Avenues to restructure the copyright regime

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Background

- Normative gap in copyright law: the current bundle of economic rights is not aligned with today’s creative process and exploitation of the resulting work.
- Poort’s argument: ‘reasonable exploitation’ + guiding principles & catalogue regulation.
- Rognstad’s previous article: catalogue could include specific legitimate purposes as falling outside the right to reasonable exploitation (e.g. parody).
- Suggestion: using cultural diversity as an overarching goal could provide opportunities to resolve conflicts between freedom of expression and proprietary rights (i.e. copyright).
Comments on Poort’s paper (another lawyer’s perspective)

- Nice reminder that the economic rationale for copyright ≠ maximum breadth of protection or maximisation of creative outputs;
- Role of courts? Legal certainty increased or decreased?
- ISPs: costs of false positives, but what about the cost related to ignoring false negatives?
- What’s next?
Restructuring copyright through cultural diversity

Art. 2.1 UNESCO Convention on the protection and promotion of cultural diversity: ‘Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed.’

“Diversity is something Europe has in abundance, across the cultural spectrum. We are home to an amazing amount of ideas, talent and creativity. World-class artists, creators, and the industry that supports them in their work. At the same time, there is a dark cloud lurking. Piracy.”

- Andrus Ansip at CEIPI/European Audiovisual Observatory event “Copyright Enforcement in the Online World”, 22/11/2016
The current reforms...

- Concerned about the ‘Value gap’
- Wish to ‘regulate ad-funded platforms’
- Increase reliance on AAPS
- Promote partnerships between platforms and RHs
- Require ‘complaints and redress mechanisms’
Clash between copyright and cultural diversity?

WTO-TRIPs
- Alienability
- Duration
- Scope of rights
- Exceptions

Cultural Diversity
- Copyright
- Freedom of expression

Human Rights Treaties and Conventions
- UNESCO Convention on the protection and promotion of cultural diversity
Do platforms currently promote diversity in cultural works?

Remarks:
- Based on Kris Erickson and al.’s dataset
- December 2016, 38.5% of content previously uploaded in 2011 is not viewable to the public on YouTube due to copyright concerns (32.1% blocked via Content ID)
- Only a few videos attract most of the views – the top-5 most watched videos, account for slightly over a half (55.5%) of all views while the top-10 account for almost a quarter (72.2%)
- Out of our cohort of 1839 videos, only 27 videos were effectively viewed in 2013 and only 20 remained in 2016
- As opposed to the absolute number of YouTubers sharing content, there is as little as 13 effective YouTubers in 2016
- Algorithmic blocking mostly efficient with sound recording and videos

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<th>Table 1: General descriptive statistics</th>
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<td>Descriptive statistics</td>
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<td>Live</td>
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<td>Manual copyright take down</td>
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<td>Algorithm copyright take down</td>
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<tr>
<td>Not available for other reason**</td>
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<td>Total N</td>
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<table>
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<tr>
<th></th>
<th>2013</th>
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<tr>
<td>Effective number of tubes viewed</td>
<td>27.2</td>
<td>20.2</td>
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<tr>
<td>Effective number of youtubers</td>
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<td>13.6</td>
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<tr>
<td>Top 5 youtubers' share of total views</td>
<td>-</td>
<td>55.5%</td>
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<tr>
<td>Top 10 youtubers' share of total views</td>
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<td>72.2%</td>
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*Algorithm take down

**This includes take down for other reasons than a copyright claim.
Conclusion

What we have learned:

1. The current legal framework provides a conducive environment for ‘cultural black hole’
2. Copyright presumption reversed in the online environment
3. Algorithmic decision-making plays a substantial part in the works shared on platforms
4. Digital fingerprinting technology suitable for some works but not others
5. Algorithms can have a positive effect on diversity if targeting the most popular varieties

Cultural diversity should not be seen as undermining the economic rationale for copyright but restructuring copyright should take both into consideration.

This would reinsert balance ensuring better access and choices in the enjoyment of cultural expressions but also, contribute to promoting competition within the copyright system.

To be continued...