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# - Droit d'Auteur in the information society

- Actual challenges to a copyright for the digital world

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<http://creativecommons.org/licenses/by-nd/2.5/ca/>

# AGENDA

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**1** Introduction: Copyright – A controversial issue

**2** 1st conflict: Authors vs. Content Industry

**3** 2nd conflict: Creators vs. creators

**4** 3rd conflict: Traditional content industry vs. the “new economy”

**5** The bottom line

# Copyright: A controversial issue

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- Copyright law regulates the Access, the control and the use of informational, communicational and cultural works
- Hence copyright issues are of fundamental importance for economy and society
- Today Droit d'Auteur is an omnipresent aspect in the media all over the world
- Most notably the balance between rights and exceptions is discussed extremely controversial between a number of interest groups

# Copyright: A controversial issue

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- Copyright faces a significant change of meaning:
- Information Society means inter alia: Nearly everybody uses, creates and distributes digital content, especially on the Internet and the “Web 2.0”. Thereby they get in contact with copyright
- It is no longer a special legal framework that concerns only professional artists and the industry
- Copyright rules the everyday life of most citizens. It has become an issue of significant public interest. That rises new challenges

# Copyright: A controversial issue

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- Simultaneously new stakeholders (esp. online services like Google) gained influence on the use and accessibility of copyright protected works and therefore emerged in the discussions about copyright law.
- The situation copyright has to deal with, becomes increasingly complex
- One challenge is that the traditional distinction between the groups of interests, whose concerns have to be balanced by copyright law, needs rethinking. New conflicts need to be settled
- The complex “new situation” copyright law faces in the digital world shall be illustrated by three examples

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# 1<sup>st</sup> conflict: Authors vs. Content Industry

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- Fundamental differences between authors and industry are widespread
- **Demonstrative example: Open Access for academic publications**
- All over the world (and esp. in Europe) scholars and academic institutions oppose the traditional system for academic publications
- Two reasons caused this development:
  - New possibilities to self-publishing
  - The “journal crisis”

# 1<sup>st</sup> conflict: Authors vs. Content Industry

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- The Journal Crises means a critical undersupply with information and literature in many academic institutions
- Reason: Library budgets stagnated or were even reduced over the years. Prices for academic (esp. scientific) periodicals increased massively
- Studies:
  - Average yearly price increase for academic journals: 15 – 20%
  - The average price increase between 1986 – 2000: 226%
  - Libraries in Europe spend up to 90% of their budget in journals
  - Many journals are not available anymore

# Cause: The economical paradox of the scientific publication system

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- ➔ Surprising effect: The state pays repeatedly for the same content
- 1. The state finances research and the creation of academic works through employed scholars (the authors)
- 2. The editorial process is mostly funded by public money since authors have to submit printable manuscripts in digital form
- 3. The peer-review-process is funded by the taxpayer because it is conducted mostly for free by academics who are employed with public institutions

# The economical paradox of the scientific publication system

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4. The authors assign the rights in their finished texts for free to the publishers and exclude themselves and their employer from any kind of own use („total-buy-out“)
5. After the articles are published in commercial journals the public institutions repurchase the content in form of expensive subscriptions (online or print)
6. Academic publications are noncompetitive. Publishers dictate the prices, institutions cannot even afford all the information they financed themselves, let alone all they would need – Result: **“Journal crisis”**

# Solution: Open-Access

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- Many authors and institutions promote Open Access publications
- Goal: Encourage and facilitate self-publications in public funded repositories, e-journals and other public online services
- Publication shall ensure (cost) free access to academic content by anybody

# Solution: Open-Access

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- Problem (among others): incompatibility with journal publications. Publishers demand exclusive – also online – rights from the authors. Authors cannot refuse (lack of market power)
- In order to “self-protect” them against buy-out-contracts of the publishers and to enable Open Access publications German academics demanded in the last German copyright reform (“2<sup>nd</sup> basket”, 2008) a:
  - statutorily granted
  - non-assignable
  - **right to self-publish** their own works after an “embargo-period” of half a year

# Solution: Open-Access

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- Legislator rejected the demand
- Main reason: Publishers vehemently opposed it
- On the one hand they alleged that they would willingly grant such rights by contract, on the other hand they resolutely rejected legislative measures. This would devalue “their” content.
- Subject matter will be discussed again in the 3rd basket (a further copyright reform that will be started next year). Prospects are not very good under the new conservative government

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## 2<sup>nd</sup> conflict: Creators vs. creators

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- Scope of copyright is controversial among creators
- Digital technologies are predestinated to facilitate the “Remix-culture” (i.e. forms of art and cultural expression that base on the remixing, rearranging, enhancing or reorganization of existing material)
- E.g.: Sampling, Appropriation Art, collaborative creation (like Wikipedia or Open Source Software), Video Art (like Machinima) – very popular, produce immense creative output

## 2<sup>nd</sup> conflict: Creators vs. creators

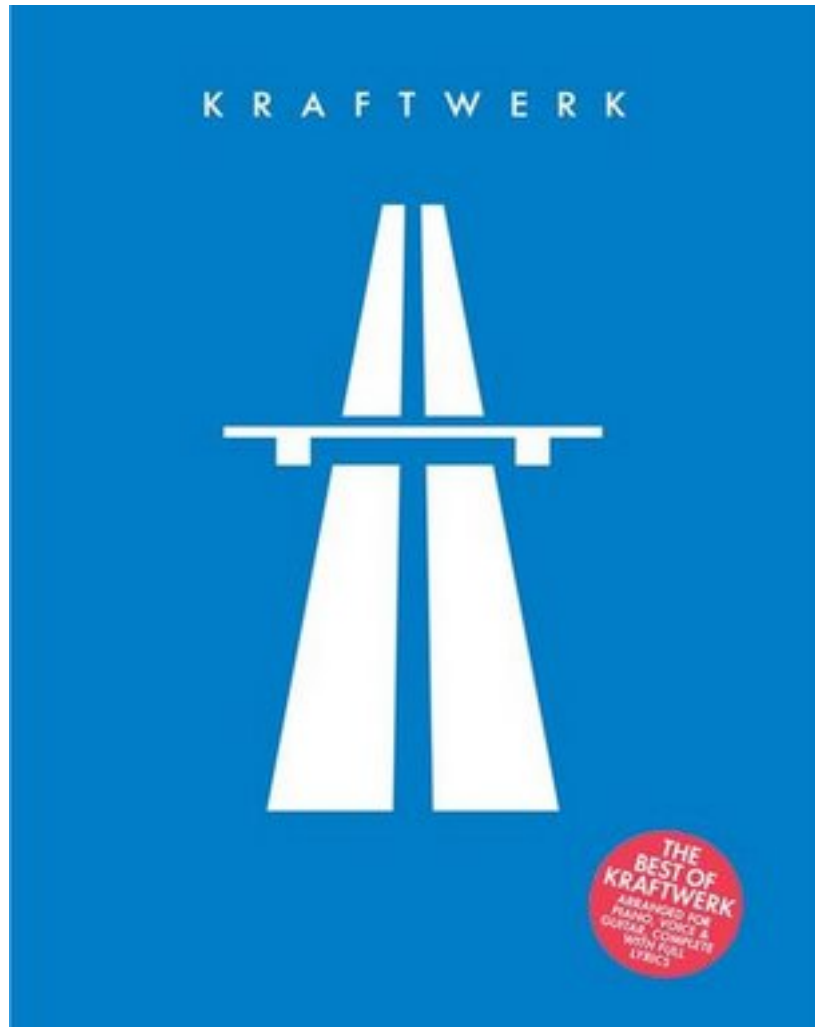
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- From copyright perspective: New forms of creativity bases mostly on “piracy”
- “Creativity of the masses” and “remix–art” are not possible under the “opt–in–principle” (no use without permission) or the absolute right to adapt the work. Obtaining licenses for every use of pre–existing material is mostly impossible
- Practices challenge the general principles
- And: They contradict the common practices of the traditional copyright industry (no use without license)
- With regard to the legal situation discrediting members of the modern digital remix–culture (professional artists as well as the blogosphere or the YouTube–Generation) as pirates or parasites is easy and even true

# German Federal Court of Justice – Metal on Metal

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- Spectacular case in Germany – “Metal on Metal”
- The German Hip Hop artist Moses P. used in his song „Nur mir“ a two second rhythm sample extracted from the Kraftwerk title „Metal on Metal“
- No rights were cleared, Kraftwerk claimed for an injunction and damages



# Permitted?

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- Decision of the Federal Court of Justice, November 20, 2008:
- Samples generally require approval
- Rights clearing obligatory irrespective of the sample's length otherwise infringement of audio recording producer's right (not: copyright!)
- Even single sounds can be protected against direct extraction!
- Unlicensed sampling only legitimate as "free use" if:
  - re-recording the respective sequence is impossible
  - sample does not contain parts of the melody

# Comment

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- Controversial decision: Evidently the Federal Court of Justice focused only on the intellectual property issue and disregarded in this course the freedom of art, cultural expression and other opposing aspects
- Hip Hop and similar styles of music use sampling as a means of expression and to pay due reference to other artists – it's not parasitism
- Rights clearing is too time-consuming, complex and expensive. The obligation to clear the rights for any tiny snippet hinders creativity, especially the work of semi- or non-professional artists
- That many artists share this attitude is demonstrated by the fact that millions of creators adopt alternative licensing schemes like Creative Commons to avoid excessive restrictions of copyright law and to encourage the creative use of their works

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# 3<sup>rd</sup> conflict: Traditional content industry vs. the “new economy”

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- New habits and methods of using and distributing copyright protected material lead to changing markets
- New kinds of content providers, users and added value service providers compete with the traditional content industry (publishers, music and film industry). Examples are:
  - Online-Content-Providers (e.g.: Google Books)
  - Information aggregators (Google Search Engine, Google News)
  - User generated content platforms (YouTube)
  - Computer-, Telecommunications-Industry (like Apple, Nokia)

# 3<sup>rd</sup> conflict: Traditional content industry vs. the “new economy”

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- Traditional content industry tries to abuse copyright law to perpetuate their markets and business models and to get rid of competitors or to profit from their success
- For Example: In Germany and Europe press publishers are demanding a new neighboring right for publishers
- Their Goals are:
  - Substitute the business model for the internet press publishers have not developed yet by legal measures
  - To obtain a new right (beyond copyright) to remuneration for the use of snippets in the Google search engine
  - To get money from ISP's for automatically generated ephemeral copies on e.g. proxy servers that are essential for any internet data transfer

## 3<sup>rd</sup> conflict: Traditional content industry vs. the “new economy”

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- Despite nobody so far presented any details let alone a precise draft for such a new right politicians adopted the demand obediently without any clue about the possible design or its consequences
- This is alarming as it demonstrates the politic approach!
- Introducing a new absolute right that extends the scope of the existing intellectual property rights needs carefully examination on the consequences!
- Any new right will restrict the public domain and the interests of the authors and the public!
- A right that monopolizes short sentences or headlines (in order to get money for the Google snippets) would be a substantial threat for new forms of publication (e.g. the blogosphere)

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# The bottom line

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→ Copyright and Droit d'Auteur development in Europe seems dramatically misdirected. Copyright policy needs desperately a fundamental rethinking that bases on the following conclusions:

1. Cultural expression is not parasitism!
2. Open Access is not piracy!
3. Search engines are no free-riders or “users” of copyright protected works but the most essential services on the internet!
4. Consumers are – most generally - not criminals!
5. The interests of creators and the entertainment industry are not identical

# The bottom line

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- The focus should shift
  - from: copy protection, prohibition rights and individual licensing
  - to: simplification, more freedoms for art and cultural expression and the access to knowledge (provided e.g. by libraries), collective rights management, alternative compensation systems like the “cultural flatrate” that is discussed these days in Germany

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**Thank you for your attention!**