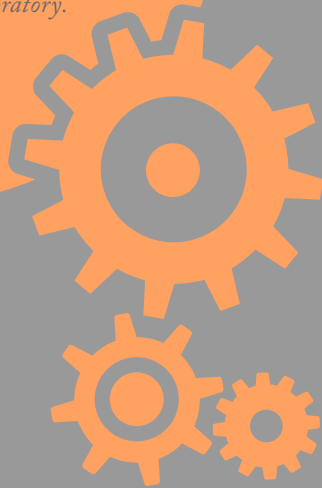


“Regulatory Systems for Informational Goods”

Copyright in the Digital Future

*A publication by the
Internet & Society Co:llaboratory.*

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[This publication is a translated and updated excerpt from the Concluding Report that was produced during the third Co:llaboratory Initiative, running from October 2010 until March 2011, dealing with Future Regulatory Systems for Immaterial Goods. The full report in German can be downloaded and ordered in print via the Co:llaboratory website at <http://collaboratory.de/english> French and English translations are underway.]

Preliminary Comment

The steering group of the Co:llaboratory was aware from the start that with its controversial topic, the third Co:llaboratory initiative concerning copyright would need be handled differently to the previous ones. Copyright is well known as a topic where opposing positions collide heavily. After a detailed discussion concerning the selection of participants for the third initiative's group of experts, the steering group made a conscious and transparent decision to work on a rather reform-oriented basis. In a selection including all lobbying groups, compromises and constructive results would have only been possible with a very restricted scope. This would have made the whole exercise quite pointless.

Ultimately a definitively heterogeneous yet open-minded group of experts was assembled for this third Co:llaboratory initiative, made up of seven lawyers, two archivists, four journalists, two artists, eight users, eleven scientists and seven additional experts from other contexts. These 41 experts first agreed to not consider the reform of copyright law in the context of present constraints, but to hypothesise about copyright in the distant future (»Scenario 2035«). The experts hoped that, by decoupling from the current discourse, a broader consensus would be achieved on new »guidelines for copyright law in the digital world«. However, due to the controversial nature of the subject matter, no consensus was in the end achieved on the essential issues in the course of discussions, despite all group members being in favour of reform. As a result, Dr. Till Kreutzer, heading the initiative, put together a »drafting group« in December 2010 to draft a set of »guidelines« and to draw up a discussion paper that would suggest innovative and comprehensive recommendations for the larger group of experts to debate.

In the smaller drafting group, a different selection of stakeholders (academics, archivists, journalists, NGOs such as Wikimedia & Creative Commons,

lawyers, platform operators and creators) were represented. Between December 2010 and mid March 2011, these eight authors formulated »guidelines« and introduced them to the larger group of experts for discussion at the workshop on 16 March 2011.

The paper's content and the manner in which it originated were retrospectively criticised by several members of the larger group of experts. They criticised the selection method for members of the »drafting group« as being not transparent enough, as well as the decision that the paper could only be viewed two days before the workshop. The steering group of the Co:llaboratory understands both of these concerns and would like to emphasise here that special attention will be devoted to addressing these issues in future. It is the nature of the Co:llaboratory to develop new working methods on an ongoing basis and this experience will flow into future projects.

The following »guidelines« are a contribution to the discussion. They make no claim to be generally valid and only represent the position of the drafting group. Immediately following the guidelines, the five critics briefly present their alternative views on the topic in a »dissenting opinion«. In addition, we are looking forward to a fascinating discussion of the guidelines in the new Co:llaboratory Paper Series. The critics of this paper will publish their own draft there and on the Co:llaboratory's website in the coming months .

Guidelines V 1.3

Guidelines for the Construction of a Regulatory System for Creative informational goods
Informational Goods

Authored by:

Dr. Per Christiansen

Lawyer for media research at Hamburg University

Jeannette Dietrich and Dr. Arnd Haller

Google Germany

Dr. Jeanette Hofmann
Wissenschaftszentrum Berlin

Dr. Paul Klimpel
Deutsche Kinemathek

Dr. Kaya Köklü
Max Planck Institute for informational goods and Competition Law

Dr. Till Kreutzer
Büro für informationsrechtliche Expertise, iRights.info

Dr. Georg Nolte
Taylor Wessing

Matthias Schindler
Wikimedia Deutschland e.V.

John H. Weitzmann
Creative Commons Germany, member of the Co:llaboratory steering group

Preamble

Regulations for creative informational goods are of fundamental significance for any knowledge and information society. Copyright law regulates the creation, production, distribution, perception and use of creative informational goods material. It increasingly functions as a kind of »Magna Carta« for the information society. The individuals involved and the general public will benefit more from creative informational goods material if copyright law fulfils its function better and strikes balances between interests more appropriately.

The dynamic nature of technical and social development in the information society, the consequences of digitalisation and the extension of distributed global networks, highlight the significance of copyright law while placing it, at the same time, under high pressure to adapt. Information technology creates great opportunities for creatives, users, innovators and society as a whole but the realisation of these opportunities is ever more dependent on the development of copyright law.

The following guidelines represent the result of the authors' detailed examination of what the central points of a regulatory system for creative informational goods should encompass. They are meant to stimulate a discussion concerning the fundamental long-term development of regulations for creative informational goods and to firmly delineate how copyright law in the year 2035 (selected for the purposes of example) must be conditioned so as to best reflect the cultural and social peculiarities of global knowledge and the information society. The guidelines are drafted using results that reflect the personal assessments and perceptions of the members of a group of copyright experts («drafting group») that was formed from a larger group of experts at the Co:llaboratory's third initiative. The personal opinions of the drafting group of experts need not coincide with the opinion of their employer nor need they agree with the collective assessments of the members of the larger group of experts involved in the initiative's deliberation processes.

The rapid development of the information society demands a fundamental reform of copyright law. The adaptation of individual aspects of an extensive »analogue« legal framework falls short in the digital age. The premise of these guidelines is that further development of copyright law can no longer be achieved by merely fine-tuning individual elements, because present copyright regulatory systems (international, multinational and national) are based on antiquated models from the »analogue age«.

Instead, fundamental reforms of intellectual property systems are needed, based on the value of creative achievement, the categorical examination of regulatory approaches and the principles of copyright law development for the digital world. At the same time, the foundations of today's copyright law, in the context of its changing function and increased significance, must continuously be re-legitimised. And last but not least, the scope of what is and is not worthy of protection must be scrutinised.

The guidelines intentionally do not refer to »copyright law« but refer rather to a »regulatory system for creative informational goods«. This neutral concept, which has not previously been introduced, is designed to express a regulatory system that brings a variety of protection and regulatory purposes to the table and does not focus exclusively on the protection of creatives. On the other hand, this concept is designed to help erase the historical dichotomy between copyright law in Continental European (*droit d'auteur*) and Anglo-Saxon copyright law which, in an increasingly globalised world, results in considerable obstructions to usage and distribution.

Regulatory Aspect 1

Regulatory objectives and the functions of a regulatory system for creative informational goods in the digital world

1. Overall approach to the substantiation of regulatory objectives

The overall objective of a regulatory system for creative informational goods is to promote creative achievements and advance cultural, scientific and technological progress. In this respect, the regulatory system serves both the interests of the general public and those of the individual. Granting subjective (in some cases exclusive) protection rights also serves the interests of the general public. However, such protection rights are no end in themselves. The »present logic behind property law« is not a suitable legal basis for the protection of creative informational goods. It is not suitable because it is inefficient and runs counter to an a priori neutral balance of all interests involved.

2. Ordering and regulating system

A regulatory system for creative informational goods needs to provide legal boundaries for the creation, distribution and use of creative material. It needs to regulate the relationships between participating interest groups (i.e. the creatives, distributors, users and intermediaries) and accordingly provide an ordering and regulating system for the complex legal circumstances that relate to the development, availability and usage of newly conceived as well as legacy material. As a result, the proposed regulatory system for creative informational goods will not see itself as a one-dimensional protection and defence mechanism that primarily focuses on the protection of the owner (creator or user). Rather it will serve as a multidimensional structural reconciliation of the interests of all who participate in the creation, production, distribution and use of informational goods. »Intermediaries« promote or enable the availability of creative property through secondary offerings, for example through aggregation, search or technical infrastructures on the Internet. In a digital (online) world, the services of mediators influence the usability of creative informational goods to a large extent because they select it (e.g. as editors, publishers and content scouts), systematise it (e.g. as

archives, libraries and repository providers), make it findable (e.g. as search engines, registers and metadata aggregators) or provide the prerequisites for use (hardware, software and services). In this manner, intermediaries and their offerings promote the development, distribution and use of creatively produced material, and this is why their interests must be appropriately considered when designing an ordering and regulating system for creative informational goods.

3. Protection of creative achievements

In order to promote creativity, the regulatory system for creative informational goods must prevent third parties from publishing, changing and, above all, exploiting the achievements of creatives against their will. Such protection seems necessary for all the interests involved. The proposed regulatory system opens up the additional possibility for creatives to negotiate remunerations for the use of their achievements under fair and well balanced conditions regarding bargaining power. In this regard, this regulatory system makes a distinction between creativity as an intrinsic human action that one can »promote« by giving it space, and creativity as an action triggered by economic »incentives«.

4. Investment protection and incentive

Moreover, a regulatory system for creative informational goods sets targeted and sustainable incentives for investment in the creation, distribution and brokering of creative material. This, however, happens only insofar as the mechanisms that exist apart from regulatory incentives do in fact not trigger such investment enough, meaning that other motivations structurally fall short in this respect. For a defined set of cases this may require the use of material to be subject to approval.

5. Promoting innovation

An appropriate regulatory system for creative informational goods must also promote technical innovations that serve the creation, distribution and brokering of creative achievements. This function must be fulfilled regardless of whether innovation and additional values is provided by the creatives themselves, by users or by third parties.

6. Structural reconciliation of interests

If the objectives of the proposed regulatory system for creative informational goods lead to conflicts between the interests of those involved, it will structurally reconcile these interests. Reconciliation of interests is used exclusively to achieve the overall regulatory objective described in no. 1. This requires that the interests involved are valued equally, and that all participating interests must be brought to an appropriate balance in the event of conflict. A priori hierarchical valuation (e.g. of protection interest versus use interest) runs counter to this regulatory approach.

7. Regulatory intervention into competition

The proposed regulatory system for creative informational goods defines the legal framework for the marketing of those goods. Due to the special conditions of informational goods (limited substitutability and non-rivalry) specific interventions into free competition and freedom of contract are justified in the markets involved.

8. Competition restrictions through exclusive rights

Thus, restrictions to free competition must be tolerated as far as they are necessary for assigning informational goods to certain legal entities for a limited time through exclusive rights, creating for a limited time a content monopoly. In light of the peculiarities of informational goods and the markets, such monopoly positions seem necessary for the protection of creatives' interests and users' investments. Such interventions are only justified for as long as they are necessary for the fulfilment of regulatory purposes. If the intervention is no longer justified it must end.

9. Restrictions to freedom of contract in favour of creatives

Moreover, certain interventions to freedom of contract, in order to favour structurally disadvantaged parties or through the granting of a »claim for appropriate remuneration« or similar provisions in creator contract law are absolutely necessary.

10. Moral rights

The alignment of the regulatory system for informational goods towards the protection of general interests does not necessitate that the creator's Continental European moral rights will not be legally protected. Rather, moral rights (primarily the right to creative acknowledgment) are also of essential significance in the proposed regulatory system because they protect the elementary economic interests of creatives and by this promote creativity.

Regulatory Aspect 2

Usage authorisation and limitation

1. Criticism of the present protection and exception system

The present system, where comprehensive and exclusives rights are the rule and instances of freedom to use are the exceptions, runs counter to the objectives of the proposed new regulatory system for creative informational goods. The hierarchical concept of today is very strongly based on the fundamental idea of absolute protection for »intellectual property«. However, this hierarchical protection and exception system focuses too much on the particular interests of individuals (those of the copyright holders) and to a large extent neglects the interests of the common good. The balanced protection of creative informational goods is not sufficiently considered.

2. Criticism of the present prioritisation of interests

The current prioritisation of interests is neither required nor called for. A basic presumption that the protection of the »owner of the intellectual property« takes priority over opposing interests may have been appropriate at a time when the possibility of »using« works (in the sense of copyright law) beyond their intended use, i.e. beyond reading, listening, viewing, only existed for an extremely small circle of commercial entities who competed with each other as a rule. Today, the restrictions created by copyright law are primarily focused on the control and protection of competitors (copycats, reprinters), who saved themselves the cost of creating and producing the work and who therefore have an advantage in the market. Protection against private use, on the other hand, was unnecessary at the time today's copyright codes were

drafted, because private use in copyright law terms did not take place very regularly.

3. »Intellectual property« in the digital world

However, this situation has fundamentally changed in the digital world. The adherence to a basic principle of comprehensive protection for an individual's rights that only permits freedom of use in exceptional cases (»intellectual property«) has resulted in the massive spread of the control mechanisms created to enforce copyright law, into areas where the law had no previous influence whatsoever. Things are not how they were in the early days of printing. An absolute copyright in the digital world no longer merely provides protection against competition but also grants the de-facto authorisation to regulate and even (legally) control the method of reception for the end user (reading on digital devices). Yet, it had never been part of the original concept behind copyright, regardless whether looking at the Continental European or the Anglo-Saxon tradition, to allow the creator to control even the most basic consumption of creative works. The same applies even more to when copyright is extended to technical copies and also to the actions of technical service providers and »added-value information services« (intermediaries). In an increasingly digitalised environment, strict adherence to a fundamentalist notion of »intellectual property« gives rise to an underlying extension of regulations and restrictions exercised by copyright owners, who now have almost total control over use and consumption of a creative work. This has increasingly impacted the interests of those who want balanced protective rights that serve the common good.

4. Criticism of restrictions

Extensive restrictions of this kind were never intended by copyright law nor will they be adopted into other intellectual property rights (such as industrial property rights).

5. Conflict between the objectives for producing creative informational goods and the restrictions

Granting extensive control to copyright holders in the case of creative informational goods is neither necessary nor justified. It is also a contradiction. As a rule, such restrictions are specially created in order to

achieve the greatest possible publicity, i.e. for a work to be used by and available to as many people as possible. The basic prerequisites for this are unobstructed access and usage. Absolute property rights that more or less give any decisive power (power of restriction) to the respective copyright holder, are not only unjustified but they seriously compromise the rights of those in protected areas (e.g. the private sphere) and conflict with opposing interests that are also protected by basic rights (such as freedom of communication).

6. Structural reconciliation of interests

The occasional conflicts between the interests of creators, distributors, intermediaries and users means that these interests must, in principle, be considered equally - at least as far as they are protected by basic rights - in the granting of protection for creative informational goods. To arrive at a basic presumption like this in a regulatory system for creative informational goods, it is helpful and necessary to turn away from a system that is based on the logic of ownership. The dominant focus on the interests of the owner distorts the wider picture of conflicting needs. A rule/exception relationship does not exist in the sense that the free roam offered by the regulation of property provisions relative to the exclusivity rights of copyright holders would justify the exception, nor is the opposite the case. Rather the regulation of property provisions in copyright law is an instrument for reconciling the (often conflicting) interests of those concerned, which categorically do not exist in a hierarchical relationship, neither in one direction nor the other.

7. The advantage of general clauses

The Continental European restriction system - at least in light of the concluding restraint catalogue (art. 5 of RL2001/29/EC) held in the European Acquis Communautaire - is too inflexible to react promptly to social and technological changes in the use of creative informational goods. Consequently, conditions should be regulated using general clauses - for the purposes of legal clarity - in accordance with the pattern of the US American Fair Use Doctrine. The existing European system results in single-sided interventions for the reconciliation of interests, because although property rights can continue to develop and be extended, even without changes in the law (they are - at least in German copyright law - only listed as examples, open to interpretation by courts), the regulation of property provisions by definition in the aforementioned EU Directive cannot. The correcting and balancing functions that the regulation of property provisions should fulfil are

significantly weakened by this.

8. Area exceptions

Regulation of property provisions using general clauses could (and should) result in the clarification of which areas are exempt from protection by copyright law so that their usage can be facilitated by those who are favoured by the restrictions. Area exceptions are appropriate in situations where it is possible to weigh up the interests of those involved across-the-board, and for which an area exception appears to be necessary.

9. Public institutions

For example, an area exception would appear to be appropriate for the archiving of protected creative informational goods in public institutions. Such measures are of general interest as they serve the interests of creatives, producers, distributors and users alike. Consequently they should - without differentiation for technical and archival methods - always be permitted free of charge.

10. Private use

The same could apply - possibly against flat-rate compensation - to private use: Current copyright law is already based on the idea that the law only applies to certain marketing stages and therefore that a monopoly is not granted for every level of use. If this is the case (as it is for example with distribution rights which are limited – within the European Economic Area - to the right of first distribution), the copyright holders must themselves ensure that they earn their revenue for a higher level of distribution. If higher ranking conflicting interests speak out against restrictions in a certain area (for example with use in the private sphere) and/or if regulations that are easier to understand and manage are necessary in light of the special characteristics of the parties privileged by restrictions, then area-specific exceptions must be granted.

11. Compensation

Various instruments are available for the compensation for uses that occur within the scope of area exceptions or fair use. In many cases and where

practical, flat- rate compensation claims can be provided that are enforced either collectively (perhaps via distribution companies, collecting societies or other private sector »rights intermediaries«) and/or with the aid of technical settlement systems. At least must this apply if claims for compensation are subject to government regulations concerning amount and structure (as per the German Copyright Administration Act). To protect the participation interests of the creatives from the negotiating disparity that de-facto exists in many cases, they should be structured so that they are legally guaranteed, nonassignable and indispensable - at least relative to commercial users.

Regulatory Aspect 3

Moral Rights and Usage Rights

1. The relevance of moral rights

Moral rights are of considerable significance in a regulatory system for creative informational goods. They play a major role, particularly in an environment where many creators (sometimes then called »layman creators«/»producers«/»prosumers«) are producing their work for reasons of principle rather than solely or mainly for profit. Moral rights can enhance a creator's reputation and therefore also indirectly serve their financial interests. Above all, this applies for right of attribution. Also, the moral rights component playing a role in the right to make derivative works and in protection against mutilation should also be granted in the future - with an appropriate scope and as far as desired by the creators - to ensure the integrity of a work.

2. Development of moral rights for creators

Consequently, an effective protection of the moral rights of creators is desirable. However, when devising the creators' moral rights, attention must be paid to a balanced reconciliation with opposing interests, which under certain circumstances may call for restrictions if the respective constellation of interests make it necessary. Given the low intervention intensity of creator moral rights on the interests of third parties, such restrictions however are of significantly less significance than are those of exclusive exploitation rights.

3. Differentiated treatment

Because creators' moral rights and exploitation rights frequently serve different purposes and their intervention intensity is of different weight, it appears necessary to consider and treat their configuration, personal assignment and accruelement separately (as opposed to the German model of monism). This also applies, above all, to the duration of protection and to possible restrictions. Such a separation allows, inter alia, for a clearer differentiation between the interests of the creators and the interests of the users, compared the current system. To achieve this, exploitation rights and creators' moral rights should, in a dualistic sense have different accruelement prerequisites and runtimes, and different rights owners should be able to hold them.

Regulatory Aspect 4

The duration of protection for creative informational goods

1. Legitimacy of an appropriate duration of protection

A limited duration of protection of appropriate length is an important component of the proposed regulatory system for creative informational goods and a central instrument for the establishment of an appropriate balance of all interests involved. The duration of protection is a typified reconciliation of interests between the creatives and the owners of the exploitation rights, on the one hand, and the interests of third parties in freedom of use, on the other. If protection effectively means monopolisation or another kind of interventions in the market, these need reasons that justify them. The protection must end when its respective justification no longer applies. From this point of view, particularly for the duration of exclusive property rights, the basic principle for determination of an appropriate duration of protection follows: »as long as necessary, as short as possible«.

2. Aspects for determining the duration of exclusive property rights

As defined in no. 1, an »appropriate« duration of exclusive rights presupposes that the justification of creating a monopoly is found in the necessity of amortising investments and the ability to earn entrepreneurial

profits. Different goods have different exploitation circles and exploitation claims. A typified reconciliation mechanism has to factor this. The protection period should not be tailored for an exceptional possibility of a late return of investment or profit, that occur only for some goods. Instead, the exclusive rights will only be granted until the costs usually incurred for the production of the informational goods in question are usually amortised. Subsequently, the legal monopoly no longer applies and the initial user enters into free competition with potential competitors. Initial users and competitors enter into competition under the same conditions because the investments of the first purchaser were already amortised beforehand. In addition, the initial user has the advantage over the competitors of being entitled to claim further economic participation.

3. Necessity of a differentiation between exclusive rights and economic participation rights

Moreover the proposed regulatory system for creative informational goods, when allocating the protection periods, differentiates between the protection of exclusive rights and claims to economic participation. As far as there are concerns against an excessively long-lasting monopolisation through exclusive rights, these concerns are simply less valid for claims to monetary participation that extends beyond the duration of the exclusive rights of the respective owner(s). These claims serve the economic participation of the creator or user, however, contrary to exclusive rights, they do not hinder the use or re-exploitation by third parties. A graduated system of exclusive rights and claims for economic participation enables an appropriate, differentiated protection for the respective type of material.

4. Necessity of a differentiation between exploitation rights and creators' moral rights

Over and above this, in a structural reconciliation of interests it must be considered that exploitation rights and creators' moral rights have fundamentally different justification grounds. That differences must also be reflected in the determination of the duration of protection. It appears reasonable to protect creators' moral rights for a longer period than the period for which exclusive rights are given.

5. Criticism of an excessively long duration of protection for exclusive rights

A duration of protection that is uniformly allocated to all types of protected material, spanning the lifetime of the creator plus seventy years (or even longer), as it is presently regulated, is inappropriate at least for the allocation of exclusive exploitation rights. It hinders the attainment of the goals formulated in aspect 1, because it grants a monopoly position beyond the required scope. Overlong duration of protection for exclusive rights hinder cultural progress and technical innovation, because many works lose most of their economical value decades before their protection ends and at least in that period of time are effectively lost to society, some forever. Complex works, such as music or films to which a variety of rights exist, can be used and re-used by third parties with reasonable legal certainty and appropriate transaction costs only after they enter the public domain. In addition, overlong durations of protection hinder the usability of creative achievements, can cause legal uncertainty for republishing, (because the rights ownership is increasingly difficult to determine), in some cases result in the impossibility of licensing for a purely legal use, cause the phenomenon of orphan works, lead to excessively high prices and frequently result in underuse or non-use due to the artificially high transaction costs, increased by the legal monopoly.

This applies to digital re-use in particular, for which the marginal costs are so low that the probability of re-use by third parties and renewed use after the protective rights elapse is generally very high. Thus, if exclusive rights are allocated for too long, the probability is high that such material, for which exploitation only promises low prospects for profit (any more), can no longer be made available. Accordingly the material can no longer be used, although oftentimes it is culturally still in demand. Because economic and cultural interest as a rule are differently motivated, such conflicts of interest are systematically pre-established for across-the-board protection periods, and thus frequently overlong exclusive rights.

6. Reasons for a shorter duration of protection for exclusive rights

On the other hand, shortening of the duration of protection for exclusive rights counteracts the danger that digital material with a low earnings outlook (from the view of the rights owner) will no longer be made available. The renewed possibility for use - if necessary providing for continued economic

participation of the creator - can incentivise re-use for new creative purposes and investments. From the perspective of the creatorss there is an additional advantage of short-term exclusive rights in that they regain control over their works at an early stage (which is not the case when transferring long-term exclusive use rights for the entire term).

7. Economic participation rights

The shortened duration of protection for exclusive rights in the regulatory system for creative informational goods is compensated through subsequently granted claims for economic participation. These claims for economic participation arise when a justification for a monopolising exclusive right is no longer present. Claims for participation must be appropriate, i.e. not excessively high and not prohibitive in effect.

8. Combination models for duration of protection

The combination of limited exclusive rights and more extensive economic participation rights enables multiple models for the concrete formation of protection periods:

- Shorter duration of protection combined with subsequent economic participation rights

A fixed defined duration of protection of X years that is oriented to the typical average exploitation cycles/diffusion curves of the immaterial good traded on the respective market, is followed by a phase in which no exclusive rights but claims for economic participation (in an actual commercial exploitation of the object of protection) are granted for a defined term of Y years. These claims for participation can only be enforced collectively. Initial user (=last owner of the exclusive use rights) and creator each have their own mutually independent claims for participation in the revenues of subsequent commercial users (who henceforth can use the respective informational goods without the consent of one of the original rights holders). The claims of the creator are non-assignable and indispensable.

- Shorter duration of protection with the possibility of extension through registration

Exclusive rights will be granted for a basic duration of protection of X years

that is oriented to the typical average exploitation cycles/diffusion curves of the respective informational goods. Subsequently there is the possibility of extending the exclusive rights, once for a duration of another X years or a shorter additional time of Y years, through registration for a fee. Thereafter all rights expire. The registration income will be supplied to systems for subsidising creators (who by extension serve to promote culture).

- Shorter duration of protection combined with extension possibilities and/or economic participation rights

Exclusive rights will be granted for a basic duration of protection of X years that is oriented to the typical average exploitation cycles/diffusion curves of the respective informational goods. Subsequently there is a selection possibility: The exclusive right can either be extended once after the basic protection period expires, through a registration for a fee. Or the economic participation claims mentioned above enter into force. The participation claims only occur when the exclusive rights expire. The last owner of the exclusive use rights can exercise the extension option, i.e. the extension option can be exercised either by a user or by the creator (if he has not assigned his exclusive use right). If a user is the last owner of the exclusive use rights and decides to extend the exclusive use rights, the creator receives a (non-assignable and indispensable) claim for economic participation in the revenues of that last owner, unless a contractual agreement exists that is more favourable for the creator.

9. Dogmatic grounds for the duration of protection model

The recommended differentiation and allocation of the duration of protection corresponds to the systematic approach of the regulatory model for creative informational goods proposed here, being a predominantly market economy oriented protection model (except for the creators' moral rights). The model ensures that the law promotes creativity in the required scope, provides incentives for investment and innovation without impairing through an excessively long protection period the interests society has in an enriching cultural production, in a functioning market for such material, in technical innovation and cultural progress and in free dealing with creative endeavours. In other words, a duration of protection allocated in this manner ensures that exclusive rights and participation claims exist as long as it appears necessary to appropriately protect the required incentives for investments in the

respective creative informational goods (investment protection function) and the legitimate interests of the creatives in economic participation (alimentation and participation function). Protection ends at the time from which the common good interests in a prospering cultural production, free competition, technical innovation, as well as the free dealing with creative informational goods would be inappropriately impaired (balance function).

10. Control consideration

Alimentation interest of the creators: Long-granted exclusive rights are not necessarily advantageous for protection of the alimentation interests of the creators. Such protection can also effectively be ensured through claims to economic participation. From the perspective of the alimentation and remuneration interests of the creators these are frequently even preferential, at least if they are framed in such a manner that they are legally guaranteed, non-assignable and indispensable. At the same time, the disposition over exclusive rights is usually subject to unequal bargaining power market. Many creators must completely transfer their use rights to the initial user, without restrictions in time, content, or space (»total-buyout«). This is due to structural inequalities.

11. Creators' moral rights

For the creators' moral rights the applicable duration of protection of 70 years post Mortem auctoris appears to be appropriate. Even a longer duration of protection would meet little concerns. By 2035, reconciliation of interests should be regulated as follows:

- a) Through a clearly composed creator exploitation and moral rights law, which only extensively engages after a work is actively registered.
- b) Only indirectly via contracts with the creators, which in this regard are protected by a strong creator contract law.
- c) Through a recognition of the general public as private users that are not subject to any restrictions in use (see above).



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