



The pirate inside us

In the depths of copyright

August 24, 2010

The tide of information online is rising inexorably. Second by second, terabyte upon terabyte of new images, songs, films and other forms of digital content are being uploaded onto the internet. New digital content is being created, consumed, modified, shared and disseminated virally with no loss in quality at low cost.

The internet is altering our requirements and our consumption habits. Many consumers find themselves faced with the question of whether to buy digital content stored on a physical medium or to simply download their preferred artists or favourite films online. While the sales of physical media are trending down, fans are using their computers to download individual songs or entire albums by their favourite bands.

The majority of files downloaded from the internet are pirated copies since they infringe copyright.

This is the fate being suffered by the music and film industries, along with the computer games and digital book markets.

Is this solely a threat or is it also an opportunity for change? Are creative minds and thus innovation online hindered or promoted by traditional intellectual property rights? Can free licensing models be an alternative to traditional copyright and help to broaden the knowledge commons with greater creative freedom?

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1. Yo ho ho, pirates ahoy!

The boom in downloading and the online piracy of films, music and other copyright digital content, whether knowingly or unknowingly, has become accepted behaviour for many people who otherwise conform with social norms. And just between us: haven't you also illegally downloaded music from the internet?

The "digital natives" generation

Such downloading, however, breaks the law, namely copyright law. Consumers – and especially those belonging to the young generation of so-called "digital natives" – are not always aware that they are doing anything wrong. They have grown up with the relevant technologies, such as computers, the internet, mobile phones and a varied range of data formats and/or with relatively free access to digital goods. Also, online piracy is virtually uncontrollable and untraceable because of the ease with which files can be exchanged and the decentralised nature of the activity. If a law is difficult to enforce, then there is a risk of a decline in the general perception that committing such acts is illegal. Nevertheless, although the internet is a neutral platform, it is by no means a legal vacuum.

Digital goods do have a price!

Simply because digital goods are freely accessible does not mean that they are *per se* free of charge. Richard Stallmann, the US free software movement activist, never tires of reiterating that when he uses the word "free" he means in the sense of "free speech" and not as in "free beer".

Producing digital content gives rise to costs that can only be met after there is a finished product. It may be that many creative artists are not motivated primarily by monetary interests, but insufficient income can equally stifle their creativity. This must also penetrate the consciousness of digital natives.

This generation's expectations of having access to copyrighted content free of charge must be countered using education and persuasion. The free beer mentality must not become the driver of copyright reform. The entrepreneurial risk involved in a creative activity, for example in producing digital goods, is not assumed exclusively – but at least in part – for monetary motives, but also with the aid of enforceable intellectual property rights.

2. The Everyday Story of Copyright

Copyright applies from the very moment that intellectual property is created. Unlike a patent, which is the subject of a filing and approval process with a patent office, the rights and obligations of the copyright law apply when the creative work is completed, without any filings or registrations needing to be made. In Germany copyright protection lasts for 70 years after the death of the author. In order for the work to be made freely available to the general public before the end of this period, the author must give his express consent.¹ Whether this universal, long duration of copyright is adequate or whether consideration should possibly be given to differentiated, shorter periods remains an issue for discussion.

Once upon a time in an analogue world ...

Copyright law was created and developed for the analogue world into which we were born in the 20th century. Music publishers, for

¹ It is estimated that only 4% of all copyrighted creative works are currently being commercially exploited. Copyright does, however, also apply to the remaining 96%. This therefore includes all records or CDs that eventually sell out and any films that have long since faded into obscurity.

Online creativity is increasingly a collective process

example, are interested in controlling the quantity and price at which individual copies are distributed. For these purposes and where digital facilities are not available the architecture of copyright law is indeed adequate. But in the new digital era with the technological opportunities that it provides in everyday life this means that suddenly millions of people can simultaneously encounter copyright issues. The loss-free copying of digital content means freedom for some, while others see their artistic control over their work restricted and they lose income. Furthermore, creativity is increasingly being expressed collectively. Works are being created in virtual spaces by cooperative communities. With these new ways of being creative and exploiting the finished works, copyright is becoming an exceptionally explosive issue.

The digital age opens up new avenues for creative people to establish contact with users

The internet offers new marketing strategies

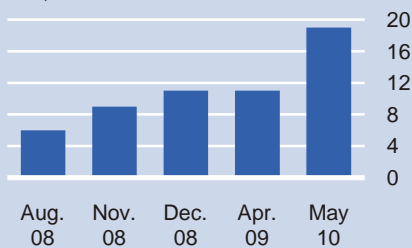
The digital world offers new forms of marketing. The internet enables artists to establish direct contact with users (without an intermediary). Using their own websites creative minds can offer their digital content directly to the online community and at low cost. For example, books are now being offered both as digital downloads free of charge, as well as being successfully sold for a fee in bookstores.² This twin-track distribution model saves advertising and marketing costs and at the same time can multiply the dissemination of content via social media such as the fast-growing Twitter, LinkedIn and Facebook sites or other elements of the blogosphere.

In addition, external and/or collective knowledge of users can be integrated relatively easily and cheaply, by blogging new ideas for design, marketing or other ideas along the value network (open innovation/crowdsourcing). External expertise can quickly help in optimising one's own business model. The traditional business model of music intermediaries, i.e. the selling of music or films stored on physical media is becoming less and less important.³

First and foremost the above-mentioned digital natives, but also internet users in general, increasingly want to access, consume and possibly modify digital content. In addition, they possess the skills required to make corresponding use of digital technologies. In May 2010, for example, 15% of US inhabitants over the age of 18 had modified existing digital content and/or created new digital content.⁴ Such a statistic begs the question of whether copyright in its current form is still up-to-date or whether it should not be adapted to our increasingly digital world. A law that was created to protect the interests of a relatively modest number of companies in the 20th century may no longer be appropriate when suddenly millions of people can simultaneously consume digital, partly copyrighted goods. The traditional copyright law is based on artificial scarcity and control. Today's technological scope in the area of digital goods is making these restrictions obsolete. Digital goods are not scarce and the internet is virtually uncontrollable.

How many people use Twitter/microblogging services?

% of over-18s living in the US
n=1,698

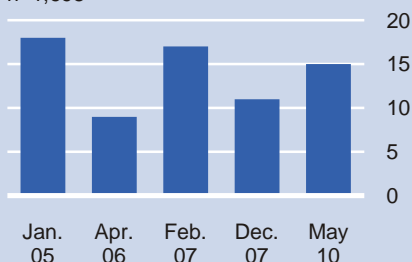


Source: Pew Research Center

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Who is "remixing" digital content*?

% of over-18s living in the US,
n=1,698



*Songs, words, images, other digital content.

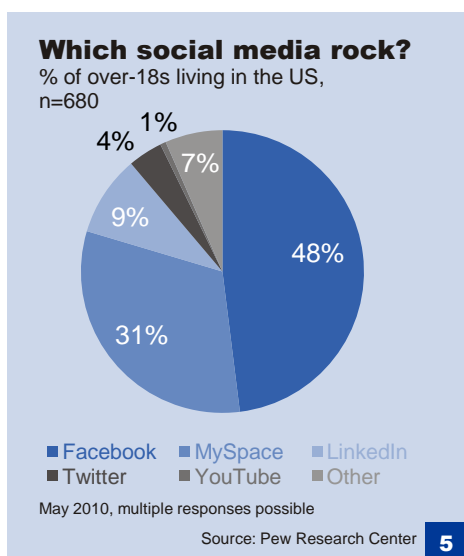
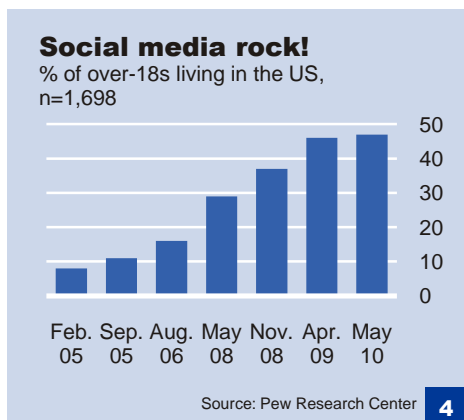
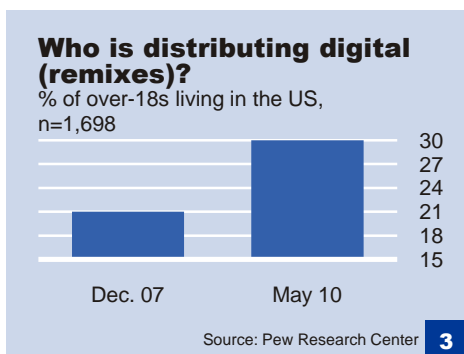
Source: Pew Research Center

2

² See Benkler, Yochai (2006). The Wealth of Networks. This book is available for free online and can also be purchased in bookstores.

³ Ehmer P. and R. Porsch (2008). Music industry still on song: But key changes are playing out. Current Issues. June 27, 2008. Deutsche Bank Research. Frankfurt am Main.

⁴ Madden M. and A. Smith. 2010. Reputation Management and Social Media. Pew Internet & American Life Project. An initiative of the Pew Research Center. Washington, D.C.



Participate, share, interact and collaborate

The modest number of original exploiters of rights concentrate solely on establishing individual stars, investing large sums in them and generating high revenues from marketing them. Their products are thus off-limits for free-of-charge, creative reuse by internet users.

The remix culture is gaining momentum

In addition, users are not only interested in purely consuming digital goods. Participation and collaborating in “being creative” are becoming increasingly important in the digital world. The boundaries between producers and consumers are becoming increasingly blurred. Many users – particularly from the younger generations – are becoming active themselves and are adding their own ideas to old and new content and multiplying their numbers online.⁵ Hardly any costs are incurred doing this while maintaining the level of technical quality. Digital technologies provide creative people with a rich choice of materials from the arts and culture to fashion a new product. This potential is, however, in many cases limited by copyright law as it currently stands.

As long as there has been no plagiarism, that is, the required *level of originality* can be demonstrated, it is part of the creative process in which ideas and elements from the works of predecessors are used as the basis for a new end product. In their day Shakespeare and Schiller also benefited from other artists and authors. How is a poem meant to be composed without the ideas and the stimuli that were first triggered by other poems or works?

Social networks are taking over the digital world

Many copyright infringements are committed on social media⁶ platforms. Inside this collaborative and interactive online world digital content (some of which is modified without permission) is blogged incessantly, around the clock as well as being linked and shared, i.e. published and virally distributed online. The share of the US population over 18 that uses social media rose between 2005 and 2010 from 8% to 47%.⁷ The most popular US social media services include Facebook, MySpace, LinkedIn, Twitter and YouTube, followed by other blogging services.

Social media provide communication platforms for creative designers ...

Value creation in the sphere of art and culture is not based solely on the principles of protecting intellectual property. Examples of this can be found, for instance, in the so-called open design community, which is based on the principles of the successful open source movement that revolutionised the IT sector. The focus is often on participating, sharing, interacting and collaborating. Creative people offer, for example, their sketches, blueprints or finished plans for items of furniture or entire home furnishing concepts. The internet user is invited to copy content in order to use it or even create something new out of it. No charge is made for the offered design as long as it is not used for commercial purposes. This is the concept with the free licensing model under which creative minds can make

⁵ User-generated content.

⁶ “Social Media” is a term that covers all online media services that allow interaction and the exchange of digital content by users. The wide variety of digital technologies enables users to make contact with one another and create media content either on their own or together with others (User Generated Content).

⁷ Madden M. and A. Smith. 2010. Reputation Management and Social Media. Pew Internet & American Life Project. An initiative of the Pew Research Center. Washington, D.C.



their work available. The resultant expanding design community benefits from the two-way feedback, that is the sharing and learning from published design proposals, while at the same time the profile of the individual artists develops online (without an intermediary or additional costs). The main obstacles facing creative people are not combating internet piracy, but first and foremost of striving to raise their public profile and their personal reputation.

... and those in the music scene

It is a similar story in the networks for open or free music. Musicians and users come together there in virtual spaces to make their music available free of charge for primarily non-commercial use and/or engage in a dialogue. The conditions for music consumption within the community are many and varied: they range from free licence offerings and fee-based filesharing right through to donations. Depending on the licence or the level of freedom of the music, it may even be permissible to modify the music and make it available (commercially) as a remix. The motivation behind this is often of an intrinsic nature that is not necessarily monetary.

The rise of the “sharing culture”

The driving forces behind these movements, apart from technological progress, are undoubtedly also the human need to be able to establish social contacts and the growing desire to exchange ideas and collaborate in achieving an objective. This trend is not really new, but it is precisely those decentralised and virtual contact platforms (social media) on the internet that provide the ideal information and communication facilities for exchanging, modifying and/or sharing digital content – also illegally.⁸

Copyright: Does it promote or stifle innovation?

Trade-off

Copyright law in its extreme form “all rights reserved” can suppress creativity. In the worst case this impedes innovation potential, therefore throwing up the question of whether in the digital age there is a conflict of interest between the perception of copyright as a source of or an obstacle to innovation.

Sophisticated technical protection mechanisms

Digital rights management is too short-sighted for the long term

Efforts aimed at achieving more effective copy protection (digital rights management, DRM) are also one way of responding to the “everything is free, everything comes free of charge” mentality of digital natives, but experience shows that such technologies incite the user to circumvent these mechanisms. Furthermore, a DRM-protected file limits the compatibility of some playback equipment. For example, despite the acquisition of a licence with the purchase of a DRM-protected media file, the file cannot be played back on every portable device, but only on ones with DRM support.

Barring websites is tantamount to censorship

Blocking the internet denies users the freedom of communication

Banning internet portals is not a permanent solution. Blocking individual web pages is often imprecise, cannot be reliably monitored and runs the risk of being perceived as attempted internet censorship. Recently, more than 130,000 people came together online at short notice to draw up an e-petition to protest against the CDU’s demands for an Access Impediment Act (*Zugangserschwerungsgesetz*).

⁸ The growing practice of sharing digital goods has been stimulated by music and film filesharing services such as Kazaa, Limewire, Napster and Piratebay.

Three strikes and you're out!

Digital agenda

With the rapid pace of technological change in the digital world a common and comprehensible language needs to be spoken by policymakers and internet users. Germany needs a digital agenda. A handbook that brings the rapidly expanding digital component of our everyday lives in line with the existing rules and legislation. Recently the Federal German Minister of the Interior published a draft internet manifesto (in German only) with the title "14 Thesen zu den Grundlagen einer gemeinsamen Netzpolitik der Zukunft".* Copyright is not the only issue dealt with in the publication. The general objective of this initial draft is to establish a balance between the state and the internet. Among other things the Minister of the Interior has expressed his support for net neutrality (equal treatment of digital content), open standards online and for the rights of the individual to control personal data. However, a German "go-it-alone" should be avoided, because the internet knows no national borders.

*See: www.bmi.bund.de/cae/servlet/contentblob/1099988/publicationFile/88667/thesen_netzpolitik.pdf.

Creative Commons

Internet regulation undermines democratic freedom

"All rights reserved" versus "Some rights reserved"

Also being debated is the call for the provider to block internet access in cases where a user repeatedly (on three occasions) infringes copyright, as introduced recently in France. In this connection an important signal was sent by Germany's justice ministry on April 26, 2010⁹ when it stated that the call for the blocking of individual pages or internet access was the wrong way and would result in a serious curtailment of the freedom of communication of individual users. Instead, the justice minister advocates educating and informing users. She supports "online warning signs" that would inform users immediately before they perform an illegal download that they are about to break the law.¹⁰ The minister failed to provide any details about its actual implementation, however.

Interests must be weighed up

The interests of the parties involved in the legal dispute concerning copyright threaten to drift even further apart. While the rights holders carry out cost-intensive lobbying to argue for greater enforceability of current copyright legislation so that they can cling to their partly outdated business models, less attention is paid to the interests of creative people and internet users. Copyright law could be successfully reformed if, in addition to the views of the rights exploiters and the artists, the interests of internet users were also to be taken into account. The growing indifference of many internet users towards copyright infringements sends a clear message.

3. "Soft" copyright – free licensing models

There are alternatives to traditional copyright law. Law professor Lawrence Lessig founded the "Creative Commons"¹¹ (CC) initiative with the objective of creating a bigger and richer "knowledge commons". He is not opposed to copyright on principle and naturally considers the commercial exploitation of works to be worth protecting. One elementary instrument in our economic order is the protection and the importance of copyright. However, the balance has been upset by the opportunities opened up by digital technology. Lessig therefore categorically opposes the overly restrictive application of intellectual property rules to intangible goods.

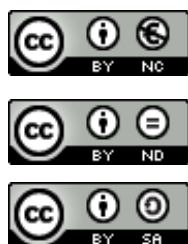
Lessig's rallying cry is that "overregulation stifles creativity. It smothers innovation. It gives dinosaurs a veto over the future. It wastes the extraordinary opportunity for democratic creativity that digital technologies enables."

The non-profit-organisation offers "open content" licences based on existing copyright law. They consist of six open licensing models that enable the authors of intellectual property to change "all rights reserved" into "some rights reserved", which allows more freedoms to be granted than up until now. The author does not of course relinquish his statutory copyright or exploitation rights, but he can simplify the use (e.g. the copying) of his work and thus its dissemination via licensing models. One elementary difference consequently is that authors themselves and not lawmakers decide under which conditions others may use their work. This shortens the individual clarification process for the author and the consumer. Standards apply.

⁹ World Intellectual Property Day.

¹⁰ Federal German Ministry of Justice. Berliner Rede zum Urheberrecht. Berlin, June 14, 2010.

¹¹ <http://creativecommons.org/>.



For example, stipulations can be made (see pictograms in the margin) that the use for commercial purposes is forbidden (*nc = no commercial use*), other users can be forbidden from revising the work (*nd = no derivatives*), thereby restricting use to the reproduction of the work in its original form. The licence can, however, also oblige others to make their derivative works publicly available to others under the same licence (*sa = share alike*). The latter type of licence made it possible for “free software” to be developed in the first place. This is the only way that the respective source code can be modified and continuously optimised. The named licence types can be combined with one another. The attribution obligation (*by*) is, however, a condition of each open licence. Regardless of the freely chosen type of licence, the author himself always retains the copyright in his creative work. The licensing models of Creative Commons are available in different languages and are also tailored individually to the differing national legislative conditions in order to keep in step with the increasing international transparency and harmonisation.

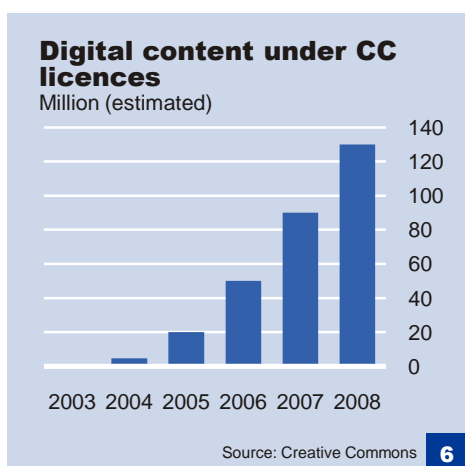
Where CC is already in use

Whereas when we started producing this publication Google listed 157 million entries for the term “Creative Commons”, by the time we achieved completion the number had already risen to 181 million. The Creative Commons movement gained a high profile thanks primarily to the US election campaign of Barack Obama. His website and the majority of its press releases were made freely available under CC licences.¹² This made it easier for many bloggers, journalists and other geographically dispersed social media users to carry out international reporting on election campaign events. Ultimately this proved to be a successful marketing strategy for Obama. The BBC (British Broadcasting Corporation) is currently planning a digital film archive (to be called the Creative Archive), which is to contain all works available under a free licence.¹³

In Germany, for example, the University of Tübingen document server offers its authors two types of Creative Commons licences. In addition, the Max Planck Society and the Helmholtz Association offer free licences to ensure sustainable technology transfer for the good of science.¹⁴ TV programmes such as ZDF’s “Elektronischer Reporter” are also available online under CC. Since the end of 2008 Germany’s Federal Archives (*das Bundesarchiv*) has made more than 100,000 images available online under free licences. Moreover, millions of people access digital content every day that are also posted under CC licences on Wikipedia or Flickr.

4. Process opening is a valuable instrument for promoting innovation

Opening value creation networks and the resultant expanding volume of digital, free content (e.g. e-government, wikis, Open Design, Open Music, Open Science, Open Access) are giving the internet a less regimented dimension. New applications in knowledge management are emerging, technology transfer is being stimulated and new business ideas are materialising for the self-employed. Information is being exchanged faster and more



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¹² <http://www.whitehouse.gov/copyright>.

¹³ <http://www.bbc.co.uk/creativearchive/>.

¹⁴ Both research institutes also signed the Berlin Declaration advocating open access to scientific knowledge in 2003. <http://oa.mpg.de/openaccess-berlin/berlindeclaration.html>.

Grasp opportunities

efficiently. The result is a larger knowledge commons that benefits a broader section of the population.

Even though some established business models from the analogue world are set to become extinct, the digital world is generating a myriad of new business models and ideas, especially in the service sector, too. This does, however, require creativity.

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