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Edwards, L., Klein, B., Lee, D., Moss, G., & Philip, F. (2013). Framing the consumer Copyright regulation and the public. ***Convergence: The International Journal of Research into New Media Technologies*****, *19*(1), 9-24.**

Abstract

With illegal downloading at the centre of debates about the creative economy, various policy initiatives and regulatory attempts have tried (and largely failed) to control, persuade and punish users into adhering to copyright law. Rights holders, policymakers, intermediaries and users each circulate and maintain particular attitudes about appropriate uses of digital media. This article maps the failure of regulation to control user behaviour, considers various policy and academic research approaches to understanding users, and introduces an analytical framework that re-evaluates user resistance as expressions of legitimate justifications. A democratic copyright policymaking process must accommodate the modes of justification offered by users to allow copyright law to reconnect with the public interest goals at its foundation.

Keywords: copyright, digital, justification, media policy, modalities of regulation, United Kingdom

Introduction

Illegal downloading of copyrighted material among ordinary media consumers has cast copyright as a central component of contemporary conversations about and activities around the creative industries. Rights holders are intent on controlling copyright in the face of new technologies, policymakers are concerned with the effect of illegal downloading on the larger cultural economy, intermediaries such as ISPs are forced to defend their roles and responsibilities, and users are navigating morally and legally murky terrain in their pursuit of digital media. Copyright may be a shared topic among these interested groups, but the discourses circulated within and between them are not always in tune.

This article explores the current disjunctures between regulatory practice, government and industry discourse and user perspectives and behaviours in relation to copyright.

Users' refusal to accept current approaches to copyright regulation signals fundamental errors in the approach taken by policymakers and industry, who tend to focus on the efficacy of regulatory efforts while taking the notion of copyright for granted. Challenges to copyright presented by digital technology prompt the need to revisit basic issues around and approaches to regulating copyright and, crucially, a repositioning of users as sources of legitimate justifications rather than dysfunctional consumers to be educated or prosecuted. As suggested by Yar (2008: 610), Boltanski and Thévenot's (2006) work on justification and orders of worth can offer an alternative framework through which to explore contentions over copyright regulation. This article traces the ineffectiveness of direct and indirect regulation to control user behaviour towards copyright; considers various approaches to and accounts of users; and offers a theoretical intervention into the debate with a view to reading user resistance as legitimately justified and indicative of regulation's failure to address the public interest objectives at the root of copyright's foundation.

Copyright Policy and Regulation

The starting point of copyright's history is generally identified as the shift initiated by the Statute of Anne in 1709, whereby the right of stationers to publish in perpetuity works purchased was displaced by short-term exclusive rights of authors. Despite various legal twists and turns over the past three centuries, copyright legislation has continued to be understood as seeking a balance between rights of creators (or owners) and availability to the wider public. The main goal of public policy, in this regard, is to find a balance between two aspects of the public interest inherent to copyright: copyright as driving creative activity and thus promoting learning for the benefit of the public (through the consumption of copyrighted work) and exceptions

to copyright that offer the widest availability of copyrighted material for the public (Davies, 2002: x).

It is no surprise that holders of the proprietary author perspective are concerned by the shift resulting from the emergence of digital technology, where 'the public interest has been invoked, not in favour of strengthening the protection afforded to authors and other right owners to protect them against piracy in cyberspace, but in favour of free and unfettered access by the public to copyright works combined with the means of copying them for personal use' (Davies, 2002: 7). Yet what may seem at first a simple injustice perpetrated by an uncaring public against hardworking artists is rich with complexity. For example, as Rose (1993) notes, originality only took a central role in cultural production at the same time that the notion of the author's property rights became recognised as an important value; prior to the eighteenth century the concept of authorial literary property was unformed. Furthermore, and with regard to 'other right owners', one reason copyright law 'remains unchanged – despite the contradictions between the Romanticist assumptions about authorship and the very real practices of cultural production – is because the law, as it is currently constituted, works to the advantage of wealthy copyright owners' (McLeod, 2001: 25-26).

Deazley (2004) offers an adept and useful counterpoint to the assumptions underpinning concerns about authorial rights by challenging the myth produced through countless narratives that consider the history and progression of copyright as naturally, organically culminating in the modern proprietary author. Through an examination of copyright legislation in eighteenth century Britain, he argues that

copyright ‘was never simply concerned with the bookseller or the author’ and that ‘copyright, with both the passing of the *Statute of Anne* and the factual decision of *Donaldson*, was primarily defined and justified in the interests of society and not the individual’ (2004: 226).

Modern copyright policy obscures a more complex history in favour of a proprietary author-centred one, and tends to neglect or downplay the public interest element of copyright’s history. Recent reviews of copyright policy acknowledge the importance of the ‘public interest’ and of copyright exceptions (Gowers, 2006; Department for Business, Innovation and Skills/ Intellectual Property Office (BIS/IPO), 2009), but such recognition has not been substantively incorporated as yet into copyright regulation. There has been an overwhelming emphasis on ‘piracy’ and the need to better regulate digital copying in order to protect the rights of right holders in the creative industries, a position produced and maintained through discourse. Deazley highlights the significance of language, including the rhetoric of modern copyright discourse, and suggests we must ‘hold up to scrutiny the very language with which we articulate and describe copyright’ (2008: 8). An exploration of the ways in which regulation is produced through practice and discourse helps to explain how and why copyright policy and regulation may be met with resistance by users.

If ‘policy’ involves the setting of general goals and principles, ‘regulation’ refers to particular tools and actions designed to realise policy ends (Freedman, 2008: 14). Regulation might refer narrowly to a ‘specific set of commands’, where it involves ‘the promulgation of a binding set of rules to be applied by a body devoted to this purpose’ (Baldwin, Cave & Lodge 2012: 3). However, it can also be used in a

broader sense to refer to all tools and actions designed to influence behaviour in a particular direction. While government remains a central source of such actions, we invoke regulation here to encompass 'all forms of social or economic influence – where all mechanisms affecting behaviour – whether these be stated-derived or from other sources (e.g., markets) – are deemed regulatory' (Baldwin, Cave & Lodge 2012: 3). Viewed this way, 'regulation may be carried out not merely by state institutions but by a host of other bodies, including corporations, self-regulators, professional or trade bodies, and voluntary organizations' (Baldwin, Cave & Lodge 2012: 3).

Consistent with this broader view of regulation, Lessig's (1999; 2006) model of internet regulation offers a useful analytical framework, outlining four 'modalities of regulation': law, social norms, the market and architecture (Lessig, 2006: 120-137). Whereas law regulates through the threat and use of punishment, social norms influence behaviour through informal social cues and sanctions, markets through the price of goods, and architecture through the physical constraints imposed by the external environment (Lessig, 2006: 124). Each of these four modalities of regulation enables particular courses of action while constraining others and so can be used to achieve regulatory objectives. Regulation is the sum of how these four constraints act upon the individual and direct her conduct in a particular way.

While these modalities of regulation are distinct, Lessig (2006: 123) notes that they are interdependent in practice and may support or work against each other. Law has a particularly important role: legislators not only aim to achieve policy objectives *directly* through law and by setting binding regulatory rules, but can also seek to do

so *indirectly* by modifying one or more of the other forms of constraint (norms, market, or architecture) (Lessig, 2006: 125-136).

Modalities and the UK Context

Each of Lessig's modalities of regulation has been used by policymakers and industry to try to tackle illegal downloading and regulate digital copying in the UK context, but with limited success. As a modality of regulation, law remains central. Copyright law governs the right of individuals to make and distribute digital copies. The terms of copyright have been extended through law (BBC, 2011c), further limiting public access to copyrighted works, and copyright law has been used to prosecute copyright infringers and online intermediaries that facilitate copyright infringement. Examples include the legal action taken against Newzbin by a group of Hollywood studios in 2010 (BBC, 2010b), as well as legal cases that have taken place outside the UK, but with global implications, including the action against Napster in 2000 and the more recent actions involving The Pirate Bay (for an overview of key cases, see Murray, 2010: 222-266).

Despite legal efforts, copyright infringement continues, reflecting a sustained failure by both the New Labour and the Conservative-Liberal Democratic coalition governments to address the now longstanding mismatch between current copyright legislation and user expectation and practice in the digital age, even when government-initiated reviews have recommended changes that might begin to bridge the gap. Recent reviews, for example, have recommended an extension to the Copyright Designs and Patents Act 1988 to allow for limited private copying across formats, but no such exception has been passed (Gowers, 2006; DCMS, 2007;

Hargreaves, 2011). Current law has produced the farcical situation in which a fan who legally purchases an album from iTunes and burns it onto a CD to listen to on her drive to work is infringing copyright. Although record labels have affirmed that consumers will not be prosecuted for such practice, this grey area in legislation flags up the fact that the system is out of date and ill-equipped to address everyday media activities in the digital age. With the British copyright system so obviously misaligned with current consumer practice and expectation, the question of what other parts of legislation are similarly not up to scratch, or have been rendered redundant with the advent of new technologies, is highlighted.

Taken together, parody, pastiche and caricature represent another area where everyday media practice is at odds with UK copyright legislation. With the adoption of digitisation and the ability to accurately, rapidly and cheaply copy media, a vibrant user-led online creative community has developed around these cultural practices. Indeed, the Hargreaves review recommended a parody exception, noting, 'Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy' (Hargreaves Review, 2011: 50). The legal constraint, which holds producers and distributors of parody, pastiche and caricature potentially liable for copyright infringement, seems absurd in the context of a long history of parody in British cultural life. The law also curtails creative expression, lending weight to the notion that there is limited government and industry support for future 'produsers' (Bruns, 2008) and creators, such as DIY filmmakers who produce machinima (Frølunde, 2012). As these examples illustrate,

current copyright law does not accommodate cultural nuances and remains out of step with user activities.

Given that law alone has been ineffective in preventing copyright infringement, governments and industry have also turned to less direct forms of regulation. Efforts have been made to modify social norms by teaching copyright in the classroom (Yar, 2008) or by running advertising campaigns that characterize file-sharers as 'thieves' and 'knock-off Nigels' (Industry Trust, 2007). However, attempts to (implicitly or explicitly) threaten and vilify copyright infringers occur at a time when file-sharing has become an increasingly common activity for many ordinary media consumers, limiting the persuasiveness of such messages for users. For example, the Motion Picture Association of America's 'Piracy is a Crime' campaign, which compared copyright infringement to physical theft (MPAA, 2004), backfired, becoming a source of ridicule and the basis of a parody in an advert which aired on the British comedy programme *The IT Crowd*. [2]

Regulators and industry have more recently changed the tone of advertising and educational campaigns designed to stop downloading in an attempt to shift the discourse from the threat of legal action to the threat of a poor media experience and social embarrassment. For example, the campaign by 20th Century Fox 'Watch Real DVDs' (20th Century Fox, 2008) tells the tale of Bob and Jim, two young men who invite their friends over to watch a DVD. Bob has a legally bought DVD, but Jim has invited his friends to watch a pirated copy. The legal DVD is of the very best quality and the evening is a great success, while Jim's DVD suffers from poor sound, visuals

and glaring continuity problems, disappointing his friends, humiliating him and making his evening a social disaster.

Attempts to regulate through social norms are also exercised through public relations work by industry players that suggest copyright infringement activity is damaging the health of the creative industries. NBC Universal, for example, commissioned research to quantify the scale of illegal downloading and streaming of films, amongst other media, and publicised a rise in such activity of almost 30% from 2006 to 2010 (BBC, 2011b; Envisional, 2011). However, such news items should be contextualised in relation to widely-available industry figures and academic research that show P2P downloading is not to blame, for instance, for the decline in CD purchases (Andersen and Frenz, 2010). On the contrary, the growth in illegal downloading sits alongside a rise in legal sales of digital content (IFPI, 2012).

There have also been attempts to adapt the market in order to promote legal downloading and streaming. Examples of regulation through the market include decisions about when and how media is released, such as Disney's controversial decision to release *Alice in Wonderland* (2010a) on DVD only three months after its theatrical release (rather than waiting the usual 17 weeks), thereby reducing the attractiveness of pirated copies. The market has also been adapted through the promotion of legal platforms for content distribution such as iTunes, LoveFilm and Netflix, as well as cloud-based services such as Spotify (BBC, 2010) and Findanyfilm.com, an online initiative from the UK Film Council to help consumers find the films they want. The latter is a typical example of new policy interventions based on behavioural economic arguments such as 'nudge' theory, which encourage

individuals to make more ‘responsible’ decisions by constructing markets in ways which make desirable behaviour more rational (Thaler and Sunstein, 2008). The regulatory potential of the market lies in the convenience of the packages provided, which are becoming increasingly attractive to users (Music Week, 2012). However, despite the successes claimed by these platforms, it is clear that copyright infringement on the internet remains a dominant force.

Finally, there have also been attempts to regulate digital copying at the level of architecture or code. Lessig (2006) stresses the particular importance of code (broadly defined as technical instructions embedded in software and hardware) as a form of regulation in the internet environment. Code can be easily designed and (re)programmed to serve different purposes and values. Furthermore, unlike law, code regulates behaviour *ex ante*, making it difficult for users to resist regulation, and usually in a non-transparent way that is not easy for users to detect or understand (McIntyre and Scott, 2008).

Digital Rights Management (DRM), for example, has been employed in order to control and limit the ways in which digital files can be used after sale. While efficient, the use of DRM for music files proved unpopular with users. As Murray (2010: 69-70) argues, ‘DRM was viewed by the majority of music consumers to be an unreasonable, and sometimes damaging, restriction on their freedom to enjoy something they viewed, having paid to purchase it, as their property’. As such, ‘all attempts to use design modalities to engineer music files which could not be copied have failed’ (Ibid: 65). For instance, Apple decided to remove its FairPlay DRM restrictions for music files on iTunes in 2009. DRM is still used for videos on iTunes,

however, and DRM is employed by other providers (e.g., Netflix uses Microsoft Playready DRM).

Efforts have also been made to constrain the supply and distribution of illegal content by focusing on the role of Internet Service Providers as a key intermediary. Here, the modalities of law and architecture interact. In July 2011, for instance, the British high court ordered British Telecom to block Newzbin 2 through use of its Cleanfeed software (BBC, 2011a), while the Digital Economy Act 2010 included provisions for Ofcom to force ISPs to throttle, suspend or disconnect the internet accounts of persistent infringers who ignore initial warnings about their activities (*Digital Economy Act 2010*, section 10).

Despite the barrage of regulatory measures across the range of modalities, the regulation of digital copying has not proven especially effective in practice. While the market of legal digital consumption has grown (IFPI, 2012), many users continue to copy and share digital content illegally. The resistance to comply with copyright regulation displayed by increasing and increasingly open illegal downloading has cast user attitudes and behaviours as a crucial focus for government and industry research, with a view to producing more effective regulation. For example, the Strategic Advisory Body for Intellectual Property (SABIP) recently conducted a number of studies of user behaviour, both offline and online, with the intent of informing future policy in this area (Hunt et al, 2009; SABIP, 2009). Such work is framed by the underlying belief that in order to regulate effectively, policymakers need to understand user attitudes, norms and behaviours in a more sophisticated way. SABIP stated:

> A comprehensive approach based on a greater understanding of people's attitudes and behaviours is required. This will enable policy-makers to devise effective laws and effective enforcement whilst feeding into other aspects of copyright policy, such as user-friendly licences that are seen to be fair and reasonable, awareness-raising and education programmes for users in all demographics. They would also inform the testing of more attractive legitimate business models. To this extent, a fuller understanding of attitudes and behaviours is the foundation upon which good business and good policy are built. (SABIP, 2010: 2)

As outlined above, by considering each of Lessig's modalities in turn a marked lack of engagement with users - in terms of norms, behaviours and attitudes - is revealed. User resistance to regulation is difficult to account for using Lessig's model, but other work provides more insight into the user perspective. In a critique of Lessig's model, Murray (2010: 62-70) proposes a 'network communitarian' perspective, which he argues is better able to explain user resistance and the relative failure of copyright regulation in practice. This perspective emphasizes the social mediation of regulation. Whereas Lessig's model depicts the individual as the passive subject of external regulatory constraints, the network communitarian perspective emphasizes how the individual is always already embedded within a wider community with which he or she shares certain values and norms. Furthermore, the community plays a more active role than Lessig suggests in being able to shape and negotiate the form regulation takes.

In stressing the importance of common values and norms, the network communitarian perspective can help to explain resistance to copyright regulation in a way that moves beyond rational-individualistic theories, which assume that individuals just download illegally because it is free, easy, and they can get away with it. In the next section, we consider a range of recent studies of user attitudes and behaviours towards copyright infringement that begin to position actions against broader social contexts.

These bodies of work are marked by different objectives and assumptions, which shape the range of user identities, attitudes and motivations that emerge.

Users Under the Microscope

Much of the existing work on users has been initiated by industry and policy researchers, who tend to be closely aligned in their desire to ensure the existence of a copyright system that will protect the commercial benefit derived from creative work. Research questions often focus on how to resolve the conundrum of user violation of copyright in the face of multiple efforts to regulate behaviour (e.g., Hunt et al, 2009; SABIP, 2010; BOP Consulting, 2010). Recent policy research has demonstrated recognition that the existing system of copyright is responsible for user violation of copyright because it is excessively complex, out of touch with technological advances and/or poorly communicated (BOP Consulting, 2010: 44). This position has led to a focus on understanding the detail of user lives and identities in order to construct forms of regulation to which users can relate. If the system of policy-making is at fault for having produced forms of regulation that do not relate to users in situ, then by understanding users' lives better, the assumption is that regulation may be altered to be more relevant, and therefore more effective. Questions focus not on user ignorance, but on the rationality that guides their decision-making and the influences on those decisions that originate outside the regulatory environment (SABIP, 2010).

Industry research also dichotomises users by emphasising the extreme criminal nature of piracy, associating it with forms of organised crime including human trafficking and the illegal drugs trade (Business Software Alliance, 2011). The emphasis in this research - and the public relations work done to publicise it - is on the widespread

damage that copyright infringement can cause not only within, but beyond specific industries in wider social contexts (Film Distributors' Association, 2012). The scale of this copyright infringement, which continues despite these negative effects, is ascribed to the relative ignorance of consumers (who may not recognise pirated copies of copyrighted works or know where to source legal product), or to their lack of understanding about the scale or criminality of the problem.

By constructing users as a group of well-intentioned individuals faced with a system that is too difficult or too illogical for them to adhere to in the context of their daily lives (BOP Consulting, 2010: 2), opposition to copyright is understood as circumstantial and passive rather than intentional. User agency is reserved for criminal activity and, since most users are positioned as inherently law-abiding, the challenge is to ensure that law-abiding tendencies are encouraged in the context of copyright.

The presentation of user behaviour as an individualised response to a flawed system supports the parallel logic that copyright regulation need not engage with the inherently social nature - or 'network community' (Murray, 2010) - of online activity. Thus, even as industry and policymakers are attempting to better understand users, distance is discursively constructed between users, their networks and copyright owners.

Academic contributions across and at the intersections of ethics, marketing and criminology take for granted the legal foundation of copyright and, like policy research, set out to explore why users violate copyright and how legal behaviour

might be encouraged. Many of these studies focus on the self-perception of users and the application of moral and ethical criteria in online contexts. Studies highlight a lack of clarity about the ways ethics are understood and applied by users in online contexts (Suter et al, 2006; McMahon and Cohen, 2009; Freestone and Mitchell, 2004) and attempt to explain users' rationales for their 'deviant' behaviour through the power of a 'consumer rights' belief (Shang et al, 2008) or group norms (Ingram and Hinduja, 2008). Assumptions about the legitimacy of copyright regulation are illustrated by the descriptions of user activity as 'transgression' (Selwyn, 2008; Shoham, 2008) and 'misbehavior' (Selwyn, 2008; Freestone and Mitchell, 2004), closing down potential alternative perspectives on user behaviour.

Scholars adopting a more sociological understanding of the system of copyright offer a more contextualised understanding of user behaviour, which resonates with Murray's communitarian approach through the starting point of a shared and sharing online culture and community, rather than the deviant behaviour of the individual. Beer (2008), for example, explores the ways in which sharing music across different online platforms creates virtual spaces for connection across time and space and is fundamental to the promise of user participation in Web 2.0 being realised and Condry (2004) analyses file-sharing as fan activity rather than straightforward legal or economic activity. If sharing via networks is the norm, regulating users to stop sharing becomes the aberration (Cammaerts, 2011; Rodman and Vanderdonckt, 2006).

Bryce and Rutter (2008) argue that copyright infringement needs to be considered as part of an 'everyday practice', or socially embedded activity which must be

understood within social contexts, challenging the normative discourses of industry and policymakers by addressing claims about regulatory needs and foci, as well as the role of individuals, artists and industry in the regulatory process. Rutter interrogates negative representations of illegal downloaders through an exploration of 'discourses of harm and morality that have become so firmly entrenched in industry, media and academic discussion over piracy' (2010: 414) and a critique of the punishments for illegal downloading despite the complex overlap between legitimate and illegitimate consumption practices.

Social and cultural contextualisations of copyright violation sit beside direct critiques of regulatory practices and the copyright system itself, including the heavy-handed legal approach taken by the music industry (David, 2009); attempts to turn copyright adherence into normative 'knowledge' by including it in the school curriculum (Yar, 2008); global copyright mechanisms that disadvantage artists and users from developing countries and under-resourced communities (Hesmondhalgh, 2006); and fears of piracy as a mask for corporate control (McCourt and Burkart, 2003). Copyright regulation and industry discourse around piracy are necessarily intertwined: 'In terms of the importance of piracy for the recording industry, what matters is not its economic effects but its rhetorical impact…piracy is not primarily an economic concept: it is an ideological one' (Marshall, 2004: 196-7).

Challenges to aspects of copyright as a legitimate regulatory mechanism are unlikely to dismantle the copyright system anytime soon, especially given the power exercised by the creative industries on a global scale (David, 2009; Hesmondhalgh, 2007; Frith and Marshall, 2004). What such work does accomplish, however, is the movement of

the copyright debate in a more democratic and inclusive direction. The dominance of industry and policy perspectives in the copyright debate must incorporate an engagement with user perspectives on the fundamental concepts and ideologies that underpin regulation and produce competing discourses. The disjuncture between everyday norms and practices of internet users, on the one hand, and norms that are reflected most prominently in copyright policy and regulation, on the other, suggest widespread rejection of the underlying rationales. Advocacy groups such as the Open Rights Group in the UK and the Electronic Frontier Foundation in the US can be understood as articulating perspectives that represent the user and which may be implicit in user activities. But while such groups are officially included in policy debates through formal consultation processes, their perspectives still remain outweighed by the dominance of industry objectives and assumptions regarding copyright. May (2003) and Duff (2008) have written of a 'normative crisis' surrounding digital media and its use; greater attention to users, and their advocates, in this respect is required if the current failure of regulation is to be fully understood. Boltanski and Thévenot's (2006) work on justification allows for such an exploration of competing discourses regarding copyright regulation and downloading activities.

Justifying Copyright: An Alternative Approach

Existing studies and models are useful in understanding the limitations of copyright regulation and exploring user resistance to it, but they fail to examine and explain fully the root of the chronic failure to agree that characterises relations between the different stakeholders affected by copyright legislation. Understanding copyright as a particular 'economy of worth' (Boltanski and Thévenot, 2006) allows for a

deconstruction of both discourses and behaviours related to copyright as forms of justification continually presented to and tested by the parties involved.

The critical sociological question with which Boltanski and Thévenot engage relates to the ways in which agreement is reached within society, such that disputes are resolved and activity takes place in a relatively ordered fashion. They situate these processes in the context of a model polity. Within these ideal conditions, members are connected by a common humanity but manifest different states which differentiate them from each other. These different states must be ordered as a means of effectively coordinating actions and justifying distributions within the polity. This ordering takes place on the basis of a principle of worth, generally applied within the polity as a scale of value for the good or happiness attached to the various states. As Boltanski and Thévenot (2006: 75) point out, there is a consequent tension between the common humanity recognised in all members and the ranking of their states that is required for the effective function of the polity.

This tension is resolved through the constitution of 'worth': the states allocated the highest forms of worth require a sacrifice of self-interest in the interest of the common good, while states lower in the hierarchy are characterised by greater interest in personal, rather than societal, benefit. The self-sacrifice required of elite members of the polity - and their corresponding contribution to the common good - are recognised by those lower in the hierarchy as valid grounds for higher status, since general benefits of that status are extended to and recognised by all members of the polity (Boltanski and Thévenot, 2006: 74-79). Boltanski and Thévenot (2006; Thévenot, Moody and Lafaye, 2000) suggest that there are six orders of worth that

can be used to understand the grounds for justification and subsequent agreement or conflict between members of a polity: domestic, inspired, opinion, industrial, civic and market. Industrial orders of worth justify hierarchies based on efficient operation of the polity and systemic effectiveness over time (for example, the notion that copyright will ensure the correct reward for authors that will encourage their continued creative effort). Market orders of worth base their arguments on economic benefits delivered by a particular hierarchy, the appropriateness of modes of production and consumption, and the efficient circulation of goods and services (for example, upholding copyright will ensure that Britain's creative industries will contribute to its global economic competitiveness). Finally, civic orders of worth are grounded in hierarchies that are justified on the basis of the collective identity, welfare, citizenship and solidarity they deliver (for example, upholding copyright means benefits will accrue both to the wider public as well as to specific industries, whereas copyright infringement fulfils only personal self-interest).

While these three orders of worth operate to justify the existence of copyright, the inspired, opinion and domestic orders of worth also inform their operation, since they are used to justify the status of those entitled to copyright protection, those entitled to have a voice in the debate and to articulate the responsibilities of users in relation to the former. The inspired order privileges individual creativity, risk-taking and imagination that challenges normative rationalities and routines, and can be seen in discourses that recognise the value of creative work and the need to reward it. Within the opinion order of worth, on the other hand, higher status is driven by external recognition and the ability to influence and shape public opinion. In the copyright debate, this order privileges the voices of major corporations, policymakers and

celebrities who express opinions one way or another about the legitimacy of the copyright regime. The scale of copyright infringement also becomes significant, since it represents an expression of public opinion. However, the individual contributions of everyday users, and even the advocacy groups that represent their views, remain comparatively marginalised, since they cannot claim to influence opinion in the same way as higher profile individuals and organisations, whose own perspectives delegitimate alternatives. Finally, hierarchies in the domestic order of worth are constructed on the basis of traditional forms of authority, including the mutual responsibilities of individuals and organisations that need to be fulfilled in order to deliver harmony rather than conflict. Thus, those in traditional leadership positions (e.g. government and policymakers) are recognised as having the right to explain the responsibilities of different stakeholders in the copyright debate in order to ensure an equitable copyright regime.

For an order of worth to function as an effective organising principle there must be agreement as to what constitutes the 'common good' for the polity. In other words, the acquiescence of those lower in the hierarchy is obtained when they recognise not only the claim to *benefit* the common good, but also the *definition* of the 'common good' itself. As Boltanski and Thévenot argue:

> The structure of the model supports two basic requirements that are strongly antagonistic: (1) a requirement of common humanity that presupposes a form of identity shared by all persons and (2) a requirement of order governing this humanity. The definition of the common good is the keystone of the construction that has to ensure compatibility between these two requirements. (2006: 77)

While in the model polity such conditions may be met, in the real world disputes about the definition of the 'common good' and of relative worth continually emerge because polities defined by different orders of worth co-exist. The 'noise' from

external polities prompts challenges to the prevailing order within a particular polity. In the copyright debate, for example, the claim that copyright will ensure continued production and circulation of creative works (market order of worth) may be challenged by counter-claims that copyright shuts down fair access to creative works for a range of use by the wider public (civic order of worth). These represent clashes between orders of worth (across polities, which may take the form of contentions about the common good). On the other hand, clashes may also focus on the relative worth attached to states within the polity. In the context of the inspired order of worth that frames copyright, for example, users may challenge the way in which the encroachment of justifications from the industrial order of worth result in higher status attributed to formally recognised and contracted authors of original creative works, compared to those who parody or caricature these originals. The logic of the inspired order is based on individual creativity and so the formal recognition of a creative artist by organisations or institutions should not result in higher status. Where such clashes arise, tests are required to justify the attributions of value made on the basis of the prevailing order of worth. It is for this reason that justificatory discourses - which may be understood as an iterative articulation of orders of worth and the responses to tests of those orders of worth - are fundamental to the function of society. Through these ongoing processes of justification, compromise may be reached by appealing to a form of common good that transcends the interests of individual polities and can encompass the various orders of worth involved in the debate (Boltanski and Thévenot, 2006: 277-278).

Boltanski and Thévenot's work adds a new dimension to understanding copyright regulation. The notion of orders of worth, for example, enhances Lessig's work by

contributing a rationale for the construction of various modalities of regulation as based on the protection of a particular order of worth which, in turn, is grounded in the notion of a particular common good. Correspondingly, the failure of different attempts to regulate may be interpreted as a failure in response to an implicit or explicit test of the order of worth or common good on which the regulation is based. Moreover, the ordering process inherent in claims to superior worth prompts a more explicit analysis of the power dynamics that underpin contestations of copyright within Murray's 'networked communitarian' approach.

Boltanski and Thévenot's work facilitates a shift away from examining the mechanisms used to enforce copyright, and towards examining the justificatory discourses that articulate the grounds for copyright legislation and enforcement. These discourses are generated by groups of organisations and individuals with an interest in copyright regulation: government, industries invested in intellectual property (e.g. music, software, film, publishing), Internet Service Providers, creative workers, advocacy groups and ordinary users. Some of these groups (e.g. ISPs, artists within a particular industry) might be considered polities, since their members are connected by some common interpretations of a common good and order of worth. Within the justificatory discourses generated by these groups, the presence or absence of the different conditions for a model polity (members connected by a common humanity, an agreed common good and an accepted order of worth) and the possibility of compromise between different polities can be explored. Understanding the way these justificatory dynamics shape the copyright debate has the potential to create a more deliberative and democratic social mediation of the issues that could lead to more informed and negotiated policy formation.

Towards More Democratic Policy-making

This article has traced the relative failure of regulation in the case of digital copyright. Challenges presented by digitisation have revealed the ways in which current copyright law fails to acknowledge the public perspective or serve the public interest. Rather than prompting a genuine dialogue or reassessment of the roles, purposes and needs relating to copyright, changes in technology have produced a race to secure and enforce the existing system (a system that not incidentally serves those with the most power and greatest financial stake in the debate).

A better understanding of the justifications underpinning copyright regulation may help to promote more negotiated, informed and democratic policy making in this area. Murray (2010) argues that user resistance to copyright regulation is an example of the active role the community plays in negotiating internet regulation. Referring to Lessig's modalities of regulation, he suggests that the 'modalities of laws, markets, and norms draw their legitimacy from the community, meaning that the regulatory process is in fact a dialogue not an externally imposed set of constraints' (Murray, 2010: 68). But while users may have resisted copyright regulation to some extent, this is quite different from users having a positive, constructive impact on policy making; Murray's (2010: 68) depiction of internet regulation as the outcome of a process of societal 'dialogue' appears overly sanguine in this context. Ideally, policy making would be an inclusive, democratic process, which reflected all viewpoints and which was oriented towards the public interest. However, research on the media and communications policy process demonstrates how certain private interests often dominate policy making in practice (Freedman, 2008: 80-105, 2010; Hesmondhalgh,

2005). As Marsh (2002: 22-32, 2008) has argued, structural inequality influences policy making in three broad ways, constraining if not ultimately determining policy decisions. Firstly, the balance of resources held by groups in society can influence policy decisions. For example, much recent discussion about copyright policy is framed by a general need to defend and promote the economic interests of the creative industries as an important domestic industry in the UK, thereby equating the particular private interests of such companies with the general national interest (DCMS, 2009; Hargreaves, 2011). Secondly, the resources which actors are able to draw upon in lobbying and seeking to influence the policy process are not equally shared. Given access to much greater organisational, financial, and communicative resources, large and well-established private companies tend to hold greater sway in the policy making process than members of the public or those advocacy groups that seek to represent them. Thirdly, the nature of the political system itself may reflect and reproduce inequality. The UK political system is centralised and is based on electoral representation and a 'thin' liberal conception of participation. The government may pay lip service to the value of greater public participation and consultation, but such participation rarely has a discernible impact on the decisions that are eventually taken (Freedman, 2008).

Given that the policy making process is characterised by inequality and asymmetries of power, users are less able to influence the shape of regulation than the network communitarian perspective suggests. Resistance to the policing of digital copying by users, internet companies and advocacy groups will no doubt continue in various forms, as evidenced by the recent successful protests against the Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA) in the US, where the protest actions ranged

from signing online petitions to hacktivist tactics such as distributed denial-of-service (DDoS) attacks. But at the same time regulatory and technological changes, such as the growing regulatory role of Internet Service Providers and the use of new, more controllable devices, as discussed by Zittrain (2008), may bring greater regulatory control over copyright in future. Besides which, the power to resist remains a purely negative one, a 'democracy of rejection' rather than a 'democracy of proposition' (Rosanvallon, 2009: 15). In other words, what is missing is not 'opportunities for citizens to express their dissatisfaction with government', but rather 'the means by which these voices can be valued within a wider process of policy development' (Couldry, 2010: 143).

Consideration of the discourses and modes of justification drawn upon (Boltanski and Thévenot, 2006; Boltanksi, 2011) by the range of actors involved in copyright debates, including ordinary users, allows for the connection of copyright regulation to the public interest, and highlights the importance of user understanding and engagement with policy, if a more constructive process of policymaking is to be achieved. Advocacy groups are proving an increasingly powerful force at the centre of protests, and offer the possibility of a bridge between user perspectives and policymakers. The policymaking process could also be enhanced through greater public engagement and deliberative consultation, where different perspectives are debated, reflected upon and clarified and interlocutors are required to justify their positions (Coleman & Blumler, 2009). Encouraging governments to embrace such an approach may prove difficult, but the path to resolving battles over copyright lies in shifting the dynamics and terms of the conversation from one based on government

and industry rhetoric seeking to discipline users and sideline alternative perspectives to one that encourages public deliberation and participation.

Notes

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[2] *The It Crowd* Season 2, Episode 3 – 'Moss and the German'

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