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Union responses to recent transformations and conflicts in the journalistic field

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Abstract

This paper examines the repercussions of global integration through new digital technologies on employment relations in the journalistic field. It focuses on the conflicts provoked by changed market and working conditions as well as on recent efforts to reform the German copyright law.

In the first part of this paper we will analyze the transformations in the journalistic field provoked by the emergence of the World Wide Web. The second part will analyze and evaluate the strategies of established trade unions and new professional organizations and their relationship to other actors like, e.g., digital right groups. We will conclude with general theoretical considerations about the significance of intellectual property rights for labor relations in the realm of knowledge work.

Introduction

In a recent interview with the British newspaper *The Guardian* Tim Berners-Lee, the inventor of the World Wide Web, called the extension of surveillance powers a "destruction of human rights". He warned: "The idea that we should routinely record information about people is obviously very dangerous. It means that there will be information around which could be stolen, which can be acquired through corrupt officials or corrupt operators … We open ourselves out, if we store this information, to it being abused." (Katz, 2012)

Strangely, a stricter surveillance of the Internet and an obligation for Internet service providers to routinely record information about their users is proposed among others by trade unions. In a response to a public consultation on the open Internet and net neutrality by the European Commission UNI Europa, the European federation of service unions, demanded that Internet service providers should be responsible for monitoring network traffic against copyright violations: "Net neutrality policies should promote the responsibility of Internet service providers and stipulate requirements regarding network management to tackle unauthorised use of protected works over the Internet. Requirements should include notifications of end-users who try to access copyright-infringing material. Following such notification, appropriate steps to block access to that content should be permitted." (UNI Europa, 2010: 4) This proposal is similar to the French HADOPI law with the difference that it is not a government agency who is responsible for the surveillance of network traffic and the decision about what is an illegal or "unauthorized use" but private companies.

In current debates about intellectual property rights employment relations and in particular the opposing interests of employers and employees seem to play no role at all. Another opposition prevails, that between net activists and large Internet companies on the one side and the media industry and the trade unions active in the sector on the other side.

The purpose of this paper is to understand why trade unions of the media sector lobby against net neutrality and Internet freedom and in favor of a stricter surveillance of Internet users. I will treat this question on the basis of the argument that labor relations

an essential to understand the debate about intellectual property rights. My main example will be current conflicts in the journalistic field in Germany.

The Internet Revolution As Background

After television the World Wide Web has produced a second far reaching revolution in the news and media sector – with partly opposing effects. Television is characterized by an economic structure with "high-cost hubs and cheap, ubiquitous, reception-only systems at the ends" (Benkler, 2006: 179). It favored large organizations able to collect sufficient funds and a one way communication in the sense of what Lawrence Lessig calls "read-only" culture. In Germany the financial constraints of public television led to the establishment of public television channels (Stühmeier, 2011: 6–9). Only in the 1980s the market was opened for private television channels with advertising as main financial resource.

The World Wide Web, on the contrary, drastically lowers the barriers for market entry (as everyone can set up a website for minimal costs) and, for the first time, offers real opportunities for a two way mass communication in the sense of Lessig's "read-write" culture or Bertolt Brecht's "Radiotheorie". Furthermore, despite existing language barriers, the web increases internationalization and at the same time enters the market of local news that has been a stronghold of classical newspapers. In particular it has conquered the domain of small adverts for housing, cars, jobs, etc. that has been a main financial resource of printed newspapers.

In response to these challenges and the general fall of advertising revenues and newsprint sales after 2001, many newspapers have chosen a strategy of cost reduction. A deterioration in journalistic working conditions has to be noted, ultimately leading to a vicious circle: Job cuts mean poorer quality because of the remaining editors having less time for investigative work. Mergers of journalism departments mean less experts and a loss of local embeddedness. Due to the deteriorating quality of the print articles, more former newspaper readers and advertisements have migrated online. The consequences for labor relations are devastating. Permanent full time employees are fired. The situation of the growing number of self-employed journalists has been aggravated by low remunerations and complete buy-out contracts that become more and more common. Hence, intellectual property law has become a main issue of labor relations in the journalistic field. On the one hand, a 2002 revision of German copyright law introduced the legal possibility of collective bargaining for self-employed journalists. On the other hand, newspaper publishers have successfully lobbied for a law proposal creating an ancillary copyright for publishers ("Leistungsschutzrecht") independent of the author's right ("Urheberrecht"). The current author's right indeed isn't a transferable right, but the journalists have traditionally been ceding their exploitation rights to the publishers. It is still unclear what a "Leistungsschutzrecht" exactly should protect and who will be obliged to pay royalties on behalf of this new right. The main journalists' unions, DJV and ver.di, support this proposal under the condition that journalists get a fair share of the revenues created by this new right.

New actors and new conflicts

With the rise of the World Wide Web the journalistic field has changed considerable. On the side of business newspaper publishers and broadcast companies face new corporate organizations as competitors: internet service providers (ISP), computer and smartphone manufacturers, software companies etc. The new competitors are very heterogeneous. The only thing they have in common is that the have succeeded to make money with Internet services. In most cases traditional publishers declare Google as enemy no. 1 of authors and publishers because it represents the free access culture and controls the market for advertising on the World Wide Web. However, companies such as Apple who have created successful business models for paid access are threatening the market position of classical publishers in a more direct way. There is one thing Google, Facebook and Apple have in common: they are gatekeepers controlling privileged ways of access.

Another challenge that online editions of printed newspapers face are weblogs and online news portals. These new media are better adapted to the possibilities of the world wide web and often specialized in areas neglected by traditional media (from IT news to local sports coverage). Political weblogs challenge the classical newspapers through their close connection to the civil rights movement and the advanced use of Internet techniques (podcasts, videos, hyperlinks).

Net activists organize in new organizations. Already in the 1980s the Chaos Computer Club combined the hacker ethic as described by Steven Levi (2001: 39–49) with a broad political agenda: civil rights, privacy, data protection, freedom of information, etc. Meanwhile a vast number of new organizations have emerged around digital rights topics and intellectual property issues.

Although the erosion of revenues in the journalistic field is not due to copyright infringement, copyright issues are intensely debated. In distinction to the music and movie industries revenues of newspaper publishers are not threatened by file-sharing or other forms of illegal copying. In a context where most television channels are free or publicly funded newspaper publishers decided to offer their online editions free of charge. However, as advertising revenues resulted to be lower as expected, oublishers seek new financial sources.

Apart from the already mentioned proposal for an ancillary copyright for publishers (“Leistungsschutzrecht”) current debates arise around issues that directly affect the relation between authors and publishers. In 2002 the German parliament adopted a new Copyright Contract Act intended to strengthen the position of authors vis-à-vis their publishers. A main element of this legal reform was the introduction legal possibility for collective agreements for freelance journalists. Until that time collective agreements of self-employed workers were regarded as a case of antitrust law. With the new bill the government recognized that freelance journalists are in weak position comparable to the position of their employed colleagues. Hence, they were granted the right to negotiate collective agreements with their publishers.

Union Strategies

However, these issues are highly controversial and have provoked intense internal debates within the two established unions as well as the emergence of new organizations, in particular the association of freelance journalists "Freischreiber". On the background of these debates two opposing views of the journalistic field, two "cultures", are coexisting. The traditional culture of journalism is very fond of the continental European concept of an inalienable "author's right" ("Urheberrecht") that is understood as the "labor law of creative workers" (Schimmel, 2007). Although authors and publishers partly have opposing interests which have to be brought into reasonable balance, this view tends to see their relationship as symbiotic. With the rise of the World Wide Web, a new culture of 'netizens' has emerged that is based on the hackers ethic's principle: "All information should be free." In contrast to the journalists' unions, many freelance journalists are interested in a possible free circulation of intellectual products on the Internet because they need to be read in order to make a name for themselves and because they need access to existing information for their own work. From this point of view more restrictive copyrights are not able to solve the crisis of news media. On the contrary a distinct copyright for publishers would only undermine the position of journalists without creating considerable new revenues. Although this latter view is mainly supported by new organizations such as 'Freischreiber' and digital rights groups, it is also widespread among members of the established journalists unions.

In addition, Freischreiber and civil right groups argue that newspaper publishers themselves sometimes show a lack of respect for the copyright of others. For instance, in German newspapers it is a common practice to cite articles in weblogs, videos on YouTube, other Internet sources with no other reference than "Source: Internet". The US student blogger Monica Gaudio was astonished when a friend told her that an article she had written for Gode Cookery website appeared in Cooks Source magazine although had never heard of the magazine, or given it permission to use her work. After a phone call and several emails to the magazine she received the following reply from the editor: "But honestly Monica, the web is considered 'public domain' and you should be happy we just didn't 'lift' your whole article and put someone else's name on it!" (Baird, 2010)

Although the ancillary copyright ("Leistungsschutzrecht") for newspaper publishers is still on the agenda of the German government the chances that the bill will pass the parliament get weaker with every day. Even if finally there will be a law it won't have the affects newspaper publishers and journalists' unions have expected. The suspicion arises that the ancillary copyright for newspaper publishers is a dead horse. From the start of the debate experts in the field knew how difficult it would be to define an ancillary copyright for newspaper publishers that doesn't affect existing copyright and freedom of opinion in an unacceptable way. Hence, the decision of the journalists' unions DJV and dju not to oppose the proposed bill completely but to accept it under the condition that journalists get a fair share of the profits was the decision to ride a dead horse.

In order to avoid such impasses it is necessary to overcome the opposition between the two cultures of journalism and the two views of the challenges journalism faces in the age of the World Wide Web. While the decision of traditional journalists' unions to accept the ancillary copyright bill can only be explained by an irrational fear of the

possibilities of the Internet, net activists still lack an answer how critical journalism can be financed in the long run. To overcome this schism a clear conception of the intersection between labor relations and copyright issues is a necessary precondition.

Industrial Relations And Intellectual Property Rights

"Intellectual property is the oil of the 21st century," this quote by Mark Getty, chairman of Getty Images sheds light on the increasing conflicts around copyrights, patents, and trademarks in the last years. The organizers of a couple of conferences at Berlin in 2007 even understood as "a direct declaration of war" (http://oil21.org).

Just in the last couple of months intense political debates about the enforcement of intellectual property rights could be observed all around the world. In the USA two proposed laws – the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA) – have actuated a unique protest of Internet companies and websites, leading to an "unprecedented" Internet blackout on January 18, 2012. A month later, the ratification process of the Anti-Counterfeiting Trade Agreement (ACTA) provoked one of the first really pan-European protest movements with demonstrations of over a million of young people all over Europe. In Germany the success of the Pirate Party in recent state elections has overturned the once stable political system.

Although trade unions and professional organizations regularly participate in the debates about copyright enforcement and intellectual property rights in general the impact of intellectual property rights on labor relations is strangely neglected. This maybe due to the fact that intellectual property rights primarily regulate business relations, not employment relations. The common view of copyright still relates to an individual author concluding a contract with his publisher. In this case copyright protects both, the author and the publisher, from unauthorized copies. However, copyright not only applies to individual artistry but also to collective forms of cultural production, from film making to the software industry. In the latter case software developers are employed by a company and the copyright is assigned to the employer rather than to the software developers themselves, Even if the work as self-employed or in loosely connected software projects, a copyright assignment is necessary to avoid legal uncertainties. In the case of free and open source software copyright-assignments regularly become an object of dispute (see e.g. de Groot, 2010, and Neary, 2009). In the case that employed and self-employed authors work for the same company the distinction between business contract and employment relation diffuses. Hence, copyright issues are a prototype for the increasing diffusion of employed and self-employed work.

Relationship between authors, publishers and audience

The impact of labor relations on copyright issues (and vice-versa the significance of copyright issues on employment relations in creative work) can be analyzed on the basis of the relationship between authors, publishers and audience. Copyright regulates the relation between these three groups which have conflicting interests: Authors want to reach a large audience and expect reputation and a financial remuneration for their

work. Publishers want to amortize their initial investments to gain a profit. The audience wants easy access to a vast amount of cultural works at the lowest price.

However, the structure of this field differs according to the type of work and changes with technological change and social development. New inventions like the letterpress, mechanical typesetting, photocopying, tape recording, and the digital revolution radically change the conditions of cultural production and the power relations between authors, publishers and audience. Although new technological developments play a key role in the history of intellectual property rights, they do not determine the terms and conditions of copyright directly. New terms and conditions are always the result of economic and social conflicts and political debates. Social change is at least as important as technological change.[1]

Publishers play a key role in the threefold relationship. Copyright was originally meant to regulate the market of publishers and still mainly affects publishers. Before the invention of mechanical typesetting the production of a book demanded high initial investments because typesetting was a very time-consuming and expensive work. As soon as the printing plates were assembled the marginal costs for each new copy were low. In the early times of the printing press the right to copy was granted as a privilege by the authority in order to protect these initial investments and to prevent a disastrous competition. At the same the "imprimatur" served as means for censorship.

With the rise of civil society the focus shifted to the authors. In a time when feudal privileges were abolished the only authority who could grant a copyright were the authors themselves. The first law that clearly reflects this shift was the British Statute on Anne in 1709. It not only based the copyright on the consent of the author but also justified it by the purpose of "the Encouragement of Learned Men to Compose and Write useful Books"[2]. In addition in defined a term of copyright of 14 years.

In continental Europe the focus on the author went even further with the introduction of an inalienable "author's right" (the *droit d'auteur* in France and the *Urheberrecht* in Germany). The author's right covers both the economic and the moral aspects of copyright. While the author can grant certain rights to the publisher the author's right itself is nontransferable. As an inalienable personal right it lasts at least for the lifetime of the author. Apart form the longer term the author's right worked de facto rather similarly to the Anglo-Saxon copyright. With the conclusion and establishment of international copyright treaties the differences between these two legal traditions have been continually eliminated.

Despite this shift of focus the economic aspect of copyright as well as author's right mainly affected publishers. To what extent an author participates in the revenues a publisher obtains is not regulated by copyright itself but depends of the copyright contract.

For a long time, the audience was concerned by copyright in so far as authors are part of the audience and use existing works in their own work, either legally (as quotation, allusion, parody, etc.) or illegally (as plagiarism or rip-off). All the same, the Copyright

1 On the history of copyright see Höffner, 2010.

2 Cited according to http://www.copyrighthistory.com/anne.html (retrieved on 26 may 2012).

Clause of the United States Constitution of 1787 defines copyright as balance between the interests of the audience and the author: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Only in the 20th century with the invention of photocopying and tape recording, the audience, for the first time, gets affected by copyright law because the means for copying become affordable by nearly everyone. This new situation led to a societal compromise: governments accepted that it makes neither sense to ban these new technologies completely nor was it considered appropriate to completely monitor the private use of these technologies. Instead, the private use of these technologies was legalized on the basis of the fair use principal in the USA or as a restriction to the author's right in continental Europe. As a compensation copyright collecting societies were established, in Germany for example the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) for music recordings, VG Bild-Kunst for pictures, and VG Wort for printed texts.

Meanwhile this development has even gone further: As everyone can afford the means for copying in the same quality as commercial companies copyright affects everyone. The audience has become an essential part of the regulation of copyright. In distinction to the 20th Century, however, a new societal compromise is out of sight.

Blind spots of the current copyright debates

The debate about copyright is biased by two blind spots with regard to the relation of author, publisher, and audience:

The first blind spot regards the conflicting interests of authors and publishers. Although conflicts around copyright contracts and copyright assignments are frequent in all areas of cultural production (with journalism as one example), they hardly play any role in political debates. Although trade unions know about these conflicts, they often build coalitions with the media industry and employer organizations against the users blamed for their alleged adherence to a "free of charge culture".

The second blind is that the intersection between authors and audience is neglected. Often authorship is understood as if authors create their works out of nothing. However, according to Christian theology *creatio ex nihilo* is a divine privilege. Human creativity depends on a cultural background, it creates on the basis of what already exists. This is most obvious in academic publishing. For scholars it is necessary to refer to existing texts. They contribute to the advancement of scientific knowledge because they stand "on the shoulders of giants" (Merton, 1965). Hence, scholars gain more from low costs of access to existing knowledge than from high revenues for copyright claims. They oppose the policies of academic publishers such as Elsevier because they feel exploited both as authors and as readers. Another example where authors heavily rely on the work of others is software development. Software in the form of editors, compilers, debuggers, libraries, etc. is the main means of production for software development. Hence, "the free software movement can be understood as an attempt of software developers to regain control over their means of production" (Lücking & Pernicka, 2010: 317).

References

Baird, Dugald (2010). Cooks Source: US copyright complaint sparks Twitter and Facebook storm. *The Guardian,* Thursday 4 November 2010 18.53 GMT. http://www.guardian.co.uk/media/pda/2010/nov/04/cooks-source-copyright-complaint (retrieved on 26 May 2012).

Benkler, Yochai (2006). *The Wealth of Networks. How Social Production Transforms Markets and Freedom.* New Haven and London: Yale University Press.

Benson, Rodney (2006). News Media as a "Journalistic Field": What Bourdieu Adds to New Institutionalism, and Vice Versa. *Political Communication,* 23 (2), 187–202.

Benson, Rodney and Neveu, Erik (eds) (2005). *Bourdieu and the journalistic field.* Cambridge: Polity Press.

de Groot, Adrian (2010). *On Copyright Assignment.* FSFE Fellowship blog, Monday, January 4th, 2010 at 22:46. http://blogs.fsfe.org/adridg/?p=628 (retrieved on 20 January 2010).

Getty, Mark (2000). Blood and Oil. The *Economist,* March 4, p. 68, quoted according to http://en.wikiquote.org/wiki/Mark_Getty (retrieved on 26 May 2012).

Höffner, Eckhard (2010). *Geschichte und Wesen des Urheberrechts.* 2 vols. München: Verlag Europäische Wirtschaft.

Katz, Ian (2012). Tim Berners-Lee urges government to stop the snooping bill. *The Guardian,* Tuesday 17 April 2012 21.34 BST. http://www.guardian.co.uk/technology/2012/apr/17/tim-berners-lee-monitoring-internet (retrieved on 26 May 2012).

Lessig, Lawrence (2004). *Free Culture.* New York: Penguin Press.

Levy, Steven 2001. *Hackers: Heroes of the computer revolution.* London: Penguin.

Lücking, Stefan and Pernicka, Susanne (2010): Knowledge Work and Intellectual Property Rights: New Challenges for Trade Unions. *Journal of Workplace Rights,* 14 (3), 311–328.

Merton, Robert K. (1965). *On the Shoulders of Giants. A Shandean Postscript.* New York: Free Press.

Meyen, Michael (2009). Das journalistische Feld in Deutschland. Ein theoretischer und empirischer Beitrag zur Journalismusforschung. *Publizistik,* 54 (3), 323–345.

Neary, Dave (2009). *Copyright assignment and other barriers to entry.* Safe as Milk Blog, April 8, 2009 1:04 am. http://blogs.gnome.org/bolsh/2009/04/08/copyright-assignment-and-other-barriers-to-entry/ (retrieved on 11 April 2009).

Schimmel, Wolfgang (2007). *Brauchen wir noch ein Urheberrecht? Anmerkungen zur Debatte über das geistige Eigentum und die "Informationsgesellschaft."* — Paper presented at a DGB workshop on 'Digital Copyright' on 6 December 2007.

Stühmeier, Torben (2011). *Das Leistungsschutzrecht für Presseverleger: Eine ordnungspolitische Analyse.* Düsseldorf: Düsseldorf Institute for Competition Economics (DICE). http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Ordnungspolitische_Perspektiven/012_OP_Stuhmeier.pdf (retrieved on 26 May 2012).

UNI Europa (2010): *UNI Europa response to the public consultation on the open internet and net neutrality in Europe.* Brussels, 29 September 2010. http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/net_neutrality/comments/08industry_social_consumer_orgs_ngos_etc/uni.pdf (retrieved on 26 May 2012).

VOGL, Gerlinde (2008). *Selbstständige Medienschaffende in der Netzwerkgesellschaft.* Boizenburg: Verlag Werner Hülsbusch.