Paper prepared for the ESF Exploratory Workshop Consuming the Illegal: Situating Digital Piracy in Everyday Experience, April 17-19, 2011, Leuven (Belgium)

TRANSNATIONAL COPYRIGHT: MISALIGNMENTS BETWEEN REGULATION, BUSINESS MODELS AND USER PRACTICE

Leonhard Dobusch
Freie Universitaet Berlin – School for Business & Economics
leonhard.dobusch@fu-berlin.de

Sigrid Quack
Max Planck Institute for the Study of Societies, Cologne
quack@mpifg.de

TRANSNATIONAL COPYRIGHT: MISALIGNMENTS BETWEEN REGULATION, BUSINESS MODELS AND USER PRACTICE

> *"If economic losses are an indication of a crime's seriousness, and if current estimates are to be believed, then film 'piracy' constitutes a crime-wave nearing epidemic proportions."* (Yar 2005: 667)

Since the 1970s, the regulation of copyright law has developed from a very specialized legal field to one of the most controversial areas in international politics (Sell and Prakadesh 2004). The regulation of property and exploitation rights of intangible goods have increasingly become an issue of social and political contestation, both in public and private arenas (Dobusch and Quack 2010a). In the course of these contestations, notions of legality and illegality of usage practices in the internet have become both subject and means of discursive struggles over what constitutes socially acceptable and legitimate practices and what should be considered as inappropriate and illegitimate. In these struggles, the actors seem to assume and maintain that legality and illegality are clear-cut, well-defined and generally accepted notions beyond any doubt. In this paper, on the contrary, we argue that this is by no means the case. We demonstrate that the legality and illegality of internet usage practices are socially constructed notions which have been changing over time and are likely to do so in the future as a result of shifting social power relations. In particular, we maintain that in the context of online copyright infringement, the title "consuming the illegal" is misleading in at least two regards.

First, the (il-)legality of many online consumption practices has been and still is far from clear. In the course of the diffusion of new technological developments, the borders between legal and illegal activities are regularly adjusted or even re-drawn (Wu 2010). Such processes of (re-)defining the (il-)legality of certain practices involve both state and non-state actors, who engage in what Black (2002: 163) terms "regulatory conversations", i.e. "communicative interactions that occur between all involved in the regulatory 'space'". Especially in the realm of business, what eventually is considered to be illegal is thus the outcome of continuous and, according to Braithwaite and Drahos (2000: 32) 'surprisingly deliberative' regulatory contests. Particularly in the last two decades in the field of copyright regulation, the set of practices considered 'illegal' has been neither stable over time nor across geographical boundaries. Both corporate and individual actors face – and may even try to create or exploit

– this legal or regulatory uncertainty. To address the issue of "consuming the illegal" therefore requires answering the questions, who determines what is defined as legal and illegal and how does this distinction become established in rapidly changing environments?

Second, the notion of "consumption" is increasingly inadequate or insufficient to describe a growing portion of online usage practices. 'Consuming' digital content online increasingly implies creatively transforming it and making it publicly available in form of user-generated content (UGC, see Elkin-Koren 2009), leading to neologism such as "prosumer" or "produser" (Bruns 2006). Even when taking into account that only a minority of users will actively interact with a certain piece of work while the majority will just consume it (van Dijck 2009), the fact remains that, on the whole, consumption of online content regularly and routinely interferes with extant copyright provisions. This user behavior, however, is enabled and enforced by corporate services, which – if not require – tempt such (potentially) infringing usage practices; examples are online video sharing platforms such as Google's YouTube (see Cha et al. 2007; Bajde 2010) or online social networks such as Facebook. Consequently, not only may the legality of consumption practices be in doubt but also changing and new consumption and usage practices feed back into regulatory processes, thereby further increasing the respective regulatory uncertainty for all participants.

In what follows, we want to reflect on the interrelationship between both these issues – legal uncertainty and changing user and business practices – in the field of transnational copyright regulation. Conceptualizing transnational regulation as an outcome of distributed agency (Quack 2007) requires a recursive perspective (Luhmann 2004; Nobles and Schiff 2009), in that the application of the code legal/illegal occurs within regulatory conversations, which are part of the regulatory system they both describe and constitute. As a consequence, there is no final and last authority deciding on the question of (il-)legality but rather are there competing authorities, co-constructing this demarcation in the form of (regulatory and non-regulatory) practices and related arbitral decisions.

Origins of Regulatory Uncertainty in the Field of Copyright

To some degree, uncertainty is an inherent feature of any legal or regulatory framework. Following rules always implies subsuming idiosyncratic situations under generalized prescriptions. These generalized prescriptions may come in form of specific rules or vague principles (Braithwaite 2002), but even the most specific prescriptions contain (at least: a grain of) indeterminacy. In arbitration or any due process of law, this indeterminacy is in turn

the motivation for opposing parties to submit to the process in the first place and, eventually, to accept decisions (Luhmann 2004).

In transnational governance, however, legal uncertainty is enhanced and multiplied by the lack of a universally recognized single authority in charge of law-making and the indeterminacy arising from the variety and distinctiveness of local contexts in which legal rules have to be applied. In the copyright field, we identify (1) international regime complexity, (2) regulatory asymmetries and ambiguities, and (3) regulatory drift as the major reasons why actors struggle with drawing the line between the legal and the illegal.

(a) Regime complexity

According to Alter and Meunier (2009: 16), "international regime complexity reduces the clarity of legal obligation by introducing overlapping sets of legal rules and jurisdictions governing an issue." Especially the lack of hierarchy distinguishes international from domestic regime complexity, albeit only "few studies and even fewer theories are available to guide scholars in thinking about the consequences of this complexity" (Alter and Meunier 2009: 13).

One consequence and source of regime complexity at the same time is the proliferation of forum-shifting tactics, where "[p]arties might move an agenda from one forum to another, exit a forum altogether[…], or pursue agendas simultaneously in multiple forums" (Sell 2010: 2). In addition to forum shopping in the political sphere, actors may also turn to private regulatory endeavors via standards (see Table 1), underlining Drahos' (2007) observation that "some negotiations are never really over".

Teubner and Fischer-Lescano (2004: 1004) go one step further and argue that the growing regime complexity "is not simply about legal norm collisions or policy conflicts, but rather has its origin in contradictions between society-wide institutionalized rationalities". Note that with this line of reasoning, Teubner and Fischer-Lescano dismiss reducing regime complexity to mere legal or political dynamics but at the same time acknowledge the relevance of those very dynamics for regulatory regimes.

It is in this context of overlapping regulatory regimes that increased precision of rules need not – and regularly will not – result in increased certainty. Since detailed provisions create internal inconsistencies and contradictions, loopholes and facilitate legal entrepreneurship in form of "creative compliance" (Black 2002: 180), attempts to regulatory mirror innovative

technological and market developments may paradoxically lead to increased uncertainty. And as demonstrated by Raustiala and Victor (2004) for the case of plant genetic resources, this uncertainty due to the existence of distinct but overlapping regimes and related forums for negotiation, may be multiplied by inconsistencies through implementation and interpretation processes on national levels.

Regime	*Forums*	*Regulatory outcome*
International treaties	WTO, UN/WIPO	TRIPS treaty, WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT)
(Supra-)national law	European Union, national legislative bodies	EU copyright directives, national laws
Private regulation via standards	Industry networks (CPTWG, SDMI), Standard setting organizations (Creative Commons, FSF)[1]	Digital Rights Management, Open Content Licensing

Table 1: Regulatory regimes in the copyright field

Regime complexity in the sense as we use it in the following is constituted by both overlaps of different functional regulatory regimes, as well as overlaps of different jurisdictional layers within a given functional multi-level regime. In the field of transnational copyright regulation, we find at least three overlapping regimes with related forums and distinct regulatory outcomes on both the transnational and the national level (see Table 1). In all these regimes we can observe actors pursuing (at least: partially) contradictory agendas in different forums. In the cases of international treaties and (supra-)national legislation, regulation is negotiated and conflicts have to be resolved in each forum, leading actors to pursue forum shopping strategies (Helfer 2004; Raustiala and Victor 2004). In the case of private regulation via standards, we find competing attempts of regulation with conflicts being resolved either in form of negotiation within certain forums or via competition for dominance among potential standard adopters (Dobusch and Quack 2010a).

(b) Regulatory asymmetries and ambiguities

Another source for uncertainty are regulatory asymmetries in terms of how specific provisions are crafted. Specificity may vary between different regimes or between different levels. Especially in the realm of international treaties "[n]egotiators adopt broad rules because it is extremely difficult to work out the fine detail for all contingencies ex ante." (Raustiala and Victor 2004: 302). (Un-)Specificity is however not equally distributed within a regulatory regime. According to Wielsch (2010: 3) an "early asymmetry in the international copyright

[1] Acronyms: Copy Protection Technical Working Group (CPTWG), Secure Digital Music Iniative (SDMI, disbanded in 2003), Free Software Foundation (FSF).

regime" is that "in the Berne Convention only the minimum standard of protection was mandatory whereas exceptions and limitations were discretionary and without any force in the absence of state action."

Even one of the core provisions of transnational copyright regulation, the so-called "three-step test" dealing with exceptions and limitations to copyright protection (see, for example, articles 13 in the TRIPS Agreement)[2], is an example for regulatory asymmetries and ambiguities. The three-step test was first introduced in the Berne Convention 1967 and can be characterized as "a flexible, open provision offering much room for interpretation" (Senftleben 2006: 407). As a result, the specificity of copyright exceptions based upon and consistent with the three-step test varies significantly, for example between the US and its unspecific Fair Use exemption and the European Unions exhaustive and comparably specific list of potential limitations in the EU Directive 2001/29/EC (see also Newby 1999; Ginsberg 2001).

Furthermore, specificity may vary across distinct but interlinked subjects even within one regime, something Yu (2007: 28) refers to as "issue-based conflicts". Compare, for example, the broad rules based upon the three-step test with the concrete and specific provisions dealing with (the circumvention of) copy protection measures in articles 11 and 12 of the WIPO Copyright Treaty.

Assessing the consequences of these asymmetries for the degree of regulatory uncertainty may then be further complicated when taking Braithwaite's (2002) arguments on legal certainty into account. As mentioned above, Braithwaite convincingly argues that regulation in form of specific prescriptions need not necessarily lead to greater certainty than unspecific or vague principles. His main hypothesis reads as follows:

> "As the complexity, flux and size of regulated economic interests increase, certainty progressively moves from being positively associated with the specificity of acts mandated by rules to being negatively associated with rule specificity." (Braithwaite 2002: 52)

Asymmetries in terms of specificity are further complemented by ambiguities, which may have been intentionally built into regulatory devices (Yu 2007). The TRIPS agreement, for instance, includes several passages that are not only vague but allow for different

[2] The respective passage in article 13 of the TRIPS Agreement reads as follows: "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."

interpretations and represent, at least according to Watal (2001) "constructive ambiguities", in that they preserve at least some national legislatory leeway (see also Raustiala and Victor's (2004) notion of "strategic ambiguity"). Another example is the already mentioned anti-circumvention provision in Article 11 of the WIPO Copyright treaty, which prohibits circumvention only in case a technological measure is "effective". This allows for interpretations ranging from very broad, i.e. effective in the sense of "in place", to very narrow, i.e. effective in the sense of "potent". This is also an example of how ambiguity increases regulatory uncertainty even though provisions are relatively concrete and specific.

Taken together, regulatory asymmetries and ambiguities foster or re-introduce differences even in inter- or supranationally harmonized regulation, thereby increasing regulatory uncertainty for transnational copyright-related practices.

(c) Regulatory drift

The reasons for regulatory uncertainty discussed so far – regime complexity as well as regulatory asymmetry and ambiguity – are more or less static characteristics of regulatory complexes in a certain field, which potentially obscure the demarcation line between legal and illegal at any given time. Logical consequence of these uncertainties is the growing importance of courts and other arbitral authorities for crafting and concretizing regulation when deciding individual cases (Quack 2007).

From a dynamic perspective on regulation, however, changes in meaning and interpretation need to be taken into account, which result from continuous (re-)application of certain legal rules. To a certain degree, applying rules necessarily results in (slight or marginal, but still) changing rules – a phenomenon referred to in the literature as "regulatory drift" (Ortmann 2010)[3]. In this context, Ortmann (2010: 206) describes why slight but recurrent deviation, resulting in unintended, subtle and long-lasting regulatory movements, cannot be avoided all-together:

> "[D]eviation allows for flexibility and situational appropriateness. […] If it were impossible to violate rules, there would be nothing for rules to regulate. Rules

[3] Discussions of "institutional drift" (Hacker 2004, Thelen and Streeck 2005) approach this phenomenon from a macro-perspective, referring to the gradual decay of institutions as a result of "slippage", i.e. when constituencies and practices to which institutionalized rules were directed gradually fade away.

> don't make sense with regard to either pure necessity or pure impossibility, but only with regard to contingency."[4]

Whether deviation in a grey zone or open rule-breaking will become accepted and legitimized as a legal practice or be defined as illegal practice, regularly becomes known only in retrospect.[5] A prominent case in the realm of copyright regulation for such a dynamic is Google's attempt of retroactively legalizing its (seemingly) illegal mass-digitization of books in the course of its Google Books project (for details see Samuelson 2010).[6] Exploiting extant regulatory uncertainty with regard to the scope of the Fair-Use clause in US copyright law, Google tried to settle related controversies and thereby (re-)define the scope of this clause in form of a private, court-approved agreement (the so-called "Google Books Settelement").

This also indicates, what will be the focus of the next section of this paper, namely how regulatory uncertainty may be reduced or enforced by usage practices of actors in the field.

Practicing Regulatory Uncertainty in the Field of Copyright

All three sources of regulatory uncertainty discussed so far have in common a concept of regulation that is the result of recursive processes of emergent and deliberative law-making by a distributed set of state and non-state actors (Quack 2007). Part of this are (discursive and non-discursive) usage and regulatory practices. For intellectual property regulation in general, Wielsch (2010: 9) describes this phenomenon as follows:

> "In the years after the conclusion of TRIPS it turned out that neither the WTO nor WIPO, the other big institutional actor in international IP policy, is the only author of IP rules with a de facto global reach. IP lawmaking on a global scale also occurs – among others – in the practices of multinational information industry actors; in the adjudication of national courts that are beginning to develop a private international law of IP; in the constraints digital technology places on behavior without regard to territory ("code is law"); in transnational

[4] Alluding to Wittgenstein (1958), Feldman and Pentland (2003: 101) argue that "no amount of rules is sufficient to specify a pattern of behavior fully, because the interpretation of any rule, or any part of a rule, requires more rules".

5 In this regard, we consider high regulatory uncertainty as potentially being an inspiration – if not a prerequisite – for innovation, which is why we do not deem regulatory uncertainty to be necessarily problematic or harmful. For an innovation to become established or settled, however, probably also requires reducing the regulatory uncertainty that inspired or enabled this innovation in the first place.

[6] Whether mass-digitization of books for providing services such as Google's Book Search, which presents short pieces ("snippets") also of copyrighted books, is covered at least by the US Fair Use clause is still an open question and thus a case of regulatory uncertainty. Also the recent rejection of the Google Book Settlement (Authors Guild v Google, March 22, 2011) has not clarified that issue.

> operating NGOs; in the activities of new actors who cooperate in transnational networks; in other international institutions that find their work affected by intellectual property law[.]"

When we now focus practices of non-state actors in the context of regulatory uncertainty in the field of copyright, we conceptualize 'a practice' in line with Reckwitz (2002: 249) as "a routinized type of behaviour which consists of several elements, interconnected to one other: forms of bodily activities, forms of mental activities, 'things' and their use, a background knowledge in the form of understanding, know-how, states of emotion and motivational knowledge." Analytically, we further distinguish two broad categories of practices: (1) regulatory practices intentionally and directly contributing to regulatory conversations sensu Black (2002) and (2) usage practices which do not directly address regulatory issues but might indirectly influence rule-making and rule-enforcement. Since the majority of the extant literature on regulatory processes deals with regulatory practices in the narrow sense[7] – even when only rarely adopting a practice perspective – we will elaborate on the second category of usage practices. More specifically, we approach them from the viewpoint of judicial practices of decision-making on cases for which the written law "on the books", i.e. international treaties and their national implementations, does not provide a clear-cut and generally accepted answer.

Even though not directly regulatory in nature, usage practices may – intentionally or unintentionally – contribute indirectly to regulatory conversations in that the respective (non-) compliance is inspiration for, subject of or even part of related regulatory practices. This is most obvious in the case of private regulation via standards (see Table 1), where adoption and compliance directly contribute to both legitimacy and effectiveness of the regulation, but holds to a probably lesser degree for any type of regulation, as well. The contribution of usage practices to legitimacy and effectiveness or regulation is thereby however only a side-effect.[8]

[7] Practices by non-state actors that directly address regulatory uncertainty via regulatory actions are, for example, lobbying to influence political rule-making processes (e.g. Lowery (2007) or developing and propagating private regulation in form of standards to account for perceived shortcomings in public regulatory frameworks (e.g. Dobusch and Quack 2010).

[8] Usage practices may nevertheless be strategically tied to regulatory uncertainty as demonstrated by Engau and Hoffmann (2011) in their assessment of corporate response strategies to regulatory uncertainty in the field of climate change regulation. They distinguish between a large set of potential response practices, subsumed under the four categories avoiding, reducing, adapting, and disregarding (Engau and Hoffmann 2011: 57). However, as we will demonstrate below, usage practices need not be strategically directed at regulatory uncertainty to have an impact on the respective regulatory conversations.

In the field of copyright regulation, particularly new online usage practices have been at the center of regulatory conversations since the emergence of the Internet (see, for example, Green 2002; Benkler 2006). Most importantly, in 1996 Article 8 of the WIPO Copyright Treaty introduced the "right of communication to the public", which endowed rights holders with an "exclusive right of authorizing any communication to the public of their works, by wire or wireless means". This provision and its national implementations respectively, is however be limited by exceptions compatible with the three-step test such as the US Fair Use clause or the European limitations and exceptions clauses. As a result, the introduction of this new "right of communication to the public" did not close but rather generated further regulatory conversations in the realm of new online usage practices.

Within these conversations, regularly two distinct types of actors are differentiated that are involved in online usage practices such as consuming, sharing or interacting with content online (see Table 2): (a) end-users and (b) intermediaries.[9]

For one, end-users – the group previously described as consumers – are confronted with questions regarding the legality of their online usage practices in a variety of contexts, ranging from watching movies online (Is consuming content from an illegal source legal?) over linking to content (Is linking to potentially illegal content legal?) to interacting with existing works online (Is adapting or remixing content legal?)

For another, (new) intermediaries such as the provider of online social networks or platforms for user-generated content (e.g. Facebook, YouTube) face *different* questions related to the *same* usage practices, in that they enable, foster or – as in the case of the Bittorrent peer-to-peer filesharing software[10] – to a certain degree require practices potentially conflicting with copyright regulation.

For both end-users and intermediaries, different usage practices may yield different regulatory consequences. While Tables 2 and 3 distinguish analytically between four different types of usage practices, empirically these might be difficult to separate. For instance, linking to a remix of two videos hosted at an online platform (e.g. YouTube) within a social network (e.g. Facebook) exhibits all of the practices mentioned below uno actu.

[9] Note that this analytical distinction may be empirically difficult or even impossible to make in the realm of new online practices such as peer-to-peer file sharing with peer-produced open source software tools.

[10] The peer-to-peer file sharing protocol Bittorrent is widely used (see Schulze and Mochalski 2009) for distributing large amounts of data such as videos by simultaneously downloading and uploading from all users interested in a given file. This requirement to not only download but also upload content makes any user a potential infringer, when the source file is not legally offered.

Online usage practices	*End-user*	*Intermediary*
watching/listening/reading (consuming in a narrow sense)	Is the source legal? Is watching/listening/reading from an illegal source legal?	Is providing tools for watching/listening/reading legal?
linking	Is linking to (illegal) content legal?	Is providing the tools for linking to content legal?
storing/offering	Is storing/offering the content legal?	Is providing tools for storing/offering (illegal) content legal?
interacting/creating online	Is interacting/creating with the content online legal?	Is providing tools for interacting/creating with online content legal?

Table 2: Online usage practices of end-users and intermediaries and respective questions of (il-)legality.

The answers to the questions listed in Table 2, given by either regulatory or arbitral authorities, are of importance for success or failure of related innovations and thus overall technological and economic development. Although all of the questions relate to (exceptions and limitations to) the right of communication to the public, regulatory uncertainty may stem from all three sources described in the previous section. Regime complexity is at stake when end-user and intermediary belong to jurisdictions with limitations and exceptions of different scope. The scope of these limitations and exceptions may in turn empower some actors while disadvantaging others and prone to changes – regulatory drift – over time.

As described, for example, by Wu (2010), specifically the history of modern telecommunication markets has been regularly shaped not only by legislation but also by litigation (see, for instance, the introduction of cable televison, Wu 2010: 180). Recent examples of paving the way for or shutting down new businesses and thereby often the overall business model have been the failed attempt to forbid the sale of portable MP3 devices (RIAA v. Diamond) or the successful litigation against (certain forms of) peer-to-peer file-sharing services such as Napster (A&M Records v. Napster) or, most recently, Lime Wire (Arista v. Lime Wire; Table 3 gives further examples, some of them taken from Elkin-Koren 2009; Riefa 2009; Borghi et al. 2010).

Especially the last two cases are instructive since both services did not directly host copyrighted materials without consent of the rights holders but fostered exchange by providing links to such content hosted by end-users (“peers”). Such ‘secondary infringement’, i.e. fostering infringement by others, was also an issue in trials involving end-users linking to content placed online without consent of the rights holder (e.g. Intellectual Reserve v. Utah

Lighthouse Ministry;) or to material in conflict with anti-circumvention provisions (e.g. Universal City Studies v. Corley, see Table 3).[11]

Online usage practices	*End-user*	*Intermediary*
watching/listening/reading (consuming in a narrow sense)	-	RIAA v. Diamond ("Rio case", 1998)[12]
linking	Intellectual Reserve v. Utah Lighthouse Ministry (1999)[13] Universal City Studios v. Corley (2001)[14]	A&M Records v. Napster (2001) Arista v. Lime Wire (2010) [15]
storing/offering	e.g. Warner v. DeWitt (2007) or Interscope v. Rodriguez (2007)[16]	Viacom v. YouTube (2007)[17] GEMA v. RapidShare (2010) [18]
interacting/creating online	Lenz v. Universal Music Corp. (2008)[19] Sapient v. Geller (2008)[20]	Warner Bros. Entertainment et al. v. RDR Books et al. (2008) [21]

Table 3: Exemplary court cases dealing with online usage practices of end-users and intermediaries

While we cannot go into the details of the cases listed in Table 3, we can draw at least three conclusions from this brief overview. First, only consumption in the most narrow sense – watching, listening, and reading by end-users – has *not* been subject of legal controversies in court. Second, consumption in a broader sense, understood as usage practices prevalent among large crowds – if not the majority – of end-user such as linking, storing or interacting with content online (see Yar 2005), has now continuously inspired legal controversy over the past decade and across different jurisdictions. Third, in the majority of cases the plaintiffs are representatives of established ("old") industry actors (e.g. Universal Music, Viacom, Warner Bros.) seeking to protect their business model against both new intermediaries and new end-user practices; directly and on a relatively broad scale targeting end-users not only via marketing and education efforts but also via litigation[22] is thereby a comparably new

[11] For the latter see also a recent decision by the German Bundesgerichtshof (Az. I ZR 39/08).
[12] Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., 29 F. Supp. 2d 624 (1998)
[13] Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp 2d 1290 (D. Utah 1999)
[14] Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001)
[15] Arista Records LLC v. Lime Group LLC, 715 F. Supp. 2d 481 (2010)
[16] An extensive collection of cases directly involving end-users can be found in the "Index of Litigation Documents Referred to in "Recording Industry vs. The People" prepared by Ray Beckerman, online: http://beckermanlegal.com/Documents.htm [March 26, 2011]
[17] Viacom International Inc., et al, v. YouTube Inc. and Google Inc. Case 1:07-cv-02103-LLS (U.S.D.C. Southern District of New York, filed 13th March 2007)
[18] OLG Düsseldorf, decision from April 27, 2010, Az. I-20 U 166/09
[19] Stephanie Lenz v. Universal Music Corp, Case 5:07-cv-03783 JF (U.S.D.C. Northern District of California filed on 08/20/08)
[20] John Doe aka Brian Sapient v. Uri Geller and Explorogist Ltd. Case 3:07-cv-02478-VRW (U.S.D.C. Northern District of California, filed 2nd March 2008)
[21] Warner Bros. Entertainment Inc. et al. v. RDR Books et al. (575 F.Supp.2d 513).
[22] See the instructive blog by Ray Beckermann, which presents an extensive collection of related law suits entitled "Recording Industry vs The People", http://recordingindustryvspeople.blogspot.com/ [March 29, 2011]

phenomenon, whereas legal battles against new intermediaries have always accompanied technological change and innovation (Wu 2010).[23]

The national character of these individual decisions may, however, lead to inconsistencies and thus even greater regulatory uncertainty in that different interpretations in this decentralized process of law-making feed back into the overall uncertainty and ambiguity of the respective copyright provisions. It is this transnational dimension that we will focus on in the subsequent section.

Transnational Regulation and Transnational Practices

Whether differences and contradictions between regulatory regimes and the respective decisions increase overall regulatory uncertainty, depends on the degree to which actors and practices span these different regimes. In the realm of copyright, regime complexity was and still is not so much a problem for activities restricted to one national jurisdiction; differences between transnational regimes are mediated and thus "resolved" via the specific national regulatory regime. However, as soon as activities transcend these national borders – something which has become ubiquitous for copyright related online practices – regime complexity increases regulatory uncertainty.

In terms of regulatory practices, transnational legal networks of private and public actors such as international arbitration courts (Lehmkuhl, 2003), intergovernmental and non-governmental organizations as well as national governments and transnational epistemic communities (Dobusch and Quack 2010b), provide the interaction context for building and developing an understanding of transnational regulation. Transnational regulation is thereby shaped in cyclical processes consisting of contractual innovation, legal standardization and legal normalization (for details see Quack 2007).

Especially the first of those regulatory practices, contractual innovation, is heavily tied to transnational usage practices in that it allows engaging in legal arbitrage at the borders of multiple jurisdictions – bending of existing law included (Carruthers and Halliday 1998). Samuelson (2004), for example, lists implementation differences with regard to copyright protection for software[24] and for DVD region codes[25] as cases for potential legal arbitrage,

[23] While one of the reasons for directly targeting end-user may be their new and previously unknown technological potential to create and distribute content online, another explanation may also be difficulties in targeting intermediaries due to regulatory asymmetries between jurisdictions (see the subsequent section below).
[24] The example deals with software licensing terms prohibiting reverse engineering (see Samuelson 2004: 226f.).

where high-protection rules of one country (e.g. U.S.) may be undermined by lower-protection rules of other countries (e.g. EU).

Another example mentioned by Samuelson (2004: 229f.), peer-to-peer (P2P) file sharing technologies, is even more instructive. As described above, both end-users and developers of P2P software have regularly been subject of legal controversy both inside and outside court. In the case of the P2P software Grokster, courts in the U.S.[26] and in the Netherlands[27] made contradictory rulings, leading Samuelson to conclude that

> "[t]he principal result of national differences on indirect copyright liability rules may be to shift development of P2P technologies offshore. The development and distribution of P2P technologies will not stop unless they are banned in all countries."

At the same time, these difficulties in legally targeting new intermediaries such as the providers of P2P technologies, may be one of the reasons why established industry actors as plaintiffs increasingly persecute individual end-users via litigation. While the providers of infringing technologies are seemingly able to exploit legal arbitrage, end-users often do not have the capability to do so in a similar way.

But even if decisions in different countries are in line, implementation and enforcement need not be. The reaction to lack of enforcement may therefore be not so much regulatory but rather in form of adapted business models. In China, for example, difficulties in enforcing both public and private regulation such as copy protection technologies ('Digital Rights Management', DRM), has led major corporate actors such as Nokia to forgo such attempts all together. Instead, the new business model seeks to compete with piracy by offering convenient and low-cost services *without* copy protection measures.[28]

Conclusions and Outlook

In his assessment of gobal 'movie piracy', Yar (2005: 677) describes a "piracy epidemic" as being "the product of shifting legal regimes, lobbying activities, rhetorical manoeuvres,

[25] "Developers of computer games may try to enhance their profits by embedding country or region codes so that their games will play only on platforms embedded with the same code. This allows game-makers to sell the same product at different prices in different countries." (Samuelson 2004: 228)
[26] Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd, 259 F Supp 2d 1029,1043,1046 (CD Cal 2003)
[27] The decision by a Dutch appellate court ruled that developers of file-sharing software were not liable for copyright infringement, even if their users might be (Samuelson 2004: 230).
[28] For details see http://governancexborders.com/2010/04/10/drm-in-the-music-industry-revival-or-retreat/

criminal justice agendas, and 'interested' or 'partial' processes of statistical inference". In doing so, he juxtaposes and contrasts his "social constructionist" perspective with a prevalent "realist" view, which explains "the 'rise of piracy' as the outcome of a range of social, economic, political and technological changes." In our paper, we attempt to go one step further. Not only is the debate around piracy manufactured and therefore socially constructed but the demarcation between legal and illegal – as a precondition for speaking about piracy in the first place – is so, as well. Paradoxically, this re-introduces a realist notion in a social constructionist perspective. In transnational legal fields such as copyright regulation, there is no single authority with the power to definitively decide whether certain practices are legal or illegal. As a consequence, not only the weak but also the most potent actors need to engage in regulatory conversations construing legality and illegality of internet usage practices. What is considered an illegal practice has changed over time (see, for example, Wu 2010) and is likely to change in the future.

In this context, one needs to be aware of the fact that proponents and opponents of extended copyright legislation and online copyright enforcement are using notions of legality and illegality for the purpose of strategically framing their aims and arguments in social struggles. Part of these struggles are presentations of copyright issues as being "resolved", certain usage practices being definitely "illegal" or "legal". A closer look at the literature, however, reveals that in many fields – even for legal practitioners – it is still very unclear and highly contested what is legal and illegal.

While public discourse on internet piracy and consuming illegal primarily focuses on end-users, our analysis rather suggests that many of the jurisdictional controversies about usage practices are currently fought out around intermediaries. Many of these intermediaries are experimenting with new business models and innovative technologies. While some of these new platforms such as YouTube achieved great legitimacy in spite of a substantial proportion of (seemingly) infringing usage practices (Shenkman 2008), others such as providers of P2P file sharing technologies have failed in gaining similar legitimacy in spite of a substantial share of non-infringing usage practices. None of these business models or innovative technologies is or has been by definition and ex ante "illegal". Yet, notions of legality and illegality might be strategically used by competitors from incumbent or "old" industries with the aim to prevent new market entrants.

Lastly, our study of the legal uncertainty surrounding online usage practices sheds a different light on so-called "internet piracy". How shall everyday internet users, mainly concerned with

their immediate goals of consuming, sharing or interacting with online contents of all kinds, easily determine whether their practices are 'legal' or 'illegal', when lawyers, judges, and legislators in different national jurisdictions disagree on these issues and novel technologies are escaping the scope of previously existing law anyway? So far we know only very little about the perceptions and strategies of end-users vis-à-vis the legality of their practices (see, for a notable exception, Bajde 2010). It would be interesting to study how end-users perceive the legality of their practices, to which extent they justify their practices as "civil opposition" to overwhelmingly powerful economic actors from the US media industry (Leung 2006) or as justified ignorance vis-à-vis incomprehensibly complex transnational law. It would also be an interesting topic for further research to investigate to which degree campaigns of the US media industry against piracy have contributed to a transnational collective identity in user communities and facilitated collective action.

References

Alter, Karen J./Meunier, Sophie (2009): The Politics of International Regime Complexity. *Perspectives on Politics*, 7 (1), 13-24

Bajde, Domen, 2010: Pirates online: How communities engage with copyrights and counterfeits: Netnography (Virtual Ethnography). Paper presented at the COUNTER Konferenz, March 23-24, 2010, Manchester, UK.

Black, Julia (2002): Regulatory Conversations. *Journal of Law and Society*, 29 (1), 163-196

Borghi, Maurizio/Gupta, Indranath/Hemmungs Wirtén, Eva (2010): Reusing Copyrighted Material in User-Generated Content. Paper presented at the COUNTER Conference, March 23-24, 2010, Manchester, UK

Braithwaite, John (2002): Rules and Principles: A Theory of Legal Certainty. *Australian Journal of Legal Philosophy*, 27, 47-82

Braithwaite, John/Drahos, Peter (2000): *Global Business Regulation.* Cambridge: Cambridge University Press.

Bruns, Axel (2006): Towards Produsage: Futures for User-Led Content Production. Paper presented at the conference "Cultural Attitudes towards Communication and Technology", 2006, June 28 - July 1, Tartu, Estonia, Online: http://eprints.qut.edu.au/4863/1/4863_1.pdf [March 20, 2011]

Cha, Meeyoung/Kwak, Haewoon/ Rodriguez, Pablo/Ahn, Yong-Yeol/Moon, Sue (2007): I Tube, You Tube, Everybody Tubes: Analyzing the World's Largest User Generated Content Video System. Paper presented at the IMC'07, October 24-26, 2007, San Diego, California, USA.

Dobusch, Leonhard/Quack, Sigrid (2010a): Copyright between Creativity and Exploitation: Transnational Mobilization and Private Regulation. Paper presented at the Fourth Villa Vigoni Conference on Economic Sociology and Political Economy: Transnational Coypright: Organization, Mobilization and Law, 12-15 Juni 2010, Lago Como, Italy

Dobusch, Leonhard/Sigrid Quack (2010b): Epistemic Communities and Social Movements: Transnational Dynamics in the Case of Creative Commons. In: Djelic, Marie-Laure/Quack, Sigrid (eds.): *Transnational Communities: Shaping Global Economic Governance.* Cambridge: Cambridge University Press, 226-251

Drahos, Peter (2007): Four Lessons for Developing Countries From the Trade Negotiations over Access to Medicines. *Liverpool Law Review* 28,11–39

Elkin-Koren, Niva (2009): Copyright and Its Limits in the Age of User-generated Content. In: Hemmungs Wirtén, Eva/Ryman, Maria (eds.), 2009: Mashing-up Culture: the Rise of User-generated Content.. Proceedings from the COUNTER workshop Mashing-up, 10-41

Feldman, Martha S./Pentland, Brian T. (2003): Reconceptualizing Organizational Routines as a Source of Flexibility and Change. *Administrative Science Quarterly*, 48 (1), 94-118.

Ginsberg, Jane C. (2001): Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions. *Revue Internationale du Droit d'Auteur*, 187, 3-59.

Green, Matthew (2002): Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet. *Ohio Law Journal*, 63, 799-818.

Hacker, Jacob S. (2005): Policy Drift: The Hidden Politics of US Welfare State Retrenchment. In: Streeck, Wolfgang and Thelen, Kathleen (eds.) *Beyond Continuity: Institutional Change in Advanced Political Economies*. Oxford University Press: 40-82.

Helfer, Lawrence (2004): Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking. *Yale Journal of International Law*, 29, 1-81.

Lehmkuhl, Dirk (2003): Structuring Dispute Resolution in Transnational Trade: Competition and Coevolution of Public and Private Institutions.In: Djelic, Marie-Laure/Quack, Sigrid (eds) *Globalization and Institutions.* Cheltenham: Edward Elgar, 278–301.

Leung, Tao (2006): Misconceptions, Miscalculations and Mistakes: P2P, China, and Copyright. *Hastings International and Comparative Law Review*, 151

Levy, Nichelle N. (2000): Method to their Madness: The Secure Digital Music Initiative, a Law and Economics Perspective. In: Virginia Journal of Law and Technology, 12, 1522-1687.

Lowery, David (2007): Why Do Organized Interests Lobby? A Multi-Global, Multi-Context Theory of Lobbying. *Polity* 39 (1), 29-54.

Luhmann (2004): *Law as a Social System.* Oxford: Oxford University Press.

Newby, Tyler G. (1999): What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law? *Stanford Law Review*, 51, 1633-1663.

Nobles, Richard/Schiff, David (2009): Jurisprudence as Self-Description: Natural law and Positivism within the English Legal System. In: Calliess, Gralf-Peter (eds.): *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag.* Berlin: Walter de Gruyter, 359-374.

Ortmann, Günther (2010): On drifting rules and standards. *Scandinavian Journal of Management*, 26, 204-214.

Quack, Sigrid (2007): Legal Professionals and Transnational Law-Making: A Case of Distributed Agency. In: *Organization*, 14, 5, 843-666.

Raustiala, Kal/Victor, David G. (2004): The Regime Complex for Plant Genetic Resources. *International Organization*, 58 (2), 277-309.

Reckwitz, Andreas (2002): Toward a Theory of Social Practices: A Development in Culturalist Theorizing. *European Journal of Social Theory*, 5 (2), 243-263.

Samuelson, Pamela (2004): Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections. *The University of Chicago Law Review*, 71 (1), 223-239.

Samuelson, Pamela (2010): Google Book Search and the Future of Books in Cyberspace, Forthcoming in *Minnesota Law Review*

Schulze, Hendrik/Mochalski, Klaus (2009): Internet Study 2008/2009. Online: http://www.ipoque.com/userfiles/file/ipoque-Internet-Study-08-09.pdf [March 31, 2011]

Sell, Susan/Prakash, Aseem (2004): Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights. *International Studies Quarterly*, 48, 143-175.

Sell, Susan (2010): Cat and Mouse: Forum-shifting in the Battle over Intellectual Property Enforcement. Paper presented at the Fourth Villa Vigoni Conference on Economic Sociology and Political Economy: Transnational Coypright: Organization, Mobilization and Law, 12-15 Juni 2010, Lago Como, Italy

Senftleben, Martin (2006): Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law. *International Review of Intellectual Property and Competition Law*, 37 (4), 407-438

Shenkman, Drew (2008): Copyright in the YouTube Age: Hosting and Linking of Online Video. Master Thesis, University of Florida, Online: http://etd.fcla.edu/UF/UFE0021926/shenkman_d.pdf [March 28, 2011]

Thelen, Kathleen/Streeck, Wolfgang (2005): Introduction. In: Streeck, Wolfgang and Thelen, Kathleen (eds.) Beyond Continuity: *Institutional Change in Advanced Political Economies.* Oxford University Press: 1-39.

Teubner, Gunther/Fischer-Lescano, Andreas (2004): Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law. *Michigan Journal of International Law*, 25, 999-1046

Tsingos, Thanos K. (2011): Liability of Hosting Provider with Regard to Open Libraries. In: Iglezakis, Ioannis/Synodinou, Tatiana-Eleni/Kapidakis, Sarantos (eds.): *E-Publishing and Digital Libraries: Legal and Organizational Issues*, IGI Global, 430-446

van Dijck, José (2009): Users like you? Theorizing agency in user generated content. *Media, Culture & Society*, 31 (1), 41-58

Watal, Jayashree (2001): *Intellectual Property Rights in the WTO and Developing Countries.* London: Kluwer International.

Wielsch, Dan (2010): Rules of Access in Copyright Law Beyond the Nation State. Paper presented at the Fourth Villa Vigoni Conference on Economic Sociology and Political Economy: Transnational Coypright: Organization, Mobilization and Law, 12-15 Juni 2010, Lago Como, Italy

Wittgenstein, Ludwig (1958): *Philosophical investigations.* New York: Macmillan.

Wu, Tim (2010): *The Master Switch: The Rise and Fall of Information Empires.* New York: Alfred A. Knopf

Yu, Peter K. (2007): International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia. *Michigan State Law Review*, 1, 1-33