., Gillian Davies and Michèle E. Hung, Music and Video Private Copying: An International Survey of the Problem and the Law (Sweet & Maxwell, 1993).

copyright holders had the right to prohibit reproductions of copyrighted works for commercial purposes and the right to restrict certain public uses of copyrighted works. At that time, copyright laws thus regulated activities of private individuals, but they have not affected many uses of copyrighted works by individuals for non-commercial purposes. The Internet has completely changed this situation. Copyright laws have started to affect many activities of private individuals which were considered lawful in the analogue era. In addition, the digital technologies allow more effective and invasive monitoring of private individuals' compliance with copyright law than analogue technologies could ever do. As these activities count enormous numbers, Lawrence Lessig warns that the copyright protection is likely to become too strong and omnipresent and thus the problem of striking a just and adequate balance between interests of right holders and users has become more urgent and serious than ever before.[26]

3. Need to Consider the Policy Making Process in the Copyright Field : Pitfalls of Incentive Theory

The third aspect which should be taken into consideration in rethinking the institution of copyright for the digital age is that the policy making process matters and considerably affects the actual design of copyright law and the balance struck between the interests of affected stakeholders. According to the collective action[27] and public choice theories,[28] the

26) See Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (Vintage, 2002); Lawrence Lessig, Free Culture: The Nature and Future of Creativity (Penguin Books, 2004); Lawrence Lessig, Code Version 2.0 (Basic Books, 2006) [hereinafter "Code"]; Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy (Penguin Press, 2008) [hereinafter "Remix"].

27) See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (Harvard University Press, rev. ed. 1971).

28) See, e.g., George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. &

policy making process tends to reflect interests which are easily organized. On the other hand, interests which are difficult to be organized are hardly reflected, because people will not, as long as acting economically rationally, resort to lobbying, unless their possible benefit is large enough.[29] Hence, the policy making process is, by its structure, biased against reflecting interests of dispersed and unorganized stakeholders, although such interests may be substantial in aggregate within a particular society.

Applying this understanding to copyright law, users' interests are inclined hardly to be reflected, and in fact, the copyright protection has a tendency to be set up on the high level at the expense of copyrighted works' users.[30] Moreover, unlike tangible property, the intellectual property regimes, including the copyright regime, can be designed quite artificially and freely as it can be seen on differences between individual national regimes despite the high level of international harmonization in this field.[31] Under these circumstances, prospecting right holders always find enough interests and incentives to be actively involved in the policy making process. This often leads to expanding their rights far beyond socially desirable level.[32]

Mgmt. Sci. 359 (1971); James M. Buchanan and Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (University of Michigan Press, 1962); Towards a Theory of the Rent-Seeking Society (James M. Buchanan, Robert Tollison and Gordon Tullock eds., Texas A & M University Press, 1980).

29) See Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 53-97 (University of Chicago Press, 1994).

30) See, e.g., Antonina Bakardjieva Engelbrecht, Copyright from an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation, 4 Rev. Econ. Res. on Copyright Iss. 65 (2007) (applying the participation-centered comparative institutional approach to copyright law).

31) For a comparative study of various national copyright laws, see, e.g., International Copyright Law and Practice (Paul Edward Geller ed., Matthew Bender 2008).

32) For analyses of several such situations, see Michele Boldrin and David K. Levine, Against Intellectual Monopoly (Cambridge University Press, 2008); Tatsuo Tanaka, Shitekikopī ha higai wo ataeteiruka (Do Private Copies Cause Any Harm?), in Furīkopī no keizaigaku: dijitaruka to kontentsubijinesu no mirai (The Economics of Free Copying: Digitization and the Future of Contents Business) 117 (Junjiro

There are several possible countermeasures to this bias in governance structure against the interests of dispersed and unorganized stakeholders. Some of them have recently appeared or still need to be put into effect. As a reaction to ongoing strengthening of copyright protection at the expense of users, various movements to defend the interests of diverse dispersed stakeholders in copyright policy making are slowly but steadily emerging in many countries. A good example of such change in the governance structure of the policy making process in Japan is the emergence of "think©" movement[33] which concentrates on broadening public discussion on controversial issues concerning strengthening copyright protection in Japan. For instance, due to the influence of think©'s activities, the discussion on possibility of extending the copyright term up to seventy years after the author's death also in Japan by following the legislations already adopted in Europe and the United States has recently been suspended.

Other possible countermeasures have traditionally been built into the structure of copyright institution, but their efficiency has gradually been hindered or in some case they have been completely dismantled. An example of such mechanism can be the role division between legislature and judiciary through a distinction between rules and standards. This issue has lately been raised by arguments supporting the introduction of fair use clause into the Japanese copyright law.

According to the classic law and economics argument,[34] the choice between rules and standards or, in other words, between individual limitation clauses and general clauses is a matter of comparing legislative costs with enforcement costs. To put it simply, where the same type of

Shintaku and Noriyuki Yanagawa eds, Nikkei Publishing, 2008).

33) See www.thinkcopyright.org (last visited Aug. 31, 2009).

34) See Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992); Richard A. Posner, Economic Analysis of Law 586-90 (Aspen Publishers, 7th ed. 2007); Robert Cooter and Thomas Ulen, Law & Economics 358-359 (Pearson Education, 5th ed. 2007).

disputes occurs quite often, clarification by legislation is more efficient rather than a case-by-case examination by judiciary due to social benefits of legal certainty. In such cases, a rule, and not any standard, should be adopted. On the other hand, where the same type of disputes arises less frequently and it is hard to foresee all possible situations, a standard should be chosen, because the judiciary will be more efficient in applying it to all relevant circumstances of particular cases. The cost of designing legislation to foresee all likely scenarios will be much higher than the respective benefits of predicting the court's decision of dispute in each potential case in advance. Applying this argument to copyright limitations and exceptions, for example, private use should be regulated by a rule—individual limitation clause—because it occurs fairly often in an everyday life.

Taking into account the public choice theory, another significant difference between rules and standards should be pointed out. Legislation in form of rules has a disadvantage for protecting the interests of the public and other dispersed stakeholders. The targets for lobbying of concentrated and well-organized interest groups are clear. Any proposed rule invites pressure and lobbying from such groups to re-correct the proposal in their favor. As a result, the rules in copyright laws such as individual limitation clauses tend to protect well-organized corporate copyright holders' interests too highly at the expense of the public and other dispersed stakeholders.

On the other hand, the proposals of provisions with the character of standards do not face such a problem because the targets are not so clear. While standards leave some margin for interpretations, agreements on a certain standard can be easily achieved. The interpretation of agreed standard can then be entrusted to the judiciary which is relatively resilient against the pressure from a variety of lobbying groups. Yet, the note should be made that it should not be taken as granted that where the same type of disputes occurs often, rules should always be selected. As

the legislature suffers from policy making biases, this aspect should be taken into account in redesigning a more proper and adequate role division between rules and standards in copyright law.[35]

4. Need to Take into Account Interests of All Creators and Copyright Holders

The final aspect to which I want to draw attention in this short essay is the need to reform the institution of copyright for the digital era also in the way that copyright law would take into account interests of all authors, creators and copyright holders, and not only the interests of a limited group of well-organized copyright holders who regularly push for strengthening copyright protection in order to maximize their private benefits. Many argue that the need to guarantee in some way and to a certain extent the consumers' freedom to use copyrighted works has increased by broadening their opportunities to use copyrighted works. Simultaneously, the excessive usage of copyrighted works by private individuals caused serious problems to the interests of copyright holders and induced many of them to search for ways how to cope with the emerged situation. This controversy was already observed during the second wave of copyright law's development. Nowadays, it has shifted to another place—cyberspace—and has expanded in its size and types.

Due to the impact of the Internet, this problem has been even augmented further. Since the advent of the Internet era, not only opportunities to use works have been amplified, but also the number of works which are available for such uses has been increased in unprecedented way. These days, many articles and photographs from old magazines

35) For a more detailed elaboration of this argument, see Yoshiyuki Tamura, Chitekizaisanhōseisakugaku no seika to kadai: tagenbunsangatatōgyo wo mezasu shinsedaihōseisakugaku he no tenbō (Achievements of, and Tasks for the Intellectual Property Law and Policy: Towards a New Global Law and Policy for Multi-Agential Governance), Hokkaido J. New Global L. & Pol'y, March 2009, at 1, 10-11 (2009).

which were not easily accessible to the broader public for a very long time are uploaded on the Internet and available to millions of Internet users. In general, these copyrighted works can be divided into two groups: (1) works, the use of which is worth the transaction costs for obtaining the required rights clearance; and (2) works, the use of which is not worth such expenses. Similarly, two types of copyright holders can be distinguished as well. Some copyright holders tend to exercise their exclusive rights extensively, including the employment of various techno-logical protection measures and digital rights managements which sig-nificantly limit the users in using the copyrighted works.[36] The others are totally indifferent to non-commercial use of their copyrighted works by individuals. Moreover, in case of so-called orphan works the identity of concerned copyright holders can be hardly found or is even completely unknown. The problem brought by digital technologies and the Internet is that even the works of the latter group of copyright holders, including orphan works, can be easily accessible and exploited in enormous num-bers by individuals. These phenomena could not be observed in previous waves of copyright law's development.

As shown above, the governance structure bias exists against the users' side. Similar problems with this type of bias can also be found on the right holders' side against some authors, creators and copyright hold-ers, especially those who do not object to various non-commercial uses of their copyrighted works by individuals. The interests of, and claims presented by, those copyright holders who want to broadly exercise their exclusive rights are more likely to be reflected in the policy making process than those of other authors, creators and copyright holders. Consequently, the gap between the views of many right holders and the

36) WCT, supra note 24, arts. 11 and 12; WPPT, supra note 24, arts. 18 and 19. See also, e.g., Peter Yu, Anticircumvention and Anti-Anticircumvention, 84 Denv. U.L. Rev. 13 (2006); Pamela Samuelson and Jason Schultz, Digital Rights Management: Should Copyright Owners Have to Give Notice of Their Use of Technical Protection Measures?, 6 J. on Telecomm. & High Tech. L. 41 (2007).

copyright law seems to slowly but surely become larger and deeper.

A solution to this problem can be found in the Creative Commons movement.[37] It does not only ensure the freedom to use, but it also, and with more significance, facilitates the establishment of legal institutions which more adequately and appropriately fit the interests and attitudes of diverse copyright holders. In short, this movement has altered the gover-nance structure by reflecting and accommodating those stakeholders' in-terests,[38] the reflection of which in the policy making process is not so easy due to the governance structure bias. Although the Creative Commons licenses have many advantages, they also have their flaws and inefficiencies. Their main limitation is that they are only voluntary.

A further problem is that they are partly influenced by the current technicalities of national copyright laws. Accordingly, even when many creators consider the current copyright protection to be too strong and pervasive, and thus want to use the Creative Commons license scheme, some of them may not fully understand all terms and conditions of such licenses or can feel troublesome to learn how to utilize particular marks.

5. Some Ideas on How to Rethink the Institution of Copyright for the Digital Era

The adequate and proper understanding of individual aspects stressed above leads us to the conclusion that to design an efficient legal in-stitution, the side and interests of stakeholders who are hardly to be able to take any viable and feasible action in policy making process should be a priori chosen and protected by legislation and judiciary. In this sense, it should be left upon the side of those stakeholders, which are able to ef-

37) See http://creativecommons.org (last visited Aug.31, 2009).

38) For an empirical study of the operation of Creative Commons regime, see Jessica Co ates, Creative Commons - The Next Generation: Creative Commons Licence Use Five Years On, 4 SCRIPTed 72 (2007), available at http://www.law.ed.ac.uk/ahrc/script-ed /vol4-1/coates.asp#4 (last visited Aug.31, 2009).

ficiently express their positions and interests in the respective policy making process, to take all necessary actions and steps to protect their interests.

At the level of legislation, it may be suggested to introduce such legal institutions which partially or completely change the default rules of copyright law by taking into account the governance structure bias. A possible option can be to set the default rules so that all creations of human creative intellectual labor are in public domain unless certain necessary steps, e.g. registration or notice, are taken by concerned authors or other creators. A further option can be an adoption of the level which can be achieved under the Creative Commons licenses as a default rule. If these options are too drastic, it is possible to recommend more moderate institutional changes, such as limiting the scope of copyright regulations within the digital field, or decreasing the level of copyright protection unless the copyright holders who are interested in continuation of their exclusive rights to the concerned works of authorship register them after lapsing a certain period and paying the respective registration fee.

At the level of judiciary, the courts are to be expected to strike the balance between the interests of rights holders and users while considering the governance structure bias. In this regard, it should be pointed out, as Jessica Litman did, that it is difficult to demand the public, which is rarely actively involved in the copyright policy making, to follow the copyright law's technicalities which are often hardly understandable by copyright law experts.[39] Accordingly, the courts can correct this im-

39) See Jessica Litman, The Exclusive Right to Read, 13 Cardozo Arts & Ent. L.J. 29, 34 (1994) ("[T]he U.S. copyright law is even more technical, inconsistent and difficult to understand; more importantly, it touches everyone and everything. In the intervening years, copyright has reached out to embrace much of the paraphernalia of modern society. The current copyright statute weighs in at 142 pages. Technology, heedless of law, has developed modes that insert multiple acts of reproduction and transmission - potentially actionable events under the copyright statute - into commonplace daily transactions. Most of us can no longer spend even an hour without colliding with the copyright law. Reading one's mail or picking up one's telephone messages these days requires many of us to commit acts that the government's

balanced situation by interpreting copyright law in favor of weaker and disadvantaged party in the policy making process. The byproduct of such courts' activities will be redesigning of copyright law in the way that individual users will observe copyright law voluntarily due to internalization of individual copyright norms without need to impose severe legal sanctions.[40] In this way, the courts will, to a certain degree, remedy insufficient participation and representation of the public in copyright policy making and will thus preserve democratic legitimacy of policy making process in a broader sense and at the higher degree. At the same time, voluntary compliance with copyright law achieved due to the internalization of its norms by regulated subjects will considerably contribute to ensuring its higher efficiency than many national copyright laws have at the present in case of restricting various uses of copyrighted works by their consumers. An example of such law was put forward by Litman by arguing that the acts of copyright infringement should be found only in the large scale commercial uses or that deprive the rights holders of the economic opportunities.[41]

Information Infrastructure Task Force now tells us ought to be viewed as unauthorized reproductions or transmissions." [references omitted]). See also Richard A. Epstein, Simple Rules for a Complex World (Harvard University Press, 1995); Lessig, Remix, supra note 26, at 266–8 (advocating in favour of simplifying the copyright norms).

40) For several arguments showing the importance of internationalizing the legal norms by the regulated subjects, see, e.g., Lessig, Code, supra note 26, at 340–45 ("Architectural constraints, then, work whether or not the subject knows they are working, while law and norms work only if the subject knows something about them. If the subject has internalized them, they can constrain whether or not the expected cost of complying exceeds the benefit of deviating. Law and norms can be made more code–like the more they are internalized, but internalization takes work."); Branislav Hazucha, Tanin no chosakukenshingai wo tasukeru gijutsu ni taisuru kiritsu no arikata: dyuaru ūsu gijutsu no kisei ni okeru (Enablement of Copyright Infringement: A Role of Social Norms in the Regulation of Dual–Use Technologies), Intell. Prop. L. & Pol'y J., September 2009, 25, 49–71 (2009) (translated by Yoshiyuki Tamura and Kazunari Tanzawa).

41) See Litman, supra note 23, at 180–82.