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Necessity to License
Copyrighted Works: Perspective of Different
Creative Economies

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Summary

Under the current international framework of copyright, rights are automatically granted to all creators of eligible works regardless of their will. Elimination of formalities, formerly a necessary condition for grant of copyright, deprived creators of choice as to whether obtain rights with accompanying obligation for others or not. Copyright legislation has primarily been established for satisfaction of interest of creators pursuing monetary gain, who are often interested in control of works. However, contrary to simplistic formula ‘interests of right holders vs. interests of general public’, many creators do not need exclusive rights, legal tools enabling exclusion of others from use of works, as their motivations for creativity often involve possibilities to share fruits of their labour. The law mostly does not differentiate between interests of creators with different motivations.

Works of all creators cannot be used without their prior authorisation for the whole duration of copyright, excluding cases falling under limitations and exceptions to copyright. If right holders would like their works to be used they have to give authorisations, as unauthorised use is generally illegal. Legal instruments normally do not specify form of authorisations, however, in order for users to have some kind of proof of acquisition of necessary authorisations, they have to be in written form, typically in form of licenses. This creates necessity to license. Potential user have to ask for licenses and right holders if they consent, regardless of whether they create with intent of monetary profit or with other non-monetary motivations, have to license use of their works, as almost the only internationally accepted way to eliminate doubt in legality of use of copyrighted works, and thus avoid allegation in ‘piracy’.

Provisions of copyright law are generally not sensitive to different interests of creators and, consecutively, right holders. Right holders realise their interests through licenses by establishing legal setting suitable for their needs. In this thesis, all creators are viewed as participants of three different creative economies: commercial, sharing and hybrid – classification not new, but relatively recently gaining support. Participants of different economies have different interests, nonetheless, they all have to license. The thesis explores issues related to compliance with the necessity to license copyrighted works by participants of commercial, sharing and hybrid economies.

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Abbreviations

Bern Convention	Bern Convention for the Protection of Literary and Artistic Works, Paris Act of 24 July 1971, as amended on 28 September 1979
EU	European Union
ITU	International Telecommunication Union
Rome Convention	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, 15 April 1994
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1. Introduction

1.1. Overview

As a general rule, creative works under copyright can be used legally only if authorisations of works' right holders are acquired prior to their use, and if right holders would like their works to be used they have to grant permissions. This legal construction, peculiar to systems of property rights, virtually excludes uses of objects covered by exclusive rights without documented permissions of right holders. This rule of the copyright creates necessity to license creative works as practically the only commonly accepted way to document given authorisations. Modern architecture of copyright imposes, excluding uses falling under exception and limitations, the same regulation on different modes of social production, exchange and distribution of creative works – creative economies.

This thesis allies with an idea that the system of copyright should regulate different economies of creative production differently. Traditionally, legislators and researchers tend to put more weight on commercial activities neglecting methods of creative production that do not pursue monetary gain. The ultimate goal of copyright – promotion of creativity – cannot be achieved without balanced perspective on motivations of all participants of production and distribution of creative works. Research equally targeting all economies underlying creativity is a step towards balanced and informed policymaking.

1.2. Research Question

The central research question of the present thesis is the following: *What are issues related to the compliance with the necessity to license copyrighted works by participants of commercial, sharing and hybrid economies?*

1.3. Scope and Structure

Scope of the thesis is determined by its research question and space limits.

Legal analysis is limited to the major international treaties on copyright and provisions of some regional and national legislations. The analysis does not extend further than it is necessary for surveillance of major issues related to

the licensing of copyrighted works from perspective of commercial, sharing and hybrid economies. This thesis does not aim to provide solutions to the respective issues. This task is left for future research.

Scope of the thesis is limited to *copyrighted works* distributed through the *Internet* – the fastest growing medium for distribution of creative works. Notwithstanding the fact that the current number of people without access to the Internet overweight number of Internet users, this situation will inevitably change. To this date the number of Internet users has reached the two billion mark. The number is steadily increasing, and between 2005 and 2010 it has doubled¹.

Only works in a *digital form* are of the interest, as it is the only form in which they can be distributed via the Internet. Works ordered via the Internet and delivered on material media (e.g., CDs) are outside the scope of this thesis.

The thesis consists of introduction, three chapters, conclusions and bibliography.

The *first* chapter provides an overview of three types of creative economies: commercial, sharing and hybrid. The chapter explains how these economies work and what are motivations of their participants. Economic justification for establishment of copyright is also discussed. The chapter highlights significance of the copyright for every economy. The overview does not pretend to be comprehensive. It extends to the scope necessary for demonstration of the major differences between the economics that have to be taken into consideration by copyright legislation.

The *second* chapter analyses the international legal framework of copyright and necessity to license established by the framework. The chapter surveys scope, duration, grant of copyright and limitations and exceptions to copyright. The purpose of the overview is to check whether legislative framework takes into account interests of participants of different economies.

The *third* chapter discusses issues caused by the necessity to license copyrighted works, in the context of their use on the Internet. This chapter also focuses on licensing solutions implemented by representatives of every

¹ International Telecommunication Union, *The World in 2010: ICT Facts and Figures* (2010), p. 4.

of the economies discussed in the first chapter, as necessity to license applies virtually to all participants of the mentioned economies.

General *conclusions* complete the research and provide reasoned response to the research question.

1.4. Methodology

Legal analysis is the main method of the thesis. Provisions of legislation and licenses are the primary object of the analysis. Relevant studies, reports and practices are also approached from predominantly legal perspective.

In the first chapter, explaining creative economies, *economic and social studies* are used. Economic sources are used primarily in part about commercial economy. There is apparent lack of research on economics of copyright, unlike in the area of modern intellectual property law that is traditionally referred as industrial property, e.g., patent law, industrial design.² Therefore, often, results of economic studies that were not focused on copyright specifically, but on intellectual property in general, are used.

Non-economic studies, primarily *sociological* and *anthropological*, dominate the explanation of sharing economies. *Comparative, historical methods* and *statistical analysis* are also used, where it is appropriate.

1.5. Terminology

Literature on intellectual property and economics of intellectual property in general, and on copyright and economics of copyright in particular, contains many overlapping terms. Before proceeding to the substantial discussions, it is necessary, for the purpose of clarity, to provide explanation of terms use of which might cause ambiguity.

In this thesis, term ‘*copyright*’ covers notion of ‘*copyright*’ and ‘*related rights*’ if otherwise is not stipulated or is not apparent from the context of discussions. Notions of copyright and related rights are interpreted in light of respective international treaties. Provisions of these treaties are briefly described in the chapter about legal framework of copyright.

² W. M. Landes and R. A. Posner, *The Economic Structure of Intellectual Property Law* (Belknap Press of Harvard University Press, Boston, Massachusetts, USA, 2003), p. 5.

Copyright is a part of a broader notion '*intellectual property*'. If in the thesis something is said to be applicable to intellectual property in general it means that the same is true for copyright – set of norms effects of which are of the primary interest here. Terms '*intellectual property*' and '*intellectual property rights*' deemed to be synonyms.

'*Copyright-based industries*'³, '*copyright industries*'⁴, '*cultural industries*'⁵ and '*creative industries*'⁶ are terms commonly found in texts referring to industries that have certain relation to works covered by copyright. Sometimes these terms are used interchangeably⁷ and sometimes as defining different industries⁸. In the present thesis, term '*creative industries*' is used. It was chosen as the broadest in meaning of the above-mentioned terms.⁹ Use of this term allows to embrace maximum possible number of industries that have relation to licensing of copyrighted works on the Internet. Because of this choice terms '*creative economy*' and '*creative ecology*' are used in the present thesis.¹⁰ Although meanings of these terms are currently under discussion, it is believed that in any of their reasonable interpretations they suit the scope and purpose of this writing.

Terms '*creative works*', '*creative goods*', '*copyrighted works*', '*copyrighted goods*', and just '*works*' and '*goods*' are used as synonyms to define works

³ WIPO, *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* (WIPO Publication № 893, 2003).

⁴ S. E. Siwek, *Copyright Industries in the U.S. Economy: The 2003-2007 Report* (International Intellectual Property Alliance, Washington, D.C., USA, 2009).

⁵ K. Idris, *Intellectual Property – A Power Tool for Economic Growth* (WIPO Publication № 888, 2003), p. 101; Recital 11 of the Preamble to the Directive 2006/116/EC of the European Parliament and of the Council of the European Communities of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights.

⁶ R. E. Caves, *Creative Industries: Contracts between Art and Commerce* (Harvard University Press, Cambridge, Massachusetts, USA, 2000); WIPO, *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries – Creative Industries Series No. 1* (WIPO Publication № 624, 2006); WIPO, *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries – Creative Industries Series No. 2* (WIPO Publication № 1009, 2008); WIPO, *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries – Creative Industries Series No. 3* (WIPO Publication № 1017, 2009).

⁷ *Supra* note 3, p. 18.

⁸ UNCTAD and the UNDP Special Unit for South-South Cooperation, *Creative Economy Report 2010 – Creative Economy: A Feasible Development Option* (Document UNCTAD/DITC/TAB/2010/3, 2010).

⁹ *Ibid.*, p.5.

¹⁰ J. Howkins, *Creative Ecologies: Where Thinking Is a Proper Job* (University of Queensland, St. Lucia, Australia, 2009); J. Howkins, *The Creative Economy: How People Make Money from Ideas* (Penguin, London, UK, 2001); *Supra* note 8, p. 19.

under copyright or related rights within the meaning of respective international treaties. This has been done in order to reconcile reference to ‘works’ by legal literature and to ‘goods’ by economic.

There are some differences between ‘*free software*’ (sometimes also referred as ‘*free/libre open source software*’¹¹) and ‘*open source software*’. Each of these notions has its own origin and scope. The ‘free software’ was historically first of the two. It was defined and is promoted by the Free Software Foundation¹². Term ‘open source software’ is a craft of the Open Source Initiative¹³ and it is based on the ‘Open Source Definition’¹⁴. Creation of the second notion was intended to exclude confusion of ‘free’ with ‘gratis’. Worth noting that even a founder of the Free Software Foundation, Richard Stallman, acknowledged that this was ‘a valid goal’.¹⁵ In spite of this acknowledgement made by the proponent of ‘free software’, the discussed notions differ. ‘Open source software’ encompasses wider range of computer program.¹⁶ It includes types of work licensed under conditions that Free Software Foundation does not accept (e.g., combination of software with an open code with closed) – approach taken by the Open Source Initiative in its Open Source Definition is more inclusive. In the present thesis, term ‘free/open source software’ is used to indicate software licenced under any of licenses qualifying as ‘free’ or ‘open’. Differences between the two terms are knowingly neglected.

¹¹ D. Skidmore, ‘FLOSS Legal and Engineering Terms and a License Taxonomy’ in K. St. Amant and B. Still (eds.), *Handbook of Research on Open Source Software: Technological, Economic, and Social Perspectives* (Information Science Reference, London, UK, 2007), pp. 394-395.

¹² Free Software Foundation, *Free Software Is a Matter of Liberty, Not Price*, <www.fsf.org/about>, visited on 4 May 2011.

¹³ Open Source Initiative, *The ‘Open Source’ Label*, <www.opensource.org/history>, visited on 4 May 2011.

¹⁴ Open Source Initiative, *Open Source Definition*, <www.opensource.org/docs/osd>, visited on 4 May 2011.

¹⁵ J. Gay (ed.), *Free Software, Free Society: Selected Essays of Richard M. Stallman* (Free Software Foundation, Massachusetts, USA, 2002), p. 32.

¹⁶ M. Webbink, ‘Licensing and Open Source’ in B. Fitzgerald and G. Bassett (eds.), *Legal Issues Relating to Free and Open Source Software* (Queensland University of Technology School of Law, Brisbane, Australia, 2004), p. 4.

2. Creative Economies

‘Creative economy’ is a relatively recent concept. It is not yet well-defined and there are some discussions surrounding it. This chapter does not attempt to dot the i’s in these discussions, its goal is to provide an overview of different modes of social production, exchange and distribution of creative works – creative economies, for the purpose of this paper.

2.1. Commercial Economies

2.1.1. Fundamentals of Commercial Economies

In the most general sense, commercial creative economies can be defined as economic systems participants of which engage in production, exchange, distribution and consumption of creative goods. The main motivation that drives production of creative goods is monetary gain, which exceeds investment made into the production. This motivation is the ‘heart’ of these economies. Creators, i.e., human beings, in these economies are deemed to be ‘*homo economicus*’ (‘economic man’)¹⁷. *Homo economicus* is a behavioural model that assumes that actions of all human beings are governed by rationale aiming at maximisation of their utility. Many economists use this model to explain and verify economic theories and models.

The old capitalism was capitalism manufacturing material goods on factories. The new capitalism is about control of information and knowledge. Information is becoming ‘the prime resource’ of contemporary economic life.¹⁸ Reports show that there is tendency toward increase of consumption of information and that demand for it is steadily increasing.¹⁹ This change has drawn attention of industries and, in turn, policy makers and academicians to design of system of intellectual property rights, which essentially is a tool for control over intangible matters such as information

¹⁷ G. F. Gaus, *On Philosophy, Politics, and Economics* (Thomson Wadsworth, Belmont, California, USA, 2008), p. 19.

¹⁸ T. Mandeville, *Understanding Novelty: Information, Technological Change, and the Patent System* (Ablex Publishing Corporation, Norwood, New Jersey, USA, 1996), p. 3.

¹⁹ R. E. Bohn and J. E. Short, *How Much Information? 2009 Report on American Consumers* (Global Information Industry Center, University of California, San Diego, California, USA, 2009).

and knowledge.²⁰ In commercial economies, ownership or control of creative works increasingly means economic power.²¹

Economics is often used to explain necessity of public policies. This chapter will provide an economic perspective on necessity of the system of intellectual property rights.

Creative works to certain extent have characteristics of *public goods*²². Public goods are usually defined through two main characteristics – they are ‘nonrival’ and ‘nonexcludable’. The first characteristic means that use of a good by some does not affect its use by others. Nonrival good can be used by many simultaneously without reduction of good’s value for a user when another user is also using it. To say that goods are nonexcludable is to say that access to the goods cannot be easily blocked and that access by someone still enables possibility of access for all. Classic examples of public goods are the air that we breathe and a mathematical theorem. Breathing of the air by some does not affect breathing of it by others, nor can some be excluded from it. The same rationale applies to use of the mathematical theorem. It is important to stress the difference between copyrighted works and conventional means of their delivery. A few decades ago, songs were not separable from cassettes – means of their delivery. Development of digital technology has radically changed this. Creative works in digital format can be easily separated from material means of their delivery that are normally private goods (i.e., cassettes, CDs and other mediums alike are physical objects that are neither nonrival nor nonexcludable, and are normally owned by somebody).²³

Although creative works in digital form have some characteristics of public goods they are not ‘*pure*’ public goods. Some economists argue that use of works by competitors would undermine investments of original creators and deplete their profits, and therefore, these works are not nonrival in ‘*pure*’ sense of this notion. Producers attempting to maximise benefits deriving from fruits of their creation might try to exclude some from use of their

²⁰ P. Drahos, ‘The Universality of Intellectual Property Rights: Origins and Developments’ in WIPO, *Volume of Papers Presented at a Panel Discussion on Intellectual Property and Human Rights* (WIPO Publication № 762 (E), 1999), p.33.

²¹ I. F. Koenigsberg, ‘An Overview of the General Business and Legal Principles Involved in the Licensing of Copyright and Related Rights’ in WIPO, *WIPO Guide on the Licensing of Copyright and Related Rights* (WIPO Publication № 897, 2004), p. 4.

²² P. A. Samuelson and W. D. Nordhaus, *Economics* (McGraw Hill, New York, USA, 1992), p. 311.

²³ *Supra* note 3, pp. 19-20.

works²⁴. This is not easy in the digital environment. Nonetheless, use of technological protection measures has proven to be capable of achieving certain level of exclusion, at least for some time.

Traditional economic theory states that capitalism creates firms which then compete by offering better prices, quality and new products to consumers. This free-market process leads to innovation and economic growth. Later economic studies have shown that free market ('growth miracle of capitalism'²⁵) alone does not achieve optimal innovation and economic growth. Development in the free-market environment is a subject to many 'market failures', which prevent market economy from delivering the best possible outcome. It is argued that this issue required establishment of special public policies 'fixing' market failures.²⁶

If an original creator, who has incurred high fixed costs, distributes created works for a positive price (i.e., higher than zero), without some artificial instrument there is nothing that would prevent competitors from copying the works and redistributing them for a positive price lower than the price asked by the original creator. These who copy for the purpose of redistribution (often referred as 'free riders') may charge a lower price because they do not have to cover relatively high fixed costs of initial production. The ease with which works in the digital format can be multiplied infinite number of times, depriving original creators of compensation for their investment, creates a serious possibility of a market failure resulting in underinvestment into creativity and innovation.²⁷ It is said that the market failure takes place where markets fail to produce goods for which there is a demand.

Establishment of a *property system is a solution to the market failure* in underproduction of goods that have to certain extent characteristics of public goods. Property rights are commonly defined as "the ability of individuals to own, buy, sell and use their property in a market economy."²⁸. Theoretically, once property rights are assigned, contracts can be written and the market can then function properly. This should enable creators to charge others for benefits they gain from their creative works. Ultimately, the system of intellectual property rights should facilitate establishment of

²⁴ C. Greenhalgh and M. Rogers, *Innovation, Intellectual Property and Economic Growth* (Princeton University Press, Princeton, New Jersey, USA, 2010), pp. 18-19.

²⁵ W. Baumol, *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism* (Princeton University Press, Princeton, New Jersey, USA, 2002).

²⁶ *Supra* note 24, p. xii.

²⁷ *Supra* note 24, p. 22.

²⁸ P. A. Samuelson and W. D. Nordhaus, *Economics* (McGraw Hill, New York, USA, 1992), p. 31.

optimal level of creativity and innovation by making nonexcludable goods excludable, and thus providing incentives for socially desired production.²⁹ Currently, this is the most frequently mentioned economic justification for establishment of intellectual property system. It is referred not only in academic literature on law and economics but also in political discourse as an answer to the question: “Why do we have intellectual property law?”

In the context of the aforementioned conclusion about rationale for creation of the system of intellectual property rights, it is important to make three notes necessary for holistic understanding of the phenomena.

Firstly, establishment of *artificial property system is not the only solution* to the previously described problem of market failure. Public provision of public good, club provision and Pigouvian subsidies (Pigouvian taxes) are of the most commonly indicated policy alternatives addressing the problem.³⁰ Often some of these options were implemented and are functioning in parallel with the system of intellectual property rights.

Secondly, the above-described incentive-based argument justifying existence of intellectual property in general, and copyright in particular, is not the only argument. *There are other arguments* supporting existence of system of copyright, although not necessarily in its present form: natural rights arguments, reward arguments, neo-classical economics, arguments from democracy,³¹ etc.

Thirdly, no matter which of the theories scientifically reasoning establishment of the system of intellectual property rights will dominate the debate about rationality of having the system in the present days, the fact is that it was established by legislators under influence of powerful manufacturers and famous authors who strived to *increase their wealth rather than to satisfy public interests*³². As Peter Drahos has put it:

“This should not surprise us. The economic theory of legislation, the theory of public choice, argues that legislation is essentially a market process in which legislators and interest groups transact business in a way that sees the public interest subordinated to private interest.”³³

²⁹ M. Richardson *et al.*, *The Benefits and Costs of Copyright: An Economic Perspective* (Centre for Copyright Studies Ltd, Redfern, Australia, 2000), p. 7; *Supra* note 24, pp. 26-27, 32.

³⁰ *Supra* note 24, pp. 23-25.

³¹ L. Bently and B. Sherman, *Intellectual Property Law* (Oxford University Press Inc., New York, USA, 2009), pp. 35-39.

³² *Ibid.*, p. 39.

³³ *Supra* note 20, p. 32.

2.1.2. Costs of Copyright

“All legally enforceable rights cost money.”³⁴ Copyright is not an exception from this truth. Although economic argumentation is a cornerstone of today’s justification for existence of system of intellectual property rights, the same science that has built this argumentation has also highlighted losses – costs of having copyright legislation – which are presented by some as unavoidable consequences of allowing creators and industries to gain proceeds of their production and distribution of socially desired creative goods.³⁵

Creation of New Works

Some economists have concluded that there is no basis for confidence that the existing scope and duration of copyright is optimal.³⁶ They argue that expansion of scope and duration of copyright increases cost of access to existing works and transaction costs of creation of new works.³⁷ One of major inputs into new works is existence of previously created works. Therefore, rise of costs of existing works hampers creation of new – the purpose of creative process. Two major costs of copyright law are associated with introduction of monopolistic inefficiency³⁸ and transaction costs.

Monopolistic Inefficiency

Grant of copyright introduces monopolistic inefficiency³⁹. According to economic theory, resources are allocated efficiently if prices are equated to marginal costs. Often creation of copyrighted works has high fixed costs, e.g., films or computer games. Marginal cost of production of already created works (i.e., multiplication) and their recording on data mediums such as CDs is equal to cost of CDs’ production which on a large scale is practically negligible compare to the high fixed costs. In the digital environment, marginal cost of reproduction of creative works is zero. If zero

³⁴ S. Holmes and C. R. Sunstein, *The Costs of Rights: Why Liberty Depends on Taxes* (W. W. Norton & Company, New York, USA, 1999), pp. 13-35.

³⁵ *Supra* note 29, p. 13.

³⁶ For a general overview of scope and duration of copyright see chapter on legal framework of copyright.

³⁷ *Supra* note 2, p. 422.

³⁸ *N.B.*, copyright, as such, does not create economic monopolies. It grants legal exclusivity over use of copyrighted works that may confer some economic power.

³⁹ *Supra* note 24, p. 27.

price is charged then for-profit companies are not interested in production of works. If a positive price is charged for works production of which has zero marginal costs then some consumers are excluded, and therefore there is a loss of efficiency.⁴⁰ Copyright enables its holder to exclude others from use of creative works. This legally granted exclusivity of use allows charging prices above marginal costs of production and thus exclude some from enjoyment of benefits of creative goods.

Transaction Costs

In the absence of mandatory registration of existing copyrighted works⁴¹ and transfer of rights to them, it is becoming increasingly difficult to know ‘who owns what’ – the factual base essential for proper functioning of any property rights system. Creative works in digital form often do not contain information about their right holders, or if they do it is usually out-dated. After information about *inter alia* works’ right holders (part of ‘rights management information’,⁴²) is added to works and they are marketed, rights can be transferred from one holder to another without any alteration of the added information. In some cases, such transfer may take place several times while works are under copyright. Identification of a right holder requires time, involves costs and there is no guarantee that the search will be successful. Furthermore, once the right holder is identified there is a risk that permission to use needed rights will not be granted.⁴³ As a consequence, there are many valuable transactions which do not take place because of transaction costs.⁴⁴

⁴⁰ K. Arrow, ‘Economic Welfare and the Allocation of Resources for Invention’ in R. Nelson (ed.) *The Rate and Direction of Inventive Activity* (National Bureau of Economic Research/Princeton University Press, Princeton, New Jersey, USA, 2010), p. 616.

⁴¹ For a general overview of absence of formalities see chapter on legal framework of copyright.

⁴² Legal definition of this term can be found in Article 12 (2) of the WIPO Copyright Treaty, 20 December 1996.

⁴³ H. R. Varian, *Presentation at the Seminar on Copyright and Transaction Costs of WIPO Seminar Series on “The Economics of Intellectual Property” – Program 2010*, 14 September 2010, <www.wipo.int/meetings/en/details.jsp?meeting_id=20502>, visited on 6 May 2011.

⁴⁴ ‘IP’s Online Market the Economic Forces at Play’, 6 *WIPO Magazine* (2010), pp. 5-6.

2.1.3. Benefits of Copyright

Desirability of copyright law is intrinsically linked to the question of whether its benefits (promoting creative activities through monetary rewards) outweigh its costs (ineffective distribution and transaction costs).⁴⁵

A lot of knowledge has been accumulated about economic effects of functioning of a legal architecture of intellectual property rights. In spite of this when it comes to answering a question as general as whether overall effect of intellectual property rights is positive or negative for economic development there is no definitive answer, although equally general. As WIPO Chief Economist, Carsten Fink, put it in his recent interview to WIPO Magazine:

“... it is probably unrealistic to think that there will ever be a one-line answer to the question: is IP [intellectual property] good or bad for development?”⁴⁶

Economic laws are universal and today’s economy is globalized as never before. Nevertheless, assessment of costs and benefits of intellectual property right of numerous national legal systems with myriad of nuances, although harmonised to certain extent by international treaties, is even more challenging task than finding answer to the above general question.

In case of copyright, such assessments are particularly challenging undertakings and lack of thereof is apparent. While there is a significant volume of literature on patents and economic growth, copyright has traditionally been studied from legal perspective.⁴⁷ As copyright is unregistered right, unlike patent rights, it is difficult to calculate how much of it exists, how much is used and how much revenue it generates. Moreover, it is difficult to capture the value of copyrighted goods because works in digital format are normally not tied to material mediums.

Recent economic studies on copyright are limited to evaluation of economic contribution of so-called ‘copyright-based’ industries to economic growth of macroeconomic indicators of countries (e.g., industries’ share in Gross Domestic Product, generation of employment and trade).⁴⁸ Studies of

⁴⁵ J. Ordover and W. Baumol, ‘Antitrust Policy and High-Technology Industries’, 4:4 *Oxford Review of Economic Policy* (1988), p. 14.

⁴⁶ ‘Promoting Innovation: An Economic Perspective’, 6 *WIPO Magazine* (2010), pp. 2-4.

⁴⁷ *Supra* note 3, pp. 6 and 18.

⁴⁸ WIPO, *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries – Creative Industries Series No. 1* (WIPO Publication № 624, 2006), WIPO, *National Studies on Assessing the Economic Contribution of the Copyright-Based*

‘economic contribution of copyright-based industries’ can capture only contribution of industries to economy but not value of copyright, as such. Furthermore, it is impossible to examine size of economy without copyright and then compare it to the size after introduction of copyright.⁴⁹ Additionally, statistical analysis of macroeconomic indicators can indicate positive association of intellectual property protection and economic growth, but it cannot prove causality.⁵⁰ Here is how the United Nations Conference on Trade and Development (hereafter, the UNCTAD) and the United Nations Development Programme (hereafter, the UNDP) Special Unit for South-South Cooperation characterised existing methodologies in their 2010 Report:

“... the tools currently used for capturing income flows generated by the creative industries and translated into copyrights are partial or inadequate, and new ones need to be devised.”⁵¹

In any case, it can be acknowledged that the current copyright system certainly benefits some, otherwise it simply would not be in place. However, this cannot be considered a satisfactory answer justifying existence and/or inalterability of the system of copyright in its present form.

Economists have warned to be careful about use of term ‘society’ in assessments of benefits and costs of copyright.⁵² Different considerations should apply to assessments of benefits to global economy and to societies of different countries. For example, countries exporters of creative goods, e.g., films, benefit more than countries importers.

Some indirect indication of value of copyright can be obtained from courts’ decisions involving copyright.⁵³ However, value of only a handful of rights, compare to their overall number is decided in courts. Often holders prefer not to go through lengthy and costly enforcement procedures but to settle disputes privately. Details of such settlements are usually not announced to the public. Therefore, courts decisions are capable of reflecting only value

Industries – Creative Industries Series No. 2 (WIPO Publication № 1009, 2008) and WIPO, *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries – Creative Industries Series No. 3* (WIPO Publication № 1017, 2009).

⁴⁹ *Supra* note 3, pp. 18-19.

⁵⁰ *Supra* note 24, p. 329.

⁵¹ *Supra* note 8, p. 169.

⁵² *Supra* note 29, p. 10.

⁵³ M. J. Baker and B. M. Cunningham, ‘Court Decisions and Equity Markets: Estimating the Value of Copyright Protection’, 49 *Journal of Law and Economics* (2006), pp. 567-596; Y. Mazeh and M. Rogers, ‘The Economic Significance and Extent of Copyright Cases: An Analysis of Large UK Firms’, 4 *Intellectual Property Quarterly* (2006), pp. 404-420.

of rights that are valuable enough to litigate over them and disputes over which were not settled by parties outside courtrooms.

Another source of information about value of copyright is reflected by flow of revenues collected by collective societies. Nonetheless, this data considered to be sufficiently partial for relatively accurate estimation of value of copyright.⁵⁴

2.1.4. Concluding Remarks

Theoretically, copyright is supposed to provide incentives and rewards for commercial production and dissemination of creative works. It should be giving motivation to invest time, efforts and money in creation, production and distribution of works. Under these circumstances, costs of having copyright should be outweighed by its benefits. In practice, to this date, there is no economical proof that overall benefits of copyright exceed associated costs. There are no studies that would equip lawmakers with definitive economic estimates of costs and benefits of copyright, and most probably they will not appear in a recent future. A number of indicators, significant for economic estimates, precise information about which virtually cannot be acquired further complicate provision of definitive answers in the area of economics of copyright.

2.2. Sharing Economies

2.2.1. Fundamentals of Gift Economies

Creation and dissemination of creative works is also a part of sharing economies. These economies, unlike their commercial counterparts, do not have money in their core, and their participants do not participate in them for the purpose of monetary gain. Motivations of these participants often cannot be explained by means of traditional economic theory. Therefore, it can be said that these non-monetary economies are not ‘economies’ in a traditional economic sense of this term. It should not come as a surprise that notion of these economies has been developed by sociologists, as a concept explaining ‘irrational’, from conventional economic point of view, behaviour of participants. Actions of creators within these economies often cannot be explained using traditional ‘homo economicus’ behavioural model, because creators commonly act against the egocentric rationale

⁵⁴ *Supra* note 24, p. 45.

aiming at maximisation of personal utility. These economies are commonly defined by the term ‘gift economies’.⁵⁵

‘*Gift economy*’ describes economy that is not based on maximisation of personal monetary gain but is found on giving. Giving within this economy has always certain implications. French sociologist, Marcel Mauss, whose book ‘*The Gift*’ (1923) is without doubt the most cited work in discussions about gift economies, noted that three obligations are peculiar to these economies: the obligation to give, the obligation to accept, and the obligation to reciprocate. He observed that gift exchange is a ‘total social phenomenon’ that cannot be fully described by means of a single discipline be it economy, jurisprudence, sociology or else.⁵⁶ This part of the chapter about creative economies attempts to explain how sharing economies work.

Gift economy is the phenomenon that accompanies humanity since the ancient times and it has greatly preceded invention of money. Development of the latter, commercial economy, has not ejected the first but rather enriched human interaction. Nowadays, these economies coexist and are indispensable parts of our everyday life. Gift economies can be easily recognised by absence of money in exchange that takes place within them. Money is not only unacceptable but often harmful means of this exchange. In commercial economies, prices are the major incentives for allocation of resources whereas in gift economy ‘non-price-based’ social relations play this role.⁵⁷

Usually, academicians, who write about gift economies, start description of the phenomena from examples of behaviour within groups of people in ancient times and within tribes at the present.⁵⁸ Frequent examples from modern societies are about gift exchange between friends, relatives, lovers, classmates, colleagues, etc. Present to a friend is an example of gift exchange. In spite of the fact that neither a giver of the gift is bound by legislation to make the present, nor the friend is obliged to accept it and to reciprocate, all these acts are likely to take place as long as social bonds are maintained. More complex example is transplantation of parts of human body from one person to another. Excluding circumstances of extreme poverty and instances of illegal trade in human body parts, people do not

⁵⁵ D. J. Cheal, *The Gift Economy* (Routledge, London, UK, 1988); M. Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (Routledge, London, UK, 2002).

⁵⁶ L. Hyde, *The Gift: Imagination and the Erotic Life of Property* (AIT Trondheim, Norway, 1999), p. xv.

⁵⁷ Y. Benkler, ‘Sharing Nicely: On Shareable Goods and the Emergence of Sharing as Modality of Economic Production’, 114 *Yale Law Journal* (2004), p. 282.

⁵⁸ *Supra* note 56, p. 3.

sell parts of their body, although they can live without some of them. Interestingly, this ‘sacred property’ is often given for free to close people. Questions about rationale of such behaviour ignoring monetary incentives for giving have drawn attention of medical sociologists.⁵⁹

2.2.2. Sharing Economies

After proper foundation for further discussion is established, it should be explained why term ‘*sharing economy*’ is in a title of this chapter and not ‘gift economy’. These two terms define essentially the same phenomenon. ‘Gift economy’ was historically the first term for the aforementioned form of social production and dissemination of goods. Reference to ‘sharing economy’ can be found in more recent publications⁶⁰, although term ‘gift economy’ continue to be used. Sharing economies were enabled by the digital revolution. They embrace all the principles of the gift economies and differ in the form of objects of their exchange. Objects of exchange within sharing economies are in digital format. As it was mentioned in the first part of this chapter, digital goods to certain extent have characteristics of public goods – nonrivalry and nonexcludability. Therefore sending of a digital good to a friend via the Internet does not preclude a sender from enjoying the good, because normally not the good itself is sent but its identical copy. Equally, the sender is not excluded from enjoyment of the good because he/she has the copy. It seems that term ‘sharing economy’ better describes exchange during which goods are rather shared than gifted like material objects. Therefore, term ‘sharing economy’ is used in this thesis.

As it was explained, people within sharing economy are motivated by a set of social relations. However, they will not do something if they *dislike it* to a certain extent or it is too *expensive*. Although people participating in commercial economies might also not do something when they do not like it, the threshold for not doing something when they do not like it is much higher within commercial economies. Money compensates moral and physical struggle. Within sharing economies people mostly do something because they like what they do. Many creators do ‘*art for art’s sake*’. Their behaviour is often against the predictions of rational market labour theory.⁶¹ The Internet is particularly favourable environment in which sharing economy can flourish because communication within this network is

⁵⁹ *Supra* note 56, p. xvi.

⁶⁰ *Supra* note 57, p. 282; L. Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (The Penguin Press, New York, USA, 2008), pp. 143-176.

⁶¹ R. E. Caves, *Creative Industries: Contracts between Art and Commerce* (Harvard University Press, Cambridge, Massachusetts, USA, 2000), pp. 4-5, 31-34, 78.

inexpensive. This factor is important for participants of economies that do not generate monetary income. Moreover, ‘end-to-end principle’ embodies into the architecture of the Internet enables users from any corner of the planet with Internet access to share information with others.⁶²

Interesting feature of exchange within sharing economies is that objects of exchange are not necessarily equal in monetary terms. It is frequently not an exchange of approximately the same value, this exchange is generous and irrational from commercial point of view. For example, a scientist openly shared with others a couple of films documenting behaviour of some species so that *everyone can benefit* from his work. Another scientist *being grateful* for the shared material, in response, shares his film about another species. A biologist who wanted *to get in contact* with one of the previous scientists shared her collection of photos. Eventually, some enthusiast who *desires recognition* in the respective community releases a massive collection of films. From commercial perspective, such exchange is misbalanced because the works of sharing have different monetary values.

Absolute *absence of money* within sharing economies and *lower threshold for not undertaking some work* than within commercial economies, virtually unable creation of works which require significant financial resources. For example, fool-footed feature firms with film stars playing there and dozens of special effects are not produced within sharing economies. Nonetheless, there are notable examples of development of free/open source software or a free on-line encyclopaedia Wikipedia. Development of analogue works within commercial economy would require significant financial investments. These projects are possible because of often little but numerous individual contributions. Some claim that not all creative works can be built in such a way.

In the same time, creation of ‘art for art’s sake’ is capable of achieving results unattainable by means of monetary motivations only. No matter how much someone is paid, a person may not be able to compose as Wolfgang Mozart or to paint as Salvador Dali. Furthermore, these famous creators, like many others, most probably would not stop creating if they were not paid for their works but would rather find another source of income. These days amateur creators distribute their works on the Internet for free in the hope to become famous one day and may be, in the future, even get paid for fruits of their labour. Creation of a work does not guarantee that there is a place for it on the market. At least for as long as young amateur beginners

⁶² J. Zittrain, *The Future of the Internet – And How to Stop It* (Yale University Press, London, UK, 2008), pp. 162-165.

are not paid, they would like people to copy their works, to like them, to talk about them and to share them further. This is actually the way in which many have come to be famous. Of course, a lot of seekers of popularity, recognition and/or money do not achieve their goals. Still, *many of those who tried but did not succeed will continue to compose or to draw without monetary revenues from their labour*. Art continue to be a part of their being even if their full-time occupation, generating income necessary for living in the modern society, is absolutely not related to creativity.

Nevertheless, not all exchange within sharing economy is built upon willingness to share. Some gifts impose a strong obligation to reciprocate, create oppressive sense of obligation, manipulate, humiliate, establish and maintain hierarchies.⁶³ Commonly given example of giving which must be done is giving gifts on holidays (e.g., Christmas, New Year).⁶⁴ Although there might be some kind of negative psychological effect, there is no evidence that it hampers sharing or commercial economies, or creativity as a whole. Commercial economies frequently benefit from intensive gift exchange, especially on holidays.

2.2.3. Free/Open Source Software

Development of free and open source software attracted abundance of attention. There are many profound studies exploring social, legal and economic aspects of open source models of development⁶⁵.

Free/open source software movement and ‘collective-invention regimes’ have emerged as a consequence of dissatisfaction with performance delivered by proprietary models of software development relaying on contracts, secrecy and intellectual property rights.⁶⁶ Developers of free/open source software share their codes using legal technique of licencing known as ‘copyleft’ in order to keep codes open without a risk that someone might

⁶³ *Supra* note 56, p. xvi.

⁶⁴ M. Schumaker, *Sharing Without Reckoning: Imperfect Right and the Norms of Reciprocity* (Wilfrid Laurier University Press, Waterloo, Ontario, Canada, 1992), p. 34.

⁶⁵ K. St. Amant and B. Still (eds.), *Handbook of Research on Open Source Software: Technological, Economic, and Social Perspectives* (Information Science Reference, London, UK, 2007); J. Feller and B. Fitzgerald, *Understanding Open Source Software Development* (Pearson Education Limited, London, UK, 2002); E. S. Raymond, *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary* (O’Reilly Media Inc., Sebastopol, California, USA, 2001).

⁶⁶ A. Nuvolari and F. Rullani, ‘Curious Exceptions? Open Source Software and “Open” Technology’ in K. St. Amant and B. Still (eds.), *Handbook of Research on Open Source Software: Technological, Economic, and Social Perspectives* (Information Science Reference, London, 2007), p. 234.

claim ownership over works and prevent others from accessing them.⁶⁷ Since the beginning of this movement, thousands of computer programs have been created and released under open licenses, which ensure free use of the programs by others. Worth stressing that development of the Internet has enabled not only participation of programmers from different continents but has also ensured the widest possible distribution of collaborative results within *all societies* and groups. Such openness for participation and distribution of results is beneficial for developed and developing worlds.⁶⁸

This availability of information and increasing number of developers willing to participate in this economy enabled realisation of big projects such as operating system Linux, word processing suit Open Office or the second most popular web-browser Mozilla Firefox⁶⁹. These, indeed impressive, results question conventional commercial economic wisdom in many respects.⁷⁰ Firstly, as and within any sharing economy, creators of free/open source software do not get direct monetary revenue from sharing codes they have written. These projects were realised without centralised top-to-bottom system of subordination within communities of programmers. Before, it would seem impossible that decentralised development on a large scale may lead to creation of well-functioning software. Eric Raymond, developer and open source software advocate, called this mode of development '*bazaar style*' development.⁷¹

2.2.4. Motivations of Participants of Sharing Economies

Participants of sharing economies produce creative works and share them without direct monetary incentives. Non-monetary-based motivations lies at the core of these economies and these motivations are the driving force that makes these economies work. These motivations have drawn attention of scholars curious in functioning of sharing economies.

Academician, activist and one of founders of Creative Commons, Lawrence Lessig, divided *motivations*, inducing participants of sharing economies to

⁶⁷ *Supra* note 15, pp. 91-92.

⁶⁸ D. J. Halbert, *Resisting Intellectual Property* (Routledge, New York, USA, 2005), p. 47.

⁶⁹ Net Applications, *Browser Market Share*, <www.marketshare.hitslink.com/browser-market-share.aspx?qprid=0>, visited on 4 May 2011.

⁷⁰ *Supra* note 66, p. 227.

⁷¹ E. S. Raymond, *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary* (O'Reilly Media Inc., Sebastopol, California, USA, 2001), pp. 33, 38 and 47.

create and participate, on ‘me-regarding’ and ‘thee-regarding’.⁷² *Me-regarding* motivation is founded on possible benefits for creator from his/her participation in the economy. Previously given example about the biologist who shared information about some species with another scientist in order to get in contact with him illustrates me-regarding motivation. *Thee-regarding* motivation is based on effects of creativity that do not necessarily benefit creator. The line between these two categories of motivations is very fine. The scientist who shared his videos for the benefit of all did not attempt to gain something for himself. Nonetheless, it can be said that the scientist could have expected sharing of information by others in response to his gift, and ultimately his motivation is me-regarding. Lessig acknowledged this challenge in division. He argues that the division is valid because the thee-regarding motivations are still more complicated to explain. Important to highlight that Lessig’s division is in its substance similar to division suggested by Karim R. Lakhani and Robert G. Wolf in respect of motivations of developers of software. This division will be described in the part below, dealing specifically with free/open source software development.

Lessig also observed that from type of motivation prevailing within economies depends their *sustainability*. He tied sustainability of sharing economies to their ‘thickness’. ‘Thick sharing economies’ have me-regarding motivations in their core and ‘thin sharing economies’ – thee-regarding. In his opinion thin economies are easier to support and thus they are more sustainable.

Well-known examples of sustainable sharing economies are coming from communities of developers of free/open source software. Rich body of studies exploring motivations of programmers is available. Development of software certainly differs from composing a song or drawing a picture, nevertheless, driving forces behind participants of sharing economies, although interested in different types of creativity, are likely to have a lot in common. Economists Christine Greenhalgh and Mark Rogers, dealing with issues of innovation and growth, noted that academic research has some ‘parallels’ with open source movement and that “... media, music, and arts communities often have an open source ethic.”⁷³

One of the first classifications of motivations behind programmers’ participation in free/open source software projects, now commonly quoted,

⁷² L. Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (The Penguin Press, New York, USA, 2008), pp. 152-154.

⁷³ *Supra* note 24, p. 155.

was done by academicians from the Massachusetts Institute of Technology Karim R. Lakhani and Robert G. Wolf⁷⁴. They made a comprehensive review of earlier studies on motivation in general⁷⁵ and used a web-based survey, administered to 684 software developers in 287 free/open source software projects, to come to specific conclusions about motivations of participants of these projects. They found two different types of motivation: intrinsic and extrinsic.

Intrinsic motivation is characterised by doing something for the sake of some pleasure that activity brings rather than for some consequences separable from the personality of the actor⁷⁶. Intrinsic motivation can be separated into two components: enjoyment-based and obligation/community-based intrinsic motivations. As the name suggests *enjoyment-based* motivation is derived from the satisfaction of action, from the love of creativity. It was observed that usually software developers select tasks that they find interesting and challenging but, nonetheless, not too difficult for their developing abilities. Many programmers undertake tasks that are normally not available at their job. Accomplishment of aforementioned tasks brings inner feeling of satisfaction. *Obligation/community-based* motivation is founded on intrinsic value of creator's identification of him/herself with a group. Compliance with a set of principles deemed to be necessary in order to be identified as, for example a hacker, is common among developers.

Extrinsic motivation is based on desire to achieve extrinsic consequences resulting from performance of a certain task⁷⁷. As economists put it "... people change their actions because they are induced to do so by an external intervention"⁷⁸. In other words, people compare costs and benefits of their actions. This rational is treated as relevant in economic analysis. Some programmers being employed by information technology companies receive

⁷⁴ K. R. Lakhani and R. G. Wolf, 'Why Hackers Do What They Do: Understanding Motivations and Effort in Free/Open Source Software Projects' in J. Feller *et al.* (eds.), *Perspectives on Free and Open Source Software* (MIT Press, London, UK, 2005), pp. 3-22.

⁷⁵ *Inter alia*: E. L. Deci and R. M. Ryan, *Intrinsic Motivation and Self-determination in Human Behavior* (Plenum Press, New York, USA 1985); M. Csikszentmihalyi, *Beyond Boredom and Anxiety: The Experience of Play in Work and Games* (Jossey-Bass Inc., San Francisco, USA, 1975); J. Nakamura and M. Csikszentmihalyi, 'The Construction of Meaning through Vital Engagement' in C. L. Keyes and J. Haidt (eds.), *Flourishing: Positive Psychology and the Life Well-lived* (American Psychological Association, Washington, USA, 2003), pp. 83-104.

⁷⁶ *Supra* note 74, p. 4.

⁷⁷ *Supra* note 74, p. 6.

⁷⁸ B. Frey, *Not Just for the Money: An Economic Theory of Personal Motivation* (Edward Elgar, Brookfield, Vermont, USA, 1997), p. 13.

salaries for participation in free/open source software projects. Others are motivated by opportunity to obtain new skills or, in case of so-called ‘lead users’⁷⁹, to adjust software to their needs (after adjustments are made code is disseminated). Improvement of job opportunities is also one of commonly mentioned consequences that motivate developers to participate – often, external observers can see results of somebody’s work within a free/open source software project.

2.2.5. Concluding Remarks

Sharing economies because of their open and collaborative nature do not require legal tools enabling exclusion of others from use of creative works. Creators’ motivations to create, regardless of the nature of these motivations, involve expectation to share. Disability to share is harmful for motivations, which are at the core of sharing economies. Consequently, such disability hinders creativity within these economies. Copyright, being a system of property rights that are used for exclusion, has a potential to stifle the way people interact with and use creative works.⁸⁰ Therefore, existence of copyright has rather adverse effects on creativity within sharing economies than insignificant.

2.3. Hybrid Economies

2.3.1. Fundamentals of Hybrid Economies

Term ‘hybrid economy’ is not new, it has been in use for a long time. It defines combination of different economies into one new. A well-known example of a hybrid economy is a combination of planned and market economy in People's Republic of China⁸¹. In this thesis, term ‘hybrid economy’ is used, perhaps in its unorthodox meaning, to define hybrid of previously described commercial and sharing economies.

Although concept of combination of two to form one is not novel, concept of ‘hybrid economy’ within the aforementioned meaning is relatively recent compare to the above-mentioned example of Chinese economy. To this date, not much has been written on this economy. Majority of writings are focused either on commercial or sharing economy. Book ‘Remix’, written

⁷⁹ E. von Hippel, ‘Lead Users: A Source of Novel Product Concepts’, 32:7 *Management Science* (1986), pp. 791-805.

⁸⁰ *Supra* note 31, pp. 34-35.

⁸¹ S. Ma, *The Efficiency of China’s Stock Market* (Ashgate Publishing Limited, Aldershot, UK, 2004), p. 38.

by Lawrence Lessig, is perhaps the most authoritative contemporary writing speaking about hybrid economies in the meaning used in this thesis.⁸² This book is the main reference source for this part of the chapter.

For participants of commercial and sharing economies, to create within the mixture of the two, there should be some reasons for participation in the hybrid. This part of the chapter will explore motivations of participants and conditions necessary for sustainability of hybrid economies.

2.3.2. Motivations of Participants of Hybrid Economies

Participants of commercial economies are motivated by monetary gain. Sharing economies are characterised by absence of money. So, what motivates participants from the two economies to create within hybrid economies?

Firstly, as it was indicated earlier, creators of sharing economies often, without asking a cent for their labour, produce works that are demanded on commercial market and therefore have monetary value. Participants of commercial economies are mostly not excluded from sharing and thus results of labour within sharing economies. Accordingly, creative industries see sharing economies as a *source of free labour and works*.

Modern web-based social networks are good examples of representatives of hybrid economies. All the big networks (e.g., Facebook, Twitter and Myspace) were created and are maintained for the purpose of income generation. In the same time, these entities have created just a fraction of the vast amount of the content that they host today. Majority of the content has been created and added to the networks by their users. For this reason, this content is often referred as '*user-generated content*'⁸³. It is also true to state that normally users share their content (e.g., photos, videos and writings) for free. Eventually, use of creative works supplied in abundance by users eliminates, to a certain extent, necessity to produce creative works by the networks or at least *reduce production costs*. This is perhaps the major motivation for participation of commercial entities in hybrid economies.

Participants of sharing economies also have their reasons for participation in hybrids, which mostly aim at generation of profits for their owners. Hybrids

⁸² *Supra* note 72, pp. 177-249.

⁸³ E. Popek, *Understanding the World of User-Generated Content* (Rosen Publishing Group, New York, USA, 2011).

usually solve at least two problems of creativity peculiar to sharing economies. Firstly, involvement of financial resources into hybrids *reduces costs* related to participation within sharing economies. As it was stated previously, high costs of creation and distribution of works may disable production of works within sharing economies. For example, hybrids usually create artificial environment – favourable for sharing economy – in which things can be done free of charge and with less efforts. In addition, *unpleasant work*, for which motivations driving participants of sharing economies are not sufficient, can be done by paid professionals.

Participation in hybrid economies can benefit all – participants seeking profits and participants with other motivations. Hybrids are either sharing economies built upon commercial entity (e.g., communities of users of social networks) or commercial entities exploiting creations of sharing economies (e.g., Red Hat company that has built its business model around providing services to users of free/open source software *inter alia* Linux operating system⁸⁴).

2.3.3. Sustainability of Hybrids

Hybrids bring together participants with different motivations. This fact, except aforementioned benefits, also brings challenges as to how to sustain hybrids. A variety of means has been developed to take into account diverse interests of participants.⁸⁵ Without recalling all the principles governing two economies forming the hybrid it is appropriate to reiterate that rules of commercial economies are simpler than of sharing, because money brings simplicity into commercial exchange.⁸⁶ More challenging task is actually not to disrupt complex set of relationships of sharing part while benefiting commercial. It is essential to ‘play’ according to rules governing participation in different economies. One of measures necessary for sustainability of hybrids is proper separation between the sharing and commercial parts of hybrids.

Introduction of money into sharing part of hybrids at first sight might seem harmless, however in a long run it might have disruptive consequences. For example, if some of programmers participating in a free/open source software community start receiving payments from companies, which use

⁸⁴ Red Hat, *Company Profile*, <www.redhat.com/about/companyprofile>, visited on 4 May 2011.

⁸⁵ R. E. Caves, *Creative Industries: Contracts between Art and Commerce* (Harvard University Press, Cambridge, Massachusetts, USA, 2000).

⁸⁶ *Supra* note 72, pp. 120-122.

the software created by joint contributions of all community members, this factor might discourage other developers to continue doing for free what they used to do. If this does not result in disappearance of the community, it will certainly affect its inner dynamics.

Commercial parts of hybrids should contribute to *keeping costs low*, as it is one of reasons for blooming sharing economies. For instance, if social networks introduce fees for uploading and/or sharing of the user-generated content this would inevitably reduce amount of the content generated and number of users involved. Eventually such measure would diminish network effect created by social networks, which is so essential for successful on-line business.⁸⁷

In the modern digital era, people have high expectations towards their ability to interact with content on the web. Unprecedented development of technologies enables Internet users to do more and more things. Hybrids have to provide users with *free creative space* where users can express themselves and interact. For example, allowing readers to post their reviews of the books they have read has become a *de facto* standard among on-line bookshops. Readers post their reviews, often elaborative and lengthy, without being paid. Other visitors of on-line bookshops looking for reviewed books will get extra information about the books. No matter whether visitors will buy the book or not they will appreciate ability to read third parties comments about it. Eventually, such comments add value to the bookshop's websites without them spending resources on creation of content appreciated by customers. There are certainly some costs involved in provision of free space for creativity, however, they are negligibly low compare to benefits brought by user-generated content. Accordingly, commercial entities tend to encourage users' involvement into content creation. Hybrids are becoming increasingly common business model on the Internet.

As hybrid economy combines features of commercial and sharing economies, it embraces attitude of these economies towards use of legal instruments for achievement of their aims. In other words, commercial part of hybrids still has to address *market failure issues* caused by underprovision of creative goods that have to certain extent characteristics of public goods. This part of hybrid might need assistance in form of public policies, one of which is adoption of *copyright legislation*. On the other

⁸⁷ C. Shapiro and H. R. Varian, *Information Rules: A Strategic Guide to the Network Economy* (Harvard Business School Press, Boston, Massachusetts, USA, 1999), pp. 173-175.

hand, sharing part of hybrids is *all about sharing* and does not require any artificial instruments enabling exclusion of others from use and distribution of creative works. This part might rather need policies keeping some *space free* of restrictions that have potential to stifle creativity.

2.3.4. Concluding Remarks

Hybrid economies are, in their essence, combinations of commercial and sharing economies. Development of hybrids is determined by mutual benefits that participants of the two parts of hybrids obtain.

Commercial entities can obtain free content and achieve network effect, crucial for modern on-line businesses. Participants motivated by non-monetary incentives can obtain free space for creativity and sharing. Commercial entities might also have to undertake parts of creative projects, which participants of sharing part of hybrids do not find attractive.

Sustaining a hybrid is a difficult task. Combination of the two economies in one is not sustainable if it is built alike biological relationship of parasitism in which one party receives advantage without giving anything in return. Sustainable hybrids should rather resemble relationship of symbiosis – needs and desires of all participants should be respected. Legal instruments should take into account existence of hybrid economies and interests of their participants.

2.4. Conclusions about Creative Economies

There are different economies of creativity. They roughly can be divided into commercial, sharing and hybrid economies. The first two have money and non-monetary motivations at their core, respectively, and the third combines driving forces of the two ‘purer’ economies. All economies contribute to creation of creative works.

It is difficult to say which economies are more significant, as they cannot be compared in the same terms. Commercial economies, being ‘economies’ in the traditional economic sense of this term, are measured by economic means. These means can also be applicable to commercial parts of hybrid economies. Historically copyright legislation has been enacted and expanding under influence of authoritative individuals and powerful industries, both aiming at maximisation of their profits. Nowadays, economic justification for maintaining the copyright system seemed to

dominate the debate. However, in spite of the theoretical ability to assess costs and benefits of the commercial economy, virtually there is no definitive uniform answer as to whether benefits of copyright outweigh its costs. Consequently, it is not clear whether the current architecture of copyright established to assist primarily participants of commercial economies does this successfully. More research in the area of economics of copyright is certainly needed.

Not all creations can be valued in economic terms as well as motivations of all creators cannot be explained solely by economic vocabulary. Size of sharing economies, their growth and other conventional indicators are hard to express in numbers. Copyright legislation certainly was not established under influence of participants of sharing economies. Normally, creators within these economies have neither strong interest in legal regulations of creation and distribution of works nor financial power to influence policymakers.

Concept of ‘hybrid economies’, in the sense used in the thesis, is quite recent. Notwithstanding this fact, it seems that grouping of economies, based on combination of the two ‘purer’ economies, in the third distinct category is valid. As these economies bring together participants with motivations driving both, creative and sharing economy, often conflicting interests of participants of hybrids have to be reconciled. Rapid development of hybrids was enabled by growth of the Internet and associated technologies. Moreover, popularity of hybrid model is likely to grow.

As motivations driving creation of works within these economies differ, so do their needs for application of legislation. Ideally, copyright legislation should address interests of participants of all economies. In order to consider whether it is the case, the current legal framework of copyright should be examined. Origins of copyright legislation, like of any other, should not preclude legal norms from being subjected to scrutiny of their legitimacy in the light of present days.

3. Legal Framework of Copyright

3.1. Legal Framework of Copyright

3.1.1. Overview of the Major International Instruments

The first part of this chapter provides a general overview of the major international instruments in the area of copyright, preparing foundation for further discussions of issues related to necessity to license copyrighted works.

International legal framework for copyright has been established by adoption of the Bern Convention for the Protection of Literary and Artistic Works of 1886 (hereafter, the Bern Convention), and for rights related to copyright (sometimes referred as ‘neighbouring rights’⁸⁸) – by the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (hereafter, the Rome Convention). Prior to the adoption of these Conventions, there were only some bilateral agreements.⁸⁹ Although adoption of the Bern Convention dates back to the 19th century, it has been revised on many occasions in order to accommodate new developments. It was revised and complemented in Paris in 1896, in Berlin in 1908, in Berne in 1914, in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and in Paris in 1971. It is generally considered that the Bern Convention and the Rome Convention form the bedrock of the current international legal framework of copyright. These Conventions have 164 and 91 contracting parties respectively.⁹⁰ Both conventions have established minimum requirements to protection of copyrighted works in their contracting states as well as some founding notions and principles such as ‘originality’ and ‘automatic protection’, which are described later.

⁸⁸ K. Idris, *Intellectual Property – A Power Tool for Economic Growth* (WIPO Publication № 888, 2003), p. 101.

⁸⁹ *Supra* note 20, pp. 5-8.

⁹⁰ WIPO, *Contracting Parties to the Bern Convention*, <www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15>, visited on 4 May 2011; WIPO, *Contracting Parties to the Rome Convention*, <www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17>, visited on 4 May 2011.

In 1952, the Universal Copyright Convention was drafted under the auspice of the United Nations Educational, Scientific and Cultural Organization (hereafter, the UNESCO). This Convention was revised in Paris in 1971. The purpose of this instrument was to extend international legal framework of copyright to countries that at that time were not parties to the Bern Convention. However, since then this Convention has lost practical significance as virtually all of its parties have already ratified the Bern Convention or joined the World Trade Organization (hereafter, the WTO), all members of which have to sign the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereafter, the TRIPS Agreement).

Above-mentioned TRIPS Agreement was concluded in 1994 on the Uruguay Round of Multilateral Trade Negotiations in Marrakech, which established the WTO. This Agreement emerged from the linkage made between trade and intellectual property law. Number of contracting parties of the TRIPS Agreement is equal to the number of members of the WTO, which presently has 153 member states.⁹¹ As a consequence, all its “[m]embers shall comply with Articles 1 through 21 of the Berne Convention ...”⁹².

In 1996, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty were adopted. These Treaties are commonly referred as ‘Internet Treaties’ because the aim of their adoption was to address certain issues related to the use of copyrighted works on the Internet.⁹³ These relatively young Treaties already have 88 and 87 contracting parties.⁹⁴

Further overview of international norms, regulating scope, duration and grant of copyright and limitations and exceptions to it, is limited to the norms of the aforementioned treaties. Some examples of regional and national legislation are also used.

⁹¹ WTO, *Members and Observers*, <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, visited on 4 May 2011.

⁹² Article 9 (1) of the TRIPS Agreement.

⁹³ V. V. Sople, *Managing Intellectual Property: The Strategic Imperative* (Prentice-Hall of India Private Limited, New Delhi, India, 2006), p. 221.

⁹⁴ WIPO, *Contracting Parties to the WIPO Copyright Treaty*, <www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16>, visited on 4 May 2011; WIPO, *Contracting Parties to the WIPO Performances and Phonograms Treaty* <www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20>, visited on 4 May 2011.

3.1.2. Scope of Copyright

The international instruments do not provide a definition of ‘copyright’. They all just list rights that are granted to creators. For this reason, copyright is usually described as a *bundle of exclusive rights* to which a creator of “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”⁹⁵ is entitled, provided they he/she is not under contract that specifies otherwise⁹⁶.

Virtually any creation of the mind can attract copyright protection as long as it meets basic requirement set up by the Bern Convention. The Convention contains a non-exhaustive list of works to which copyright is extended. This list provides an idea of types of works creators of which are granted copyright. Although it might not follow from the list, computer programs are also covered by copyright.⁹⁷ Important rule is that copyright extends only to *expressions* of thoughts and ideas. Thoughts and ideas, as such, do not attract copyright protection.⁹⁸ Therefore, an idea of a drawing about something is not a suitable subject matter for copyright, but the concrete drawing in which the idea is expressed is. The above-mentioned bundle of exclusive rights is usually divided into moral and economic rights.

Moral rights, in general, give creators rights to be identified as creators and to object to distortion of their works, if it is harmful to creators’ reputation.⁹⁹ It is argued that protection of moral rights in common law countries is generally lower than in countries of civil law tradition.¹⁰⁰

Economic rights are more numerous than their moral counterparts are. Minimum rights to which creators are entitled under the main copyright treaties include:

- rights to reproduce and authorise others to reproduce copyrighted works¹⁰¹;

⁹⁵ Article 2 (1) of the Bern Convention.

⁹⁶ *Supra* note 8, p. 173.

⁹⁷ Article 10 (1) of the TRIPS Agreement; Article 4 of the WIPO Copyright Treaty.

⁹⁸ *Supra* note 95.

⁹⁹ Article 6^{bis} of the Bern Convention; Article 5 of the WIPO Performances and Phonograms Treaty.

¹⁰⁰ M. Sainsbury, *Moral Rights and Their Application in Australia* (The Federation Press, Sydney, Australia, 2003), pp. 18-19; M. Spence, *Intellectual Property* (Oxford University Press Inc., New York, USA, 2007), pp. 124-125.

¹⁰¹ Articles 2, 4 and 9 (1) of the Bern Convention; Articles 7 and 11 of the WIPO Performances and Phonograms Treaty; Article 10 of the Rome Convention.

- rights of communication of works to the public and authorise such communication including making available of works to the public¹⁰²;
- rights to make and authorise a translation or adaptation¹⁰³;
- rights relating to public performance and communication¹⁰⁴;
- derivative rights for performers, producers of sound recordings and broadcasting organisations¹⁰⁵;
- right to authorise commercial rental¹⁰⁶.

Only economic rights can be transferred, that is moral rights cannot be a subject of a license. Therefore, although moral rights might also have economic value¹⁰⁷ further discussion will concentrate merely on economic rights.

The direct purpose of economic rights is to enable creators, and entities which contribute to the creation and distribution of creative works, to gain monetary profit in return for their investment of skill, time and financial resources. These rights are valuable, or sometimes even necessary, for participants motivated by monetary interests. Exclusivity, enabled by the rights, addresses market failure issue, which is caused by characteristics of creative goods described in the previous chapter. This exclusivity does not bring much to the participants of sharing economies as it prevents free sharing – in order to perform acts reserved for a right holder an authorisation must be acquired, excluding uses falling within limitations and exceptions to copyright.

3.1.3. Duration

Internationally established minimum duration of copyright is a life of a creator and 50 years after his/her death¹⁰⁸ with exception to works of applied art, photographic and cinematographic works, copyright in which lasts for 25 years from the moment of their creation¹⁰⁹. This minimum standard for duration of copyright, being fixed in the Bern Convention and

¹⁰² Articles 6 and 8 of the WIPO Copyright Treaty; Articles 10 and 14 of the WIPO Performances and Phonograms Treaty.

¹⁰³ Articles 8 and 12 of the Bern Convention.

¹⁰⁴ Articles 11 and 11^{ter} of the Bern Convention.

¹⁰⁵ Article 11^{bis} of the Bern Convention; Articles 7 and 13 of the Rome Convention; Article 14 of the TRIPS Agreement; Article 15 of the WIPO Performances and Phonograms Treaty.

¹⁰⁶ Article 7 of the WIPO Copyright Treaty; Articles 9 and 13 of the WIPO Performances and Phonograms Treaty.

¹⁰⁷ *Supra* note 29, p. 3.

¹⁰⁸ Article 7 (1) of the Bern Convention; Article 12 of the TRIPS Agreement.

¹⁰⁹ Article 7 (4) of the Bern Convention.

TRIPS Agreement, is firmly rooted in the international legal framework of copyright. The WIPO Copyright Treaty, number of contracting parties to which is almost twice smaller than to the Bern Convention, extends minimum term for photographic works to the term for other works.¹¹⁰

The Rome Convention has established a norm of 20 years for duration of related rights granted to performers, producers of phonograms and broadcasting organisations¹¹¹. More recent WIPO Performances and Phonograms Treaty extended the term to 50 years for performers and producers of phonograms¹¹². List of contracting parties to these instruments are quite similar.

In many countries and jurisdictions, the minimum term of copyright required by the international treaties has been extended.

In the USA, for example, an Act to Amend the Provisions of Title 17, United States Code, with Respect to the Duration of Copyright, and for Other Purposes of 27 January 1998 (commonly known as ‘the Sonny Bono Copyright Term Extension Act’) extended copyright terms by 20 years. Before adoption of this Act the Copyright Act of 1976 provided for copyright duration of a life of an author and 50 years after his/her death and 75 years for a work of corporate authorship. After adoption of the Sonny Bono Act, duration of copyright became life of the author plus 70 years and for works of corporate authorship 120 years after creation or 95 years after publication, whichever endpoint is earlier. Copyright for works published before 1 January 1978 was increased by 20 years to a total of 95 years from their publication date.

Duration of copyright established by the Bern Convention was extended to 70 years in the European Union (hereafter, the EU) by the Directive 93/98/EEC of the Council of the European Communities of 29 October 1993 Harmonising the Term of Protection of Copyright and Certain Related Rights. Later, this act was replaced by the Directive 2006/116/EC of the European Parliament and of the Council of the European Communities of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights (often referred as ‘Copyright Term Directive’), which consolidated previously made amendments to the Directive 93/98/EEC. Article 1 of the new and presently valid Directive 2006/116/EC left the term of copyright extended by the previous Directive unchanged.

¹¹⁰ Article 9 of the WIPO Copyright Treaty.

¹¹¹ Article 14 of the Rome Convention.

¹¹² Article 17 of the WIPO Performances and Phonograms Treaty.

Currently, Mexico has the longest term of copyright. Decree of 30 April 2003 amended *inter alia* Article 29 of the Federal Law on Copyright and extended term of copyright to 100 years after author's death.

Limited duration of copyright is supposed to play an important balancing function. After lapse of term of copyright, works become a part of the 'public domain', i.e., works that are not under copyright and are free for all to use. Public domain is considered to greatly contribute to creation of new works as it provides a rich source of inspiration, information and materials that can be used in new works. Public domain is equally available to participants of all economies. Some scholars warn about increased over time length of copyright and the shift in the balance of involved interests this has caused.¹¹³ Some works might not bring any commercial gain to their right holders, but if they are under copyright their use is still restricted. Duration of copyright is the same for almost all types of works regardless of the time works are actually being used. The same applies to works under related rights. For example, books, which can be commercially exploited for many years, and computer programs, which often become out-dated in a few years, if not earlier, are protected for the same period of time. As long as works are under copyright and desired use of the works does not fall within limitation and exceptions to copyright, authorisation has to be acquired prior to their use.

3.1.4. Limitations and Exceptions

Scope of copyright is limited by a set of limitations and exceptions. It is generally considered that the main role of limitations and exceptions is to balance interests of right holders and general public.¹¹⁴ This common consideration might lead to a conclusion that interests of creators contradict interests of general public. However, it is not always true. *Interests of creators willing to share their works actually often match interests of the*

¹¹³ V. Benadou and S. Dusollier, 'Draw Me a Public Domain' in P. Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing Limited, Cheltenham, UK, 2007), pp. 161-184.

¹¹⁴ L. Bently *et al.* (eds.), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing Limited, Cheltenham, UK, 2010), p. 348; J. M. Martinez-Piva (ed.), *Knowledge Generation and Protection: Intellectual Property, Innovation and Economic Development* (Springer, New York, USA, 2009), p. 137; P. B. Hugenholtz, 'Copyright without Frontiers: The Problem of Territoriality in European Copyright Law' in E. Derclaye, *Research Handbook on the Future of the EU Copyright* (Edward Elgar Publishing Limited, Cheltenham, UK, 2009), p. 17.

public willing to receive works and use them. Therefore, it should be accurate to state that limitations and exceptions should be balancing interests of creators motivated by monetary gain against interests of creators willing to share and of general public. Before coming to any conclusions, it is advisable to make an overview of the limitations and exceptions established by the international instruments.

These limitations and exceptions are typically divided into three categories: works excluded from the scope of copyright; excluded acts of exploitation ('free uses') and acts which can be carried out without authorisation, but with the obligation to compensate right holders ('compulsory licenses').¹¹⁵

The first category consists of *works which are excluded from the scope of copyright.* These are: official texts of a legislative, administrative and legal nature; news of the day; political speeches and speeches delivered in the course of legal proceedings.¹¹⁶

The second category of limitations consists of certain *acts of exploitation that should or can be excluded.* Right of quotation provided by Article 10 of the Bern Convention is the only act of exploitation exclusion of which is mandatory for the Convention's contracting parties. The contracting parties may introduce other exceptions. These exceptions include: the right of utilization for teaching purposes; exceptions made for the benefit of the press; reproduction by the press, broadcast, communicated to the public by wire of lectures, addresses and other works that were delivered in public, when this is justified by the purpose of information.¹¹⁷ In respect of related rights, the Rome Convention excludes the following acts of exploitation: private use; use solely for the purposes of teaching or scientific research; use of short excerpts for the purposes of reporting current events; ephemeral fixation (i.e., recordings made for the purpose of a later broadcast) by a broadcasting organization by means of its own facilities and for its own broadcasts.¹¹⁸

The third category contains *non-voluntary licenses* that can be introduced into national legislations. Such licenses can be introduced in relation to the recordings of musical works and in relation to the broadcasting and certain communication to the public.¹¹⁹ The Rome Convention provides its contracting parties with a freedom to introduce any limitations and

¹¹⁵ *Supra* note 8, p. 175.

¹¹⁶ Articles 2 (4), 2 (8) and 2^{bis} (1) of the Bern Convention.

¹¹⁷ Articles 2^{bis} (1), 9 (2), 10 (2) and 10^{bis} of the Bern Convention.

¹¹⁸ Article 15 (1) of the Rome Convention.

¹¹⁹ Articles 11^{bis} (2) and 13 of the Bern Convention.

exceptions on conditions of non-voluntary licenses as far as they are compatible with the provisions of the Convention.¹²⁰

Some countries have introduced concepts of '*fair use*' or 'fair dealing', in addition to the available exceptions of free uses.¹²¹ These concepts allow using works without authorisation of a right holder, taking into account such factors as: the nature and purpose of the use, including whether it is for commercial purposes; the nature of the work that is used; the amount of the work used; and effect of the use on the potential commercial value of the work.

If contracting parties decide to introduce any of the exceptions into their legislation they have to comply with the so-called '*three-step test*'. According to the test, limitations and exceptions should be confined 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 right holder. This clause is firmly rooted in the international legal framework, as it is included into the major treaties.¹²²

Many countries made use of possibility to introduce limitations and exceptions in order to balance respective interests. However, some scholars and civil societies' activists are raising concerns that many of the limitations and exceptions were disabled by pressure on national policy makers by industries and foreign governments interested in creating space for monetary revenues. Often, bilateral trade treaties mitigate or disable limitations and exceptions, established by national legislations, thus extending scope of copyright. Such treaties are often referred as '*TRIPS-plus*' because their provisions broaden scope of copyright in comparison to the international TRIPS Agreement.¹²³

Extension of scope of copyright beyond the minimum requirements established by the main international treaties is common not only among developed countries, which are major producers of commercial works, but also among developing and the least-developed countries. Recently published results of research, undertaken by the African Copyright and

¹²⁰ Article 15 (2) of the Rome Convention.

¹²¹ *Supra* note 3, p. 16.

¹²² Article 9 (2) of the Bern Convention; Article 13 of the TRIPS Agreement; Article 10 (1) of the WIPO Copyright Treaty; Article 16 (2) of the WIPO Performances and Phonograms Treaty.

¹²³ R. Melendez-Ortiz and P. Roffe (eds.), *Intellectual Property and Sustainable Development: Development Agendas in a Changing World* (Edward Elgar Publishing Limited, Cheltenham, UK, 2009), pp. 54-55.

Access to Knowledge Project¹²⁴ in eight African countries (Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda), confirmed that copyright protection which these countries provide:

“... complies with and in many cases exceeds, the standards reflected in the applicable international treaties and agreements, ... this is in spite of the fact that three of the study countries, Mozambique, Senegal and Uganda, are least-developed countries (LCD) which have longer grace periods to comply with, let alone exceed, TRIPs obligations.”¹²⁵

In the digital environment it is difficult to control how and how much of a work is being used. Providers of content frequently use technological protection measures and contracts that often exclude users from enjoyment of their rights under respective limitations and exceptions. It has been observed that access to copyrighted works on the Internet is increasingly governed by private contracts rather than by respective international or national legislation with checks and balances developed in the course of lengthy negotiations that were taking into consideration involved interests.¹²⁶

Consequently, it is difficult to state with a high level of certainty whether limitations and exceptions to copyright really play the balancing role they should play. Notwithstanding this uncertainty, it is, however, clear that exemptions and limitations are not necessarily equally important for interests of all creators. It seems that limitation of scope of copyright is primarily favourable for creativity within sharing economies.

3.1.5. Grant of Copyright

Formalities

One of the founding principles of the international copyright law is principle of ‘*automatic protection*’. According to the principle the enjoyment and the exercise of copyright must not depend or be made conditional on any formality¹²⁷. However, this does not preclude countries from imposing such formalities on their own nationals (this fact is often omitted in the relevant

¹²⁴ ACA2K, *About* ACA2K, <www.aca2k.org/index.php?option=com_content&view=article&id=179&Itemid=61&lang=en>, visited on 4 May 2011.

¹²⁵ C. Armstrong *et al.* (eds.), *Access to Knowledge in Africa: The Role of Copyright* (UCT Press, Claremont, Republic of South Africa, 2010), p. 318.

¹²⁶ WIPO, *Intellectual Property on the Internet: A Survey of Issues* (WIPO Publication No 856, 2003), p. 41.

¹²⁷ Article 5 (2) of the Bern Convention.

literature), nor does it prevent creators from placing claims of copyright on their works.

In the area of related rights, although the Rome Convention permits domestic legislations of its contracting parties to require compliance with formalities for performers and/or producers in order to be granted rights, the Convention puts certain limitations on the formalities¹²⁸. The WIPO Performances and Phonograms Treaty does not allow for any formalities¹²⁹.

General practice is that countries do not impose formalities neither on foreign creators nor on their own nationals, although the Bern Convention does not prohibit the second. In the past, formalities had form of necessity to place a special sign on a work together with information that may assist in identification of a right holder; to deposit a copy of a work or to register it in other ways. Originally, the first copyright acts required creators to comply with certain formalities either to be granted copyright or to be able to enforce it in a court. By the close of the nineteenth century, formalities gradually became losing their practical importance. In the succeeding century, international abolition of formalities was generally regarded as a progressive move, which freed creators from the burden to comply with formalities. Nowadays, although legislation of some countries contains some form of registration or deposit requirement it is no longer a necessary condition for grant of copyright.¹³⁰ Currently, views on the issue of formalities are not that unanimous as they used to be. There are claims that circumstances that lead to the abolition of formalities for the purpose of grant of copyright are no longer valid.¹³¹

In spite of the absence of a legal obligation to comply with formalities, creators often register their rights to reinforce their claims in case of court proceedings, where national intellectual property offices provide for such services. It is not rare to find on a work a notice indicating that the work is under copyright and providing some information about its right holders – *rights management information*, in terms of the WIPO Copyright Treaty. Creators often make use of their right to declare their rights. Such voluntary use of formalities is supported by *presumption of authorship* that states that

¹²⁸ Article 11 of the Rome Convention.

¹²⁹ Article 20 of the WIPO Performances and Phonograms Treaty.

¹³⁰ P. Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press, New York, USA, 2001), p. 188.

¹³¹ S. van Gompel, '*Les Formalites Sont Mortes, Vive Les Formalites!* Copyright Formalities and the Reason for Their Decline in Nineteenth Century Europe' in R. Deazley *et al.* (eds.), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers, Cambridge, UK, 2010), pp. 204-206.

in the absence of proof of the contrary a person indicated as an author shall be regarded as the author of the work¹³².

Originality

Originality of a work is a requirement necessary for a creator to be granted copyright. Term 'originality' cannot be found in any international treaty. It derives from interpretation of Article 2 (1) of the Bern Convention.

It is commonly accepted that originality does not appeal to the high art, and that a work does not have to be very creative or of a good quality. The concept of originality refers rather to the way in which the work comes into existence than to its qualitative characteristics. The concept requires the work to be own creation and not to be merely copied.¹³³

As none of the treaties explains requirement of originality, this concept was left to interpretation by national institutions. Traditionally, interpretation of the originality requirement is divided into common and civil law interpretations. Without going into details, it can be stated that in the common law countries the requirement is considered to be lower and easier to fulfil. In these countries, a work is original if it is not a copy of another work and the minimum 'skill and labour' requirement is met. Civil law countries have higher originality criteria, which might exclude some works from copyright that otherwise would be under copyright in common law jurisdictions. A number of courts' decisions in individual cases have developed this difference in interpretation. It is difficult to draw a fine line between the two approaches to originality.¹³⁴ In general, excluding some special circumstances peculiar to national legal systems, virtually any expression of thoughts and ideas qualifies for copyright as long as it is author's own creation and is not stipulated by functionality of the creation.

Creators

After creation of an original work copyright is automatically and immediately granted to its creators. Creators are the initial owners of copyright. Moral rights always remain with creators, as they cannot be transferred, unlike economic rights. International conventions neither define who are creators nor contain any requirements to a person of a creator.

¹³² Article 15 of the Bern Convention.

¹³³ G. Dutfield and U. Suthersanen, *Global Intellectual Property Law* (Edward Elgar Publishing Limited, Cheltenham, UK, 2008), pp. 80-83.

¹³⁴ *Supra* note 31, pp. 93-111.

Thus, this task is left to domestic legislation. Normally, only physical persons can be granted copyright.

Employers commonly contract with their employees over allocation of rights over created works. Legislation of civil law countries usually does not derogate from the principle that copyright vests in the actual creator. Nonetheless, France, Germany and Japan, for instance, have exempted computer programs from the above-mentioned general rule. Accordingly, copyright can be granted to legal persons.¹³⁵ In some jurisdictions (the USA is a notable example) grant of the rights to legal persons is common, and is known as ‘corporate authorship’. Corporate authorship is based on a legal fiction that a legal person is an ‘author’.¹³⁶ International treaties grant copyright to ‘authors’ without defining the term. The legal fiction allows granting copyright to corporate entities but not to employees, who are actual creators. Creators making works for hire, virtually, cannot extract any economic value out of made works (e.g., royalties) and their monetary benefit is limited to salaries they receive. Proponents of the corporate authorship argue that involvement of a significant number of people in production of some works would make it almost impossible to exploit works commercially and to return made investment. Disagreement among the numerous right holders could disable use of works. Worth emphasizing that grant of copyright to legal persons is not a worldwide practice. In the area of related rights, respective international treaties explicitly permit grant of related right to legal entities – producers of phonograms and broadcasting organisations.¹³⁷ It is considered that these entities greatly contribute to creation of works and their dissemination. Grant of exclusive rights is supposed to provide incentives to these entities that primarily seek profits.

3.1.6. Summary of the Legal Framework

Under the current legal framework of copyright, the bundle of exclusive rights is granted automatically and immediately upon creation of works satisfying requirement of originality for the whole duration of copyright. Subject matter that may attract copyright is limited by expression/idea dichotomy and originality requirement. There is no need to comply with any formalities in order to be granted copyright. Originality requirement is not much of a quality requirement but rather requirement to the way in which

¹³⁵ *Supra* note 130, pp. 210-211.

¹³⁶ C. L. Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (The University of North Carolina Press, Chapel Hill, North Carolina, USA, 2009), pp. 211-239.

¹³⁷ Article 3 of the Rome Convention and Article 2 of the WIPO Performers and Phonograms Treaty.

works comes into existence. Virtually all works that are not merely copied or creation of which is not stipulated by their functionality satisfy this requirement. Legal framework granting exclusive rights immediately upon creation contributes to rapid increase of works under copyright. Uses of copyrighted works, which are not falling within limitations and exceptions to copyright, require prior authorisation of right holders. This necessity to acquire and to issue permissions for use of works is firmly rooted in the provisions of the major international treaties and is indispensable part of the contemporary legal framework of copyright.

The purpose of the overview of the international legal framework of copyright made in this chapter is to check whether norms take into account interests of participants of different creative economies. After the overview, it can be stated that the framework certainly reflects interests of creators motivated by monetary gain by granting desired exclusivity over created works. Interests of right holders willing to share their works are not reflected equally in the international legal instruments, although their interests generally coincide with interests of a general public seeking free use. Participants of sharing economies are interested rather in deregulation than in regulation of acts with works. Regulation of scope and duration of copyright and use of limitations and exceptions are the primary tools available for balancing of involved interests. Since conclusion of the first international copyright treaties, numbers of exclusive rights granted to creators and their duration have been only expanding. Studies show that available for introduction limitations and exceptions are not fully implemented in the national legislations.

Consequently, under the present framework, rights are granted to all creators regardless of their interests or needs in them. This 'rights to all' approach, historically introduced primarily for benefits of creators motivated by monetary gain, does not provide different regulations for exercise of granted rights for right holders with different interests.

4. Necessity to License and Licensing by Representatives of Creative Economies

4.1. Necessity to License

Authorisation is a necessary condition for use of works under copyright, excluding uses exempted from the scope of copyright. Mere physical availability of works for use is not sufficient. As a rule, only right holders have legal rights to authorise use of works. Authorisation has to be given in a form of legally binding document, most commonly license.¹³⁸ It does not matter whether right holders distribute their works to gain monetary profits or for any other motivations, they have to license. This creates necessity to license with respective implications. Present part of the thesis analyses issues related to licensing on the Internet in general and issues related to the compliance with the necessity to license copyrighted works by participants of every of the discusses creative economies.

4.1.1. Licensing on the Internet

Copyrighted works are everywhere. The Internet is full of copyrighted content. Therefore, the duty to acquire authorisation in order to use them imposes a *burden* on participants of exchange of these works. If some would like to use a work they have to ask for permission, and *if right holders agree they have to issue a license in order to document their permission*. As a general rule, use of works without the license is unauthorised, and thus is illegal.

Licenses, in general, are contracts that define users' rights in relation to copyrighted works. While copyright legislation still plays important role in defining scope of granted rights, licenses increasingly determine relationships between right holders and users. Licenses enable right holders to monetise their works while retaining control over them. Licenses grant authorisation to perform certain uses but never ultimate ownerships over works.¹³⁹

¹³⁸ *Supra* note 21.

¹³⁹ B. Fitzgerald, 'Commodifying and Transacting Informational Products through Contractual Licences: The Challenge for Informational Constitutionalism' in E. F. Rickett

There are some legal requirements with which licenses have to comply in order to be valid. For example, according to the German Civil Code a legal transaction that lacks the form prescribed by statute is void.¹⁴⁰ Usually these requirements are imposed not as much by intellectual property acts as by laws of contracts. First and foremost, contracts have to be in *written form*. This is a norm for contracts in many countries.¹⁴¹ Legislators often impose formalities in the name of consumer protection. The purpose of requirement of contracts being in writing is to provide information to parties. Secondly, written form implies that contracts have to be *signed*. Signatures should provide proof that parties of contracts have agreed to something and that they are bound by respective obligations.¹⁴²

The two above-mentioned, almost trivial, requirements taken together have proven to be difficult to comply in the digital environment of the Internet. While it is relatively simple to draft a license using modern word processing software, it is difficult to answer definitively on how to sign the license in the digital format. What constitute a valid signature in the digital environment? Different countries have different criteria necessary for compliance with requirement of written form and parties' signatures in order for them to be valid. In any case, signature should be attributable to a party of a license that used it and should be a result of the party's will. Typing of a name of the party or drawing signature with some kind of word processing tool seems not to satisfy the stated requirements, as it is problematic to attribute the signature to a signatory of the license.

Some legislations contain requirement for contracts over certain matters to be notarised.¹⁴³ For a contract to be notarised it has to be certified by a notary public or other persons authorised to perform notarial function. Normally, the notary public has to certify will of parties to be bound by terms of the contract by sealing parties' signatures on the document. It is virtually impossible to notarise a document that is not written or printed on paper.

Special electronic signatures and software for use of such signatures have been developed. Some countries have recognised their validity for signing

and G. W. Austin (eds.), *International Intellectual Property and the Common Law World* (Hart Publishing, Oxford, UK, 2000), pp. 35 and 45.

¹⁴⁰ Section 125 of the German Civil Code in the version promulgated on 2 January 2002.

¹⁴¹ H. Kötz and A. Flessner, *European Contract Law* (Oxford University Press Inc., New York, USA, 1997), p.82.

¹⁴² *Ibid.*, pp. 79-81.

¹⁴³ *Ibid.*, p. 83.

documents contracting legal obligations. However, these signatures have not yet played a significant role in practice.¹⁴⁴ Acquisition of such signatures and the necessary software is usually costly. Therefore, corporations are the primary users of this tools but not physical persons – the most numerous Internet users. Moreover, special electronic signatures issued by authorities or authorised organisations in one country might not be recognised in another.

‘Click-wrap’ and ‘browse-wrap’ are two types of licenses that are the most widely used on the Internet. Their parties are not required to possess special electronic signatures.

A *click-wrap license* presents on a user’s computer screen, requiring user to demonstrate assent to the terms of the license by clicking on an icon, the licensed product cannot be obtained or used until the icon is clicked.¹⁴⁵ In this license, act of clicking essentially plays role of the signature, as it demonstrates user’s consent to the terms of the license. Browse-wrap licenses often appear under the title of ‘Terms of Use’ of a website. Text of *browse-wrap license* is usually accessible by means of a hyperlink from website’s homepage and does not require user to perform any affirmative action for the license to become binding.¹⁴⁶ There are some doubts as to whether click-wrap and browse-wrap licenses are enforceable. Case law involving these licenses is relatively limited and practically all cases come from the USA. Some scholars come to conclusion that click-wrap licenses are, in general, enforceable in the USA if certain conditions are satisfied.¹⁴⁷ Enforceability of browse-wrap licenses is more doubtful. Although some assert that browse-wrap licenses, as well as click-wrap, can be enforced under certain circumstances¹⁴⁸, others are sceptical about this possibility as these licenses do not satisfy the basic elements of contract formation¹⁴⁹. Even if both types of licenses, under specific circumstances, can be enforced

¹⁴⁴ B. S. Markesinis *et al.*, *The German Law of Contract: A Comparative Treatise* (Hart Publishing, Oxford, UK, 2006), p. 82.

¹⁴⁵ C. Coteanu, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate Publishing Company, Burlington, Vermont, USA, 2005), p. 53.

¹⁴⁶ *Ibid.*, p. 55.

¹⁴⁷ E. F. Rickett and G. W. Austin (eds.), *International Intellectual Property and the Common Law World* (Hart Publishing, Oxford, UK, 2000), pp. 45 and 48; M. A. Epstein, *Epstein on Intellectual Property* (Aspen Publishers, New York, USA, 2008), p. 60.

¹⁴⁸ R. Raysman, *Intellectual Property Licensing: Forms and Analysis* (ALM Properties, Inc., New York, USA, 2006), p. 39; G. J. Battersby and C. W. Grimes, *Licensing Update 2010* (Aspen Publishers, New York, USA, 2010), p. 167.

¹⁴⁹ R. L. Miller and G. A. Jentz, *Fundamentals of Business Law: Excerpted Cases* (Cengage Learning, Mason, Ohio, USA, 2010), p. 275; M. E. Plotkin *et al.* (eds.), *E-Commerce, Law and Business* (Aspen Publishers, New York, USA, 2003), p. 84.

in courts of the USA, possibility to enforce these licenses in other jurisdictions seems to be *uncertain, if not impossible*.

Invention and development of the Internet led to unprecedented interaction between citizens of different countries. This in turn raised complex issues of international private law, namely questions of *jurisdiction* and *applicable law*. Answers on these questions are necessary for determining which national courts have jurisdiction over disputes (jurisdiction) and which national law have to be applied to relationships involving foreign element (applicable law). The Internet has enabled instant establishment of global presence. Once a website is established, it can be accessed by everyone and from almost every place with Internet access. Parties are commonly nationals of different countries; they might not be located in countries of their nationality; servers on which the website is running might be located in a country different from countries of nationality and residence of the parties. There are many other factors that might effect determination of jurisdiction. In addition, the situation is complicated by the territorial nature of copyright. In different countries, rights have different scope, duration and different limitations and exceptions are applicable to them. It is practically impossible to determine with certainty applicable law and jurisdiction of every transaction with numerous parties.¹⁵⁰ Consequently, parties cannot be absolutely sure that licenses concluded over the Internet are valid and enforceable. Popular click-wrap and browse-wrap licenses might be regarded as invalid because requirements to the form under applicable laws are not met – a document entitled license does not necessarily have any legal significance. Authorisation to use copyrighted works contained in a license is invalid if the license as a whole is invalid. Therefore, *use of copyrighted works is unauthorised when a licence authorising its use is not valid*.

To this date, there are no universal solutions to the described issues caused by territorial, although harmonised to certain extent, copyright and contract laws and truly global nature of the Internet. Click-wrap and browse-wrap licenses concluded over the Internet, in spite of legal uncertainty, are widely used because they are more convenient means for authorisation of use of copyrighted works on the Internet than licenses in traditional paper form. Need to receive a signed license by ordinary post, to sign it and to send it back in order to download a song seems to be an odd nowadays. On the other hand, commonly used on the World Wide Web click-wrap and browse-wrap licenses are not worldwide recognised legal tools for authorisations of use of copyrighted works. Ultimately, imperfections of

¹⁵⁰ WIPO, *Intellectual Property on the Internet: A Survey of Issues* (WIPO Publication No 856, 2003), pp. 113-131.

laws do not, and should not, stop creation and dissemination of creative works.

4.1.2. 'Piracy', Use of Works without Licenses and Use with Invalid Licenses – What Is the Difference?

Copyrighted works are distributed among Internet users with use of licenses, certifying authorisation of use of works by their right holders, as well as without, this is a fact. Situation with distribution of works on the Internet is commonly described in simplistic terms of the world where some are labelled 'pirates' and others are law-abiding users. The purpose of this part of the thesis is to demonstrate, referring to the previously highlighted issues of licensing on the web, that the situation is far more complex and ambiguous than it might appear at first sight.

Nowadays, term '*piracy*', aside illegal acts defined by the United Nations Convention on the Law of the Sea¹⁵¹, is commonly used to define acts of unauthorised use of copyrighted works.¹⁵² Interestingly, national copyright legislations generally do not provide a legal definition of the notion.¹⁵³ However, Articles 51 and 61 of the TRIPS Agreement refer to the notion of 'pirated copyright goods', and Footnote 14 (b) of the Agreement defines 'pirated copyright goods' as:

“...any goods which are *copies made without the consent* of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.” [emphasis added].

This definition has been repeated in the recently drafted Anti-Counterfeiting Trade Agreement.¹⁵⁴ Although notion 'piracy' is not directly defined by the

¹⁵¹ Articles 101-103 of the United Nations Convention on the Law of the Sea, 10 December 1982.

¹⁵² Recording Industry Association of America (RIAA), *What is Online Piracy?*, <www.riaa.com/physicalpiracy.php?content_selector=What-is-Online-Piracy>, visited on 4 May 2011; Canadian Recording Industry Association (CRIA), *Anti-Piracy*, <www.cria.ca/antipiracy.php>, visited on 4 May 2011; Business Software Alliance (BSA), *What is Software Piracy?*, <www.bsa.org/country/Anti-Piracy/What-is-Software-Piracy.aspx>, visited on 4 May 2011.

¹⁵³ UNESCO, *World Anti-Piracy Observatory*, <www.portal.unesco.org/culture/en/ev.php-URL_ID=39397&URL_DO=DO_TOPIC&URL_SECTION=201.html>, visited on 4 May 2011.

¹⁵⁴ Article 5 (k) of the Anti-Counterfeiting Trade Agreement, 3 December 2010.

aforementioned international Agreements, it can be determined using explained term ‘pirated copyright goods’. Therefore, *use of term ‘piracy’* for defining acts of use of copyrighted works without authorisation of right holders *is not deprived of legal foundation*. The usual message to the public is that users should not use works (e.g., songs, films) without permission even if works are available for use.

Sometimes, term ‘*theft*’ is also used to define unauthorised use of copyrighted works.¹⁵⁵ However, use of this term seems not to be supported by international legal instruments dealing with copyright.

Piracy, i.e., unauthorised use of copyrighted works, is generally regarded as a negative phenomenon that deprives creators of incentives to create.

As it has been demonstrated in the previous part of this chapter, it is *difficult to be certain that a license* used on the Internet for grant of permission to use a copyrighted work *is valid*. Among the two most popular types of licenses, click-wrap and browse-wrap, the first type is more likely to be given some legal recognition because consent of users is at least expressed by the act of clicking. There are great doubts as to whether browse-wrap licenses are recognised as appropriate authorisations that have legal significance under laws of countries from which the work can be accessed.

Although, the mentioned licenses are not definitely invalid in all cases, often, right holders use no licenses at all for distribution of their works. That is right holders willingly make their works available to be easily copied and used by anyone. Here is an example demonstrating how widespread and generally acceptable is practice of unlicensed use of works. One of the most active defenders of right holders in the notorious ‘war on piracy’, the Recording Industry Association of America (hereafter, the RIAA), in the directory of its website dedicated to ‘piracy’, invites visitors to: “Download the RIAA’s Identifying Unauthorized Sound Recordings (PDF)”.¹⁵⁶ There is no license being used for authorisation of downloading (i.e., copying on a computer’s hard drive) of the literary work about unauthorised sound recordings, prepared by the association specialising on protection of copyright. Although the work is technically available for download, from

¹⁵⁵ Federal Bureau of Investigation (FBI) of the USA, *Intellectual Property Theft*, <www.fbi.gov/about-us/investigate/cyber/ipr/ipr>, visited on 4 May 2011; Motion Picture Association of America (MPAA), *Types of Content Theft*, <www.mpaa.org/contentprotection/types-of-content-theft>, visited on 4 May 2011.

¹⁵⁶ Recording Industry Association of America (RIAA), *Avoiding Counterfeit CDs*, <www.riaa.com/physicalpiracy.php?content_selector=piracy-street-avoid-counterfeit-cd>, visited on 4 May 2011.

strictly legal point of view, the literary work is being copied as a whole, not in part relying on available limitations and exceptions, and without a valid permission from its right holder – the RIAA.

What is the difference between such use without valid license, or any license, and ‘piracy’?

Intuitively, it can be said that right holders that do as the RIAA does are willing to distribute their content and do not object to copying copyrighted works as a whole. It seems to be true. Nonetheless, the fact that interests of right holders and users meet does not eliminate the necessity to license. Participants of all economies are bound by this necessity. Copying without authorisation is a violation of copyright legislation.

On the other hand, if right holders are not against copying, like in the given example, but rather encourage it, who will complain about the violation?

Right holders, apparently even the most fearless defenders of copyright, do not draw attention to this. Users do not, and should not be expected to highlight the facts that they have downloaded copyrighted works without authorisation. This would be equal to self-incrimination in some jurisdictions providing criminal penalties for violations of copyright legislation. Therefore, this relationship is characterised by mutual ignorance of some norms of copyright.

Notwithstanding the fact that interests of parties coincide and none of them has any objections, formally, users make copies of copyrighted works without authorisation, and thus commit acts of ‘piracy’. Of course, such acts of ‘piracy’ are not acts against which ‘the war’ is being fought. Nonetheless, they contribute to the development of *legal nihilism* among population towards use of works on the Internet.

If a person downloads a copy of a brochure about ‘copyright piracy’ without a license, why would he/she expect to have the license when downloading another literary or artistic work? These works are covered by copyright and their use requires authorisation during the whole duration of copyright. Therefore, *there is a great inconsistency between the legal requirements for use of legal instruments for authorisation and their actual use*. Often, for experienced lawyers it is difficult to come to the common conclusion about validity of the licenses used on the Internet or about falling of certain uses under limitations and exceptions to copyright. For ordinary users it is even more challenging to separate legal actions from illegal, when downloads are offered without any formalities and ‘piracy’ is said to be any use without

authorisation. This uncertainty has a role to play in discrediting contemporary copyright legislation and perceiving ‘piracy’ as an acceptable activity.

4.2. Licensing by Participants of Creative Economies

This part of the thesis discusses licensing solutions used by participants of commercial, sharing and hybrid economies for achievement of their respective interests. Copyright legislation imposes practically the same regulation on different modes of production and distribution of creative works – all creators, regardless of their motivations for production of works, have to license their creations in order to distribute them legally. Scope of uses that are free of necessity to acquire permissions is limited to the uses under the limitations and exceptions. Licenses assist right holders in creation of legal settings suitable for their interests, which might not be adequately reflected in legislation. This study analyses licensing models of representatives of three economies, identified for the purpose of this thesis. Commercial economy is represented by Microsoft Windows XP operating system and Microsoft Office 2003 office suit. Wikipedia, the free on-line encyclopaedia project, represents sharing economy, and YouTube, a video-sharing platform, – hybrid economy. Unfortunately, a limitation of the length of this thesis does not permit inclusion of more examples. Study of licensing solutions applied by representatives of different creative economies should contribute to identification of interests involved in production and distribution of creative works.

4.2.1. Microsoft Windows XP and Office 2003

4.2.1.1. About Microsoft, Windows XP and Office 2003

Microsoft Corporation is a multinational *for-profit corporation* headquartered in Redmond, Washington, USA that develops, manufactures, distributes and supports a wide range of software. Founded in 1975 it has become one of the world’s leaders in the area of software development. In the end of the last fiscal year in the USA, 30 June 2010, company’s net

revenue exceeded 80 billion US dollars. As of 31 March 2011, the corporation employs almost 90 thousand people around the world.¹⁵⁷

Microsoft owns copyright to the software created by programmers, who receive salary for their work. The corporation, as the for-profit company, will continue to invest resources into development and distribution of software as long as it brings profits. Business of the corporation is built on creation of socially desired computer programs in return for payments. Those who cannot pay for products can be excluded by means of copyright and use of technical protection measures. Bundle of exclusive rights granted under copyright helps to eliminate issue of market failure caused by the nature of goods that have to certain extent characteristics of public goods. Furthermore, the company benefits from immediate and automatic grant of copyright because changes to software are frequent.

Analysis of licensing model of the Microsoft is limited to the two most popular products of the corporation: Microsoft Windows XP Professional, operating system, English language version (hereafter, the Windows XP) and Microsoft Office 2003 Professional, office suit, English language version (hereafter, the Office 2003).

Operating system is the most important computer program, and every computer must have it in order to run other programs. Operating system provides an environment within which other programs can function. Every operating system, *inter alia*, keeps track of files and directories on the disk, recognise signals from input devices (e.g., keyboard, mouse, joystick), sends output to the monitor and controls peripheral devices.¹⁵⁸

Office suit is a set of integrated programs that normally allow creation of textual documents, spreadsheets and presentations. Some office suits also contain mail clients, applications for work with graphics and web-editing tools. A combination of a few applications into the suit enables interaction of applications with each other. This interaction secures transfer of data from one application into another without its change or loss.¹⁵⁹ Microsoft Office is the office suite that consists of a bundled set of applications such

¹⁵⁷ Microsoft, *Facts About Microsoft*, <www.microsoft.com/presspass/inside_ms.msp>, visited on 4 May 2011.

¹⁵⁸ I. A. Dhotre, *Operating Systems* (Technical Publication Pune, Alert DTPrinters, Pune, India, 2008), pp. 1-2.

¹⁵⁹ K. W. Gibson (ed.), *Flying Solo: A Survival Guide for the Solo and Small Firm Lawyer* (American Bar Association, Chicago, Illinois, USA, 2005), pp. 337-338.

as Word, Excel, PowerPoint, Access, Outlook, Publisher that provide above-described functions.¹⁶⁰

Operating systems and office suits developed by Microsoft are dominating respective markets.¹⁶¹ Although recent statistical data shows that, for example share of Microsoft's operating systems Windows has a tendency to decrease, corporation's products maintain dominant positions on their markets.¹⁶² Currently, Windows XP remains the most popular operating system.¹⁶³

Microsoft distributes its software in different ways. This thesis concentrates only on the direct distribution via the Internet, i.e., acquired directly from Microsoft through its website.

4.2.1.2. Licensing Model

Interaction of users with copies of Windows XP and Office 2003 are primarily governed by terms of licenses under which these products are distributed. This part of the thesis analyses end-user license agreements used for regulation of use of Windows XP and Office 2003.¹⁶⁴ An end-user license agreement used for Windows XP is hereafter referred as the Windows XP License, and for Office 2003 – the Office 2003 License.

In general, both licenses can be characterised as restrictive, because they explicitly *reserve* most of the rights granted under copyright for Microsoft¹⁶⁵. The international treaties described in the previous chapter *prohibit* use of rights without authorisation. The licenses supplement the above-mentioned prohibition, contained in international and national instruments, with identical prohibition of contractual nature. Consequently,

¹⁶⁰ J. Habraken, *Microsoft Office 2003 All-in-One* (Que Publishing, Indianapolis, Indiana, USA, 2004), p. 7.

¹⁶¹ M. J. Foliy, *Microsoft 2.0: How Microsoft Plans to Stay Relevant in the Post-Gates Era* (Wiley Publishing, Inc., Indianapolis, Indiana, USA, 2008), p. 96; Recital 15 of the Order of the President of the Court of First Instance of the European Communities in Case T-201/04 R, *Microsoft Corp. v Commission of the European Communities*, 22 December 2004.

¹⁶² Net Market Share, *Top Operating System Share Trend*, <www.netmarketshare.com/os-market-share.aspx?qprid=9>, visited on 4 May 2011.

¹⁶³ StatCounter Global Stats, *Top 5 Operating Systems on May 11*, <www.gs.statcounter.com/#os-ww-monthly-201105-201105-bar>, visited on 4 May 2011.

¹⁶⁴ Texts of licenses can be found at: Microsoft, *Find End User License Terms for Microsoft Software Licensed by Microsoft or the Computer Manufacturer*, <www.microsoft.com/about/legal/en/us/IntellectualProperty/UseTerms/Default.aspx>, visited on 4 May 2011.

¹⁶⁵ Article 1 of the Windows XP License and Article 3 of the Office 2003 License.

in case of violation of terms of the licenses, which to a great extent reflect prohibitions established by the law, the licensor (i.e., Microsoft) may have a choice of remedies. It might address the case either from a perspective of *copyright violation* or *breach of contract*.

In order to secure company's revenues, Windows XP and Office 2003 are not sold, they are licensed¹⁶⁶. This model of distribution of software ensures, to certain extent, control over products by the licensor when they are not in its possession. Selling of software would result in transfer of ownership. Transfer of ownership over copyrighted work does not imply transfer of its copyright. Nonetheless, ownership inevitably brings some rights to a buyer of a computer program. Accordingly, Microsoft, like many other software companies, does not sell its products through the Internet, but licenses them in order to retain high level of control over use of its software.

The licenses do not grant more permissions than it is necessary for installation and use of the software. The licenses limit number of devices on which software can be used.¹⁶⁷ In respect of Office 2003, which is composed of the set of applications, respective license specifies that its component parts may not be separated for use on more than one device.¹⁶⁸ The licenses do not permit re-distribution of the products or their change. In order to disable unlicensed use of the products by licensees, special technological measures are used with the software. Accepting terms of the licenses users also agree to the use of the technological measures in the software (except and only to the extent that such activity is permitted by applicable law).¹⁶⁹ Terms of the licenses also contain other non-copyright restrictions, *inter alia*, the licenses prohibit users to reverse engineer, decompile or disassemble the products¹⁷⁰. However, Microsoft might encounter some difficulties enforcing the above-mentioned click-wrap licenses in some jurisdictions, as they might not comply with requirements to the form of legally binding instruments under some national laws.

Programmers who developed Windows XP and Office 2003 did not have to make a choice about licensing schemes for the products. Microsoft's legal department, with full-time employed legal professionals, drafted the licenses for company's business model. Excluding some exceptions, customers do not have a choice of conditions under which the products are licensed to them. The current legal framework supports such restrictive top-to-bottom

¹⁶⁶ Article 19 of the Windows XP License and Article 3 of the Office 2003 License.

¹⁶⁷ Article 1 of the Windows XP License and Article 1.1 of the Office 2003 License.

¹⁶⁸ Article 13 of the Office 2003 License.

¹⁶⁹ Article 1 of the Windows XP License and Article 2.1 of the Office 2003 License.

¹⁷⁰ Article 5 of the Windows XP License and Article 4 of the Office 2003 License.

commercial model of development and distribution of creative works. As it was described, unauthorised use of restricted uses of copyrighted works is prohibited. This legal setting allows the rights holder to charge fees for grant of rights necessary for use of copyrighted works.

4.2.2. Wikipedia

4.2.2.1. About Wikipedia

Wikipedia is the free multilingual web-based encyclopaedia project.¹⁷¹ This project has been chosen for the study as it is a world-renowned example of success of production and distribution of creative works that does not have money at its core. In a decade, Wikipedia has become one of the three most popular global social media tools¹⁷² and the fifth most visited website in the world offering instant and free access to some 17 million articles¹⁷³. Wikipedia was founded in 2001 as an effort to create and distribute a free encyclopaedia of the highest possible quality to everyone in the world in his/her own language. It is the biggest encyclopaedia in the history, containing around 17 million articles, some of which are translated on over 270 languages. The project does not hire anyone for creation of articles. Furthermore, in spite of the popularity of the website, Wikipedia does not make use of advertisement to earn money.¹⁷⁴ The primary force of development of this project is hundreds of thousands of volunteers creating and sharing their works via Wikipedia.

Development of new software enabling Internet users to create and collaboratively edit webpages (i.e., wiki software) itself would not permit great results achieved by Wikipedia project over the last decade. As it has been shown in the previous chapters, availability of copyrighted works for use does not imply that it is legal to use them. As a general rule, use of works has to be authorised by their right holders.

Necessity to acquire a license by those who would like to edit texts and necessity to issue the license by right holders is a serious obstacle to active participation of users who are not paid for their creative efforts. This formalistic procedure has been partially eliminated by use of special licenses

¹⁷¹ Wikipedia, *Wikipedia:About*, <www.en.wikipedia.org/wiki/Wikipedia:About>, visited on 4 May 2011.

¹⁷² *Supra* note 8, p. 76.

¹⁷³ 'A Decade of Wikipedia', 1 *WIPO Magazine* (2011), p. 25.

¹⁷⁴ It has been observed that this contributes to the credibility of the project and its neutrality. *Supra* note 72, pp. 161-162.

permitting use of copyrighted works in the designated manner by anyone. These licenses are an essential part of Wikipedia's success and a solution of a conflict between legal obligations and interests of participants of a sharing economy.

4.2.2.2. Licensing Model

Wikipedia does not own content of its innumerable articles. Contributors to the encyclopaedia are the major owners. The project merely functions as a platform for creative collaboration. In spite of absence of exclusivity over the content, it has managed to aggregate textual content in the amount unseen ever before.

At the time of Wikipedia's launch in 2001¹⁷⁵, the GNU Free Documentation License (hereafter, the GFDL)¹⁷⁶ was the most commonly used 'open license' for distribution of literary works. Unlike other GNU licenses, the GFDL was designed specifically for use with manuals, i.e., documentation about use of software. The first set of Creative Commons licenses was released in December 2002.¹⁷⁷ Therefore, initially, all articles on Wikipedia were licenses under the GFDL. However, on 15 July 2009 Wikipedia moved to a dual-licensing: the Creative Commons Attribution-ShareAlike 3.0 Unported License (hereafter, the CC BY-SA 3.0)¹⁷⁸ and the GFDL.¹⁷⁹ One of major motivations behind this change in licensing was inconvenience of use of the GFDL for literary works of relatively small size. The GFDL requires a copy of its text to accompany every copy of a work licensed under this license.¹⁸⁰ Text of the license might in many times exceed length of literary works released under the GFDL. These onerous provisions have not been changed by the Free Software Foundation in the succeeding versions of the license. Another significant reason that influenced the change was increased over time popularity of use of Creative Commons licenses.

¹⁷⁵ Wikipedia, *Wikipedia*, <www.en.wikipedia.org/wiki/Wikipedia>, visited on 4 May 2011.

¹⁷⁶ GNU Operating System, *GNU Free Documentation License*, <www.gnu.org/licenses/fdl.html>, visited on 4 May 2011.

¹⁷⁷ Creative Commons, *History*, <www.creativecommons.org/about/history>, visited on 4 May 2011.

¹⁷⁸ Creative Commons, *Attribution-ShareAlike 3.0 Unported License*, <www.creativecommons.org/licenses/by-sa/3.0/legalcode>, visited on 4 May 2011.

¹⁷⁹ Wikimedia, *Licensing Update*, <www.meta.wikimedia.org/wiki/Licensing_update>, visited on 4 May 2011.

¹⁸⁰ Articles 2 and 4 (H) of the GFDL.

Currently, works that are Wikipedia's contributors' own creations have to be licensed under the CC BY-SA 3.0 and the GFDL. This is enforced by addition of the following notice to the editing panel:

"By clicking the "Save Page" button, you agree to the Terms of Use, and you irrevocably agree to release your contribution under the CC-BY-SA 3.0 License and the GFDL. You agree that a hyperlink or URL is sufficient attribution under the Creative Commons license." [emphasis added].

No article can be added and no changes to an existing article can be made without user's click on the 'Save Page' button.

Article 3 of the CC BY-SA 3.0 and Articles 2-8 of the GFDL grant essentially all exclusive economic rights to users of works. Everyone who performs any of acts, which are restricted by copyright, over works licensed under above-referred licenses is deemed to have accepted their terms and thus become a party to them¹⁸¹. These licenses uphold moral rights of original creators and subsequent contributors to articles to be recognised as authors of works.¹⁸² Additionally, terms of the licenses oblige editors of works to release derivative works under the same licenses.¹⁸³ Such provisions are often referred as 'copyleft'¹⁸⁴.

As a consequence of use of the CC BY-SA 3.0 and the GFDL for licensing content published on Wikipedia, everyone is allowed to copy, distribute and edit encyclopaedia's articles. Terms of these licences free contributors from necessity to acquire and issue licenses every time prior to performance of excluded uses. In turn, this makes a difference between Wikipedia and other encyclopaedias published under conventional licensing models restricting use of works. Articles of Wikipedia are constantly updating whereas changes to traditional encyclopaedias are made within month or even years.¹⁸⁵

4.2.2.3. Compatibility of Licenses

Choice of certain type of licenses always has its costs. The CC BY-SA 3.0 and the GFDL permit various uses of copyrighted works while obliging users to make proper attribution and to license derivative works under the same licenses. These licenses are not compatible with licenses that contain

¹⁸¹ Preamble to CC BY-SA 3.0 and Article 1 of the GFDL.

¹⁸² Article 4 (c) of the CC BY-SA 3.0 and Articles 4 (B), (I) and 5 of the GFDL.

¹⁸³ Article 4 (b) of the CC BY-SA 3.0 and Article 4 of the GFDL.

¹⁸⁴ A. Dolgin, *The Economics of Symbolic Exchange* (Springer, Berlin, Germany, 2009), pp. 317-319.

¹⁸⁵ *Supra* note 8, p. 76.

contradictory provisions, which cannot be satisfied simultaneously with the terms of the CC BY-SA 3.0 and the GFDL. For example, if one license allows commercial use of works and another prohibits, such licenses are considered to be incompatible.

In order to avoid conflicts between incompatible licenses Wikipedia's Terms of Use permit addition of already created copyrighted works under condition that they are single-licensed under *terms compatible with the CC-BY-SA 3.0* or dual-licensed with the GFDL and another license with terms compatible with the CC-BY-SA 3.0.¹⁸⁶

Although the CC-BY-SA 3.0 belongs to a family of Creative Commons licenses¹⁸⁷, this license is considered to be incompatible with the following Creative Commons and GNU licenses¹⁸⁸:

- Attribution-NonCommercial;
- Attribution-NonCommercial-ShareAlike;
- Attribution-NonCommercial-NoDerivs;
- Attribution-NoDerivs;
- GNU General Public License;
- GNU Lesser General Public License;
- GNU Affero General Public License.

The first three licenses prohibit commercial exploitation of works; the third and the forth – creation of derivative works from works licensed under these licenses. The GNU licenses were written specifically for licensing of software unlike the GFDL, which was made for use with manuals. For example, above-listed GNU licenses refer to notions of 'source' and 'object code', which are not applicable to literary works that are created not in programming languages.

The CC-BY-SA 3.0 is compatible with the Creative Commons Attribution License, as this license is the least restrictive of all Creative Commons licenses. The CC-BY-SA 3.0 is also compatible with its earlier versions: CC-By-SA 1.0, 2.0 and 2.5.

¹⁸⁶ Wikimedia Foundation, *Terms of Use*, <www.wikimediafoundation.org/wiki/Terms_of_Use>, visited on 4 May 2011.

¹⁸⁷ Creative Commons, *About the Licenses*, <www.creativecommons.org/licenses>, visited on 4 May 2011.

¹⁸⁸ GNU Operating System, *License*, <www.gnu.org/licenses/licenses.html>, visited on 4 May 2011.

It is also possible to use works that are in the public domain or to make use that falls under limitations and exceptions to copyright.

4.2.2.4. Issues

Wikipedia project is supported by Wikimedia Foundation, Inc., a *non-profit charitable organization* founded under the laws of the state of Florida, USA. All servers, on which Wikipedia's content is stored, are owned by the Foundation and are also located in Florida. The content in Wikipedia is subject to the laws of Florida and the USA.¹⁸⁹

Some works are free for use by public in all countries, while others might be free in some countries but not in others. Works that are not under copyright worldwide can be added to Wikipedia without any licenses. However, works that are free outside the USA but are copyrighted in the country have to be licensed, but not *vice versa*. For example, a work of the United States Government (i.e., "... a work prepared by an officer or employee of the United States Government as part of that person's official duties"¹⁹⁰) is not entitled to domestic copyright in the USA.¹⁹¹ Therefore, although works of the USA's government might be entitled to copyright in foreign countries, they still can be added to Wikipedia without any formalities. In the same time, it is difficult to determine status of works, which were created outside the USA, under copyright laws of the United States. Knowledge of provisions of respective national legislation, jurisprudence and, often, bilateral trade agreements with the United States is required for certainty about status of works.

In addition to the issue of enforceability, common to all click-wrap and browse-wrap licenses, legality of use of works posted on Wikipedia is threatened by a phenomenon known as 'proliferation of licenses'¹⁹². There are many more open licenses than just six main Creative Commons licenses and the GFDL. Some of them are compatible with the Creative Commons Attribution-ShareAlike 3.0 Unported License and some are not. Users have to make judgement about compatibility of licenses' terms. It is difficult to

¹⁸⁹ *Supra* note 177.

¹⁹⁰ Section 101 of Title 17 of the Code of Laws of the United States of America, current on 4 May 2011.

¹⁹¹ Section 105 of Title 17 of the Code of Laws of the United States of America, current on 4 May 2011.

¹⁹² N. Elkin-Koren, 'Exploring Creative Commons: A Skeptical View of a Worthy Pursuit' in P. B. Hugenholtz and L. Guibault (eds.), *The Future of The Public Domain: Identifying the Commons in Information Law* (Kluwer Law International, Alphen aan den Rijn, Netherlands, 2006), pp. 341-345.

expect from ordinary Wikipedia contributors, people without legal background, to be able to comprehend fully terms of licenses and to make correct conclusions about their compatibility. Worth noting that even Creative Commons, the most popular open licenses for works other than software, are not translated into all languages of Wikipedia's contributors. Language barrier also contributes to possible unintentional violations of copyright legislation by Internet users who just want to contribute to the enrichment of the world's biggest free encyclopaedia.

4.2.3. YouTube

4.2.3.1. About YouTube

YouTube is the free video-sharing website. Since its foundation in 2005¹⁹³ it has become one of the three most popular global social media tools¹⁹⁴. In 2009 more than 10 hours of video were uploaded to YouTube every minute.¹⁹⁵

YouTube's collection of videos, alike Wikipedia's collection of articles, was made by website's users. Essentially, YouTube functions as a platform for sharing of audio-visual works. Unregistered users may watch videos, and registered users may, in addition, upload unlimited number of videos and add comments under them. The vast majority of users upload videos and leave comments for purposes other than monetary gain. There are no restrictions to the content of videos others than limitations for content of violent, sexual, abusive nature or violating copyright. Unlike the mainstream media, YouTube accepts almost anything regardless of quality or artistic value of videos. Practically, everyone can find something of his/her interest on this website. Many talents and secrets have been revealed thanks to YouTube. The website has enabled people around the world to share their experiences and ideas in video format.¹⁹⁶

Although, use of video-sharing functions of YouTube is free for its users, the website is a for-profit business acquired by Google Inc. in 2006.¹⁹⁷

¹⁹³ G. Jarboe, *YouTube and Video Marketing: An Hour a Day* (Wiley Publishing, Inc., Indianapolis, Indiana, USA, 2009), p. 7.

¹⁹⁴ *Supra* note 8, p. 76.

¹⁹⁵ A. Lastufka and M. W. Dean, *YouTube: An Insider's Guide to Climbing the Charts* (O'Reilly Media, Inc., Sebastopol, California, USA, 2009), p. 196.

¹⁹⁶ G. Brown, *Social Media 100 Success Secrets: Social Media, Web 2.0 User-Generated Content and Virtual Communities – 100 Most Asked Mass Collaboration Questions* (Emereo Publishing, Newstead, Queensland, Australia 2008), p. 21.

¹⁹⁷ *Supra* note 193, p. 23.

Robust infrastructure (a high bandwidth and substantial storage space) is necessary for hosting of massive amount of data and simultaneous viewing of videos by millions of users without crashing the website.¹⁹⁸ YouTube supports its services by advertising revenues. Some Internet users join YouTube in order to earn money¹⁹⁹ and companies often upload videos for the purpose of promotion²⁰⁰.

Active participation of users is important for YouTube's business model, as users are the source of continuing enrichment of website's content. The company succeeded because it permits website's users to upload videos free of charge and facilitates creation of communities around content²⁰¹, thus meeting their needs in sharing. Generation of revenues from advertisement allows the company to reconcile interests of users, who are looking for an easy and cheap way for sharing videos, and the company's aim of maximisation of its profits.

4.2.3.2. Licensing Model

YouTube, alike Wikipedia, does not own most of the content it hosts. Website's users license their content to YouTube. However, unlike the biggest free encyclopaedia, YouTube does not aim at creation of a collection of works that can be improved for the purpose of objectiveness and trustworthiness. Furthermore, videos cannot be edited in the same manner as literary works. Therefore, YouTube does not make licensing of uploaded videos under 'open licenses' mandatory for contributors. Instead, the company, similarly to Microsoft's licensing practice, applies its own set of rules.

As it was mentioned above, only registered users can upload, and eventually share, videos. The following notice appears under a registration form for creation of a YouTube account:

"By clicking 'I accept' [icon] below you are *agreeing to the YouTube Terms of Use, Google Terms of Service and Privacy Policy.*"²⁰² [emphasis added].

¹⁹⁸ R. Rowell, *YouTube: The Company and Its Founders* (ABDO Publishing Company, North Mankato, Minnesota, USA, 2011), p. 49.

¹⁹⁹ B. Schepp and D. Schepp, *How to Make Money with YouTube: Earn Cash, Market Yourself, Reach Your Customers, and Grow Your Business on the World's Most Popular Video-Sharing Site* (McGraw-Hill, New York, USA, 2009).

²⁰⁰ J. Cass, *Strategies and Tools for Corporate Blogging* (Elsevier Inc., Oxford, UK, 2007), p. 211.

²⁰¹ *Ibid.*

²⁰² YouTube, *Get Started with Your Account*, <www.youtube.com/create_account>, visited on 4 May 2011.

Thus, all content on YouTube is used under the YouTube Terms of Use²⁰³ and the Google Terms of Service²⁰⁴ containing necessary licenses.

Both Terms can be qualified either as click-wrap or browse-wrap licenses, depending from the form in which assent of users has been expressed. Users of YouTube may accept the Terms either by clicking on the ‘I accept’ icon²⁰⁵ (condition common for click-wrap licenses) or by actually using the services²⁰⁶ (condition common for browse-wrap licenses). Although the YouTube Terms of Use do not contain provision about acceptance by act of clicking, practically there is no way to upload videos without clicking on the respective icon on the form for registration of user’s account.

By submitting, posting or displaying their content (e.g., videos, comments) users of the website grant to Google Inc. and YouTube:

“... perpetual, irrevocable, worldwide, royalty-free, and non-exclusive license to reproduce, adapt, modify, translate, publish, publicly perform, publicly display and distribute any content”²⁰⁷.

In addition, Article 6 C of the YouTube Terms of Use stipulates that the license granted to YouTube is ‘sublicenseable’ and ‘transferable’. The same Article grant every user of YouTube a non-exclusive license to reproduce, distribute, display and perform content as allowed by the functionality of the website and under the YouTube Terms of Use.

There are also some limitations to the commercial exploitation of the content.²⁰⁸ By accepting the Terms, users confirm that they either own rights to the content they submit or that they have necessary permissions.²⁰⁹ Therefore, the Terms place responsibility for wrongful use of copyrighted works on contributors. The Terms define state California of the United States as the jurisdiction laws of which should apply.²¹⁰ Applicable law of

²⁰³ YouTube, *YouTube Terms of Use*, 9 June 2010, <www.youtube.com/t/terms>, visited on 4 May 2011.

²⁰⁴ Google, *Google Terms of Service*, 16 April, 2007, <www.google.com/accounts/TOS?loc=en>, visited on 4 May 2011.

²⁰⁵ Article 2.2 (A) of the Google Terms of Service.

²⁰⁶ Article 2.2 (B) of the Google Terms of Service and Article 1 of the YouTube Terms of Use.

²⁰⁷ Article 11.1 of the Google Terms of Service. Article 6 C of the YouTube Terms of Use contains analogous license.

²⁰⁸ Articles 4 D and 5 B of the YouTube Terms of Use.

²⁰⁹ Article 11.4 (B) of the Google Terms of Service and Article 6 B, D and E of the YouTube Terms of Use.

²¹⁰ Article 14 of the YouTube Terms of Use.

the United States provides for limitation of liability of Internet service providers²¹¹, including YouTube.

Accordingly, notwithstanding free (for users) character of services, contributors cannot choose terms of licenses other than terms fixed in the YouTube Terms of Use and the Google Terms of Service. The Terms grant to Google Inc. and YouTube broad rights in relation to contributed works, and a few rights to users of the website. Licensing model of YouTube makes the website a platform for sharing of access to the content through direct webcasting but not distribution of videos' digital copies.

4.2.3.3. Issues

Use of copyrighted works without authorisation of their right holders is legally prohibited. Nonetheless, in practice, there are many works uploaded to the website without prior authorisations.²¹² Although, laws of the USA provide for limited liability of service providers, this does not imply their absolute immunity for violations of copyright legislation. Service providers have to take active measures to prevent unauthorised use of copyrighted works.

In order to comply with requirements of the laws YouTube has developed and implemented Content ID programme – a set of policies and rights management tools providing right holders with control over use of their works.²¹³ It is problematic for YouTube alone to establish with high level of certainty whether upload of some works violates rights of copyright holders, as potentially any user is a creator, and thus a right holder. Content ID programme aims to assist YouTube in policing its vast content. Right holders may provide YouTube with recordings of their copyrighted works in order to enable the website to identify works identical with or containing fractions of original works. Reference files are created out of provided works and are added to a database of reference files. Every time a video is uploaded to the website it is compared against files in the database. Every time a match is identified, YouTube does with uploaded video what right holders asked it to do – to block or to leave. Often, although some videos were uploaded to the website without proper authorisation, right holders do not order to take them down as they might contribute to the popularity of other works or to give a 'new life' to an old, out of commercial use

²¹¹ Paragraph 512 (c) of Title 17 of the Code of Laws of the United States of America, current on 4 May 2011.

²¹² *Supra* note 195, p. 116.

²¹³ YouTube, *Content ID*, <www.youtube.com/t/contentid>, visited on 4 May 2011.

copyrighted work. Therefore, right holders often do not enforce their rights in copyrighted works when such enforcement might go against their commercial interests. In the same time, for ordinary users of YouTube, non-copyright specialists, it might be puzzling why one video has been taken down from the website but not the other.

It is questionable whether indication of right holders' will through the Content ID programme can be considered a proper authorisation permitting continuation of use of videos uploaded illegally, without prior authorisation. Answer to this problem is complicated by the fact that upload without prior authorisation breaches the YouTube Terms of Use and the Google Terms of Service.

Conclusions

Copyrighted works are being created within different creative economies. These economies can roughly be divided into commercial, sharing and hybrid. Creators within commercial economies are stimulated by monetary gain, and within sharing – by a set of non-monetary motivations. Combination of driving forces of the two ‘purer’ economies motivates participants of hybrid economies. All economies contribute to creation of creative works. Creators might create within different economies in different periods of time or within a few economies simultaneously.

Copyright is supposed to provide incentives and rewards for commercial production and dissemination of creative works. Grant of exclusive rights should motivate to invest time, efforts and money in creation, production and distribution of works. Costs of having copyright should be outweighed by its benefits, as only under these circumstances existence of copyright would be justified from economic point of view. In practice, to this date, there is no definitive economical proof that overall benefits exceed associated costs. More research is needed in the area of economics of copyright.

Creators motivated by non-monetary reasons are mostly not interested in an artificial system enabling exclusion from use of results of their labour. Ability to share creative works is important for participants of sharing and hybrid economies, which have open and collaborative nature. Often, interests of creators willing to share their works coincide with interests of a general public. Copyright, being a system of property rights, has a potential to stifle ways in which people interact with and use creative works. Existence of copyright has rather adverse effects on creation and exchange of works among participants not motivated by monetary gain.

Under the current international legal framework of copyright, rights are granted to all creators regardless of their interest or need in exclusive rights. Abundance of formalities, as a necessary condition for grant of copyright, caused of great expansion of the copyright system. ‘Rights to all’ approach, historically introduced primarily for benefits of creators motivated by monetary gain, does not provide different regulations for exercise of granted rights for right holders with different interests. Accordingly, practically all creators, regardless of their will, have to interact with their works under conditions of the property system. As a general rule, excluding uses under limitations and exceptions to copyright, acts with copyrighted works have to be authorised by right holders. Right holders’ authorisations are typically

documented in licenses. Licenses have become a necessary part of use of works by others.

Steadily increasing number of uses of copyrighted works on the Internet has challenged legitimacy of the current architecture of copyright and adequacy of conventional provisions of contract law to new digital environment. Validity of licenses in electronic form, in particular commonly used click-wrap and browse-wrap licenses, is an issue peculiar to use of copyrighted works on the Internet. Invalidity of licenses affects validity of authorisations they contain and, consequently, makes use of works illegal. As the legal framework of copyright does not differentiate between interests of creators with commercial and other interests, right holders frequently use licenses to create legal setting suitable to their needs. Enforceability of licenses affects equally participants of all economies as it casts doubts on normative character of their provisions, and thus ability of parties to safeguard interests expressed in texts of licenses.

There is a great inconsistency between the legal requirements for use of legal instruments for authorisation of uses of copyrighted works and actual use of these instruments. Often, right holders intentionally make their works available for use by Internet users without any licenses. From a strictly legal point of view, works are being used without legal authorisation. There is certainly a need to rethink the scope of the term 'piracy', commonly used to refer to any unauthorised uses of copyrighted materials, in order to define specifically these acts that are harmful for someone's interests. Although unauthorised use of works created for commercial purposes can be harmful for creativity in general, and interests of creators in particular, inclusion of instances of sharing of copyrighted works with others by works' right holders without use of licenses to the scope of illegal acts makes no sense.

Necessity to license makes it particularly challenging for creators not motivated by monetary gain to interact with creative works within legal boundaries of copyright. Creators not gaining direct revenues from their creative works, often amateurs, have to deal with legal matters such as choice of licenses for use with their works, compatibility of different licenses, identification of scope of uses falling under limitations and exceptions to copyright.

Balanced approach towards research of issues related to creation and use of creative works under current legal framework should contribute to informed development of solutions leading to the optimal promotion of creativity.

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