

KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY

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The fields of intellectual property have broadened and deepened in so many ways that commentators struggle to keep up with the ceaseless rush of developments and hot topics. *Kritika: Essays on Intellectual Property* is a series that is designed to help authors escape this rush. It creates a forum for authors who wish to question, investigate and reflect more deeply upon the evolving themes and principles of the discipline. The scholars participating in *Kritika* choose their own topic, style and length of essay and through their choices set in train a process of emergent critical scholarship around the principles, assumptions and goals of intellectual property systems. This emergent process unites the diversity of content to be found in the volumes of *Kritika*.

Kritika: Essays on Intellectual Property

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making law on either side of that system to see the true nature of the copyright system, we are left with a pressing political project. It is of critical importance that attention continues to be drawn to the (unromantic) political economy of copyright. While it may be discouraging that it took so long, some hope can be derived from the fact that aspects of this critical political economy analysis found their way into the Report of the Special Rapporteur in the field of cultural rights. The fact that they got there at all in such a resistant international policymaking context makes the Report a welcome novelty in the international law discourse around copyright. The Report should, therefore, be seen as opening up a political opportunity for further contestation. As much as it might be out of fashion in the neo-liberal period, being romantic about the liberatory possibilities of politics seems to me to be more sustainable than the long and dangerous romance that has been the basis of too much copyright scholarship and policymaking in the post-Berne Convention period.

2. Thomas Hoeren

The hypertrophy of German copyright law – and some fragmentary ideas on information law

I. INTRODUCTION

German copyright law is currently in a gigantic crisis. As I would like to show, this legal regime has become inappropriate and unbalanced in the digital age. In order to gain a better understanding of the information crisis, we have to consider some general rules of information law. It is important to understand that copyright law is only one feature of information law and depends on some general rules of information regulation.

A. Nobody Knows what ‘Information’ Means

This is one of the strangest aspects of information law: Its topic – information – cannot be defined.¹ Since the early days of information theory, researchers have tried to define the term ‘information’. More than a hundred different definitions are known to exist.² They originate from mathematics, informatics, economics, philosophy, communication theory, and not least from law. They distinguish between information as a product, a process, or an action. There is, however, no single definition generally accepted by the scientific community. That makes at least

¹ The problem has been clearly stated by M. Klopfer, *Informationsrecht*, Munich (2003), 24.

² S. Myburgh, *Defining Information: The Site of Struggle*, University of South Australia (2009).

German researchers feel desperate. Without any acceptable definition, information law is regarded as an indefinite and unclear concept within itself.³

B. Everybody has Information

There is, however, another striking aspect of information, which gives hope: everybody has information and has an intuitive understanding of what information might be. Regardless of whether it is called information, knowledge⁴ or data⁵ – we know that a valuable good like information exists although we might not understand what exactly it is. This fact might be one of the reasons why we cannot define information properly. Information is such an important, self-evidential good, an atomic fact, that we are unable to express what it is. We are imprisoned in a world of information; missing an external view on information, we cannot say much about its nature.

C. Information is Everywhere

Information can be found everywhere and at any time. *Cogito ergo sum*. Knowledge is one of the characteristics of mankind. Our daily life is based on information. Getting information is part of our educational system. Having more information than others is regarded as a competitive advantage in the economy. Especially in the 21st century, the term 'information society' relates to the postmodern feeling that information is the fundament of our living conditions. Information is also the essence of the internet. The internet is nothing more than one way to disseminate information. During the Dot-com bubble, the internet itself was an overstressed area of research. Today, after the bubble, it has become clear that the internet is only one distribution channel among others. Although

³ See first attempts to structure and define 'information' in J. N. Druey, *Information als Gegenstand des Rechts*, Schulthess (1995). Druey's concept is highly discussed in Europe; see V. Mayer-Schönberger, *Information und Recht*, Springer (2001), 10; H.J. Garstka, 'Empfiehl es sich, Notwendigkeit und Grenzen des Schutzes personenbezogener – auch grenzüberschreitender Informationen neu zu bestimmen?' 4 DVBl 18, 981 (1998).

⁴ The term 'knowledge' (*Wissen*) is for instance used by H. Spinner, *Die Wissensordnung*, Springer (1994), 24.

⁵ The term 'data' is mainly used by public law experts such as I. Ebsen, 'Öffentlich-rechtliche Rahmenbedingungen einer Informationsanordnung', 3 DVBl 17, 1039 (1997). The German act on access to environmental data treats data and information as synonymous, see § 3 (2) UIG.

it is certainly an important one, the focus should remain on information and not on the internet.

D. Information as Common Heritage of Mankind

The assertion that 'information is free'⁶ is a dogma of the utmost importance for a certain model of information law. According to that model, information is a common heritage of mankind; it is by its nature of the same quality as the air or the sky. The model sometimes relates to statements in the area of law and economics according to which information is a public good,⁷ which by its nature is non-exclusive⁸ and non-rivalrous.⁹

However, one has to distinguish between the empirical observation that information is freely available and the normative idea that information should be freely accessible. The latter will be discussed in section E. Therefore, the question remains whether information is actually freely available. Two notions have to be clarified before drawing empirical conclusions. Firstly, the term 'information' itself is vague (see supra section B). If we cannot define information, we cannot define its nature.¹⁰ The reference to its self-evident nature is the attempt to ontologize information, to give information an objective shape. However, information is such an abstract and vague term that its nature is everything one can suppose. Secondly, the term 'free' is even more vague as it relates to an implicit understanding of freedom. In what respect is information free? If the sentence means that everybody can use any information without restrictions, the statement is empirically wrong. To the same extent, the opposite view has been developed, stressing that information is valuable. The best way to make information valuable is simply to restrict access to it. There is a lot of information, which is

⁶ The idea can be traced back to a legendary article of J. P. Barlow, 'The Economy of Ideas: A framework for patents and copyrights in the Digital Age. (Everything you know about intellectual property is wrong)', *Wired* Issue 2.03 (1994).

⁷ More substantial research on the public good topos can be found in W. Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment*, Stanford University Press (2004).

⁸ L. Lessig, *Free Culture*, Penguin (2004) 17.

⁹ See R. F. Matheus, *Rafael Capurro e a filosofia da informação: abordagens, conceitos e metodologias de pesquisa para Ciência da Informação*, Perspectivas da Ciência da Informação, Belo Horizonte (2005), 140.

¹⁰ See in general for that problem J. Gleick, *The Information: A History, a Theory, a Flood*, Pantheon Books (2011).

secret, such as the famous recipe of Coca-Cola or the data stored by the CIA or by the FBI. Parallel to the fact that there is no general definition of information there is no general evidence that information is free.

E. Information Should be Regarded as Being a Common Good

This is one of the statements that needs some philosophical backing. Being a Kantian, it is impossible to say that 'is' leads to 'ought'.¹¹ The (unproven) suggestion that information might be a common good is not in itself a justification for the claim that 'information' should be a common good. Some justify the normative element of the sentence by making a reference to the nature of information. They say that commercial and governmental efforts to control information are incompatible with the nature of information. Others refer to liberalism and the protection of free information by the First Amendment of the US Constitution.

It does not matter which normative background is used to justify the 'information should be free' doctrine. Kantian dualism does not forbid the use of the nature of things in order to construct normative sentences. It only demands the clarification of things, to make the additional normative value involved transparent. This relates to some hermeneutical concepts of pre-notional understanding ('*Vorverständnis*').¹² Everybody who deals with information law has a particular pre-understanding about information and its 'nature'. Thus, it is not a problem to have such a pre-notional understanding, since it is necessary in order to understand things. However, it is crucial to reflect upon this '*Vorverständnis*'; it must not remain hidden, unquestioned and unaltered. Otherwise, there is a risk that research on information law is based on fundamentalism. Thus, it is the task of legal research in the area of information law to identify pre-notional understandings as being fundamentalist.

For instance, theories like the Creative Commons approach lack transparency regarding their normative background. Some argue that by nature information wants or 'yearns' to be free. However, information is incapable of 'wanting' or 'yearning'; authors arguing like that use an unreflective anthropomorphism, a metaphor that transfers the wishes of a

¹¹ See F. Kaulbach, *Das Prinzip Handlung in der Philosophie Kants*, Berlin (1978), 203.

¹² The hermeneutical problem of '*Vorverständnis*' relates to the concept of H.-G. Gadamer, *Wahrheit und Methode*, Tübingen (1986). The term has been introduced into the legal discussion by J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, Frankfurt am Main (1972).

human being (evidently the authors themselves) into the notion of 'information'. Similar problems arise if you want to use the 'nature' of information to determine what information should be. Firstly, as has been shown in section D supra, information does not have a nature; this is an inefficient way of ontologizing information. In addition, something else needs to be proven in order to use that way of argumentation – that is: if information has a certain nature, why should we protect the nature of information?

II. WHAT IS LAW?

A. Nobody Knows what Law is

For centuries the question of what law is has not been settled. A lot of open questions still exist. Is law a mere fact or a normative tool? What does normative mean in that regard? Legal theory has collapsed meanwhile.¹³ Everything that has to be said about law has been said and written. There is nothing new in the jurisprudential debate. Legal theory is thus, at the moment, in a very critical situation.¹⁴

B. Every Community has Legal Rules

There is, however, one element of law that can be regarded as an analogy to information. Although nobody really knows what law is, law is omnipresent. It is working. States have it. They enforce it – in a more or less efficient way. There is no such thing as an unregulated society. Even if there are places in this world like Hyde Park Corner or the commons for the use of poor people in the Middle Ages, these areas exist or existed due to regulatory permissions and within the framework of regulatory restrictions.

C. Law is not Everywhere

Unlike information, law is not everywhere. It has been a prejudice that lawyers tend to regulate everything. Law only exists where it is needed.

¹³ See R. Coase, 'Law and Economics at Chicago', 36 *Journal of Law and Economics* 1, 239 (1993): 'Much, and perhaps most, legal scholarship has been stamp collecting'.

¹⁴ D. Saunders, 'The Critical Jurist and the Moment of Theory', 10 *Post-colonial Studies* 77 (2007).

And it is not needed in every area of life. There are still a lot of areas which are unregulated and which need no regulation. Furthermore, legal rules need a justification. Regulating an area which has been left unregulated in the past is an act which restricts human freedom and thus needs to be justified to citizens.

D. Law Lags Behind Technology

It is quite often thought and articulated as a criticism that law is missing the speed of technological innovation.¹⁵ However, both are co-evolving. Lawyers are dyslexics in terms of hindering innovation. It is their task to let innovation start, to see what it is doing and then react and restrict it if it becomes too dangerous. Facing innovation, law has to determine the underlying regulative ideas, the normative values involved and the dangers involved for society. The slowness of law is not a mistake; it is a necessary element for both law and technology.¹⁶

III. WHAT IS A THEORY?

A. The Concept of Regulative Ideas

All disciplines are based upon certain regulative ideas, a specific 'Vorverständnis' (pre-notional understanding, supra section I.E). These ideas form the Archimedean external point, enabling us to understand the essence of the discipline. The regulative idea cannot be proven within the system; it is axiomatic.¹⁷

B. Functionality as the Regulative Idea of Technology

Technicians often forget that they are working on the basis of a regulative idea themselves. Normally they regard themselves as being neutral, independent from ethical concepts, merely devoted to solving a technical problem. Yet, the mere use of a programming language is based upon

¹⁵ R. Wolf, 'Zur Antiquiertheit des Rechts in der Risikogesellschaft', 15 *Leviathan* 357 (1987); F. Scharpf, 'Die Handlungsfähigkeit des Staates am Ende des Zwanzigsten Jahrhunderts', in B. Kohler-Koch (ed.), *Staat und Demokratie in Europa*, Springer (1991), 621.

¹⁶ See W. Fikentscher, *Eine Einführung in die Rechtsvergleichung*, Mohr Tübingen (1967), 212.

¹⁷ See P. Guyer, *Kant and the Claims of Knowledge*, Cambridge University Press (1987), 188.

pre-assumptions and pre-existing purposes. Like every human being, technicians have a particular way of life in mind when they start to work. Information and information technologies are inseparably related to these prior, pre-determined perceptions by technicians. The assumption of neutrality with regard to information technology, therefore, is false. It is merely an ideology that might be used or even misused. All major elements of technical pre-understanding may collectively be called functionality. The term is a mere symbol for the susceptibility of technology for meta-technical, normative values. Technicians mainly operate within a given normative background. Technicians are satisfied as soon as their product suits and matches their predetermined system of values.

C. Efficiency as the Regulative Idea of Economics

Economic theories are based upon the concept of efficiency.¹⁸ According to the Pareto theorem of efficiency, a change that makes at least one individual better off without making other individuals worse off is called a Pareto improvement: an allocation of resources is Pareto efficient when no further Pareto improvements can be made. Pursuant to Kaldor-Hicks, efficiency is guaranteed once the economic value of social resources is maximized. A more efficient outcome can possibly leave some people worse off. However, this may be efficient as well if the individuals made better off could *in theory* compensate those that have become worse off, therefore leading to an optimal Pareto outcome.

IV. INFORMATIONAL JUSTICE AS THE REGULATIVE IDEA OF INFORMATION LAW

Informational justice¹⁹ is the regulative idea of information law²⁰ and a metaphor for meta-rules that decide upon access to information versus

¹⁸ See H. Eidenmüller, *Effizienz als Rechtsprinzip*, C. H. Beck (1998); D. Schmidtchen, 'Effizienz als Rechtsprinzip. Bemerkungen zu dem gleichnamigen Buch von Horst Eidenmüller', in *Jahrbücher für Nationalökonomie und Statistik*, 217/2 (1997), 251.

¹⁹ The term is used in other disciplines as well; see M. C. Kernan and P. J. Hanges, 'Survivor Reactions to Reorganization: Antecedents and consequences of procedural, interpersonal, and informational justice', 5 *Journal of Applied Psychology* 87, 916 (2002).

²⁰ T. Hoeren, 'Zur Einführung: Informationsrecht', 42 *JuS* 10, 947 (2002); T. Hoeren, 'Internet und Recht – Neue Paradigmen des Informationsrechts', 51 *NJW* 39, 2849 (1998).

exclusive rights in information. It is a symbol for a critical approach that questions existing solutions of normative conflicts regarding access to information. It is, therefore, a utopian idea as it does not stick to the prevailing ideas about information rights. The ideal of a community of communicators serves as a kind of utopia which ultimately has to be taken as (potentially) realizable in our real world.

A. Deconstructive Power

No one knows what informational justice exactly is. The idea of informational justice can merely be used as a critical theory to determine injustice in the dissemination of rights in information. It has to be used in a deconstructive sense. You cannot determine whether informational justice exists or not.

B. Informational Justice is a Regulative Idea to Determine State Regulation

Informational justice is a concept, which only binds states. A company is not obliged to consider ethical values. It can do so and thus improve its reputation among its customers. However, in the long run, enterprises have to consider only one objective: profit.

C. Information Should be Free

'Information wants to be free' – this was Stewart Brand's legendary statement at the 'hacker' conference 1984.²¹ As I showed in section I.E., I do not consider this approach very helpful. Information does not want anything. Information is not even capable of wanting anything. Maybe Stewart Brand wants something but information most certainly does not. Another problem is that the statement violates Kant's principle of dualism. Even if information wants to be free empirically, this does not mean it should be free.

Based on Kant's assumptions, Brand's statement might be understood as a regulatory concept.²² I cannot find any other justification for the statement that knowledge ought to be free. We are standing on the

²¹ R. Polk Wagner, 'Information Wants to Be Free: Intellectual Property and the Mythologies of Control', *Columbia Law Review* 995 (2003).

²² Some further publications of the author amplifying the thoughts above are: T. Hoeren, 'Tractatus germanico-informaticus – Some Fragmentary Ideas on DRM and Information Law, IT Law – The Global Future', *NVvIR* (2006), 149.

shoulders of giants, our knowledge stems from previous generations. It would be difficult for our society to say: information wants to be paid. This does not mean that we do not need a copyright law, though. We do need a copyright law and we do need a patent law as exceptional phenomena rather than as general rules.²³

In general, a theory is possible which axiomatically (sic!) presupposes that information should be free. *In dubio pro libertate*. If there is any doubt whether to grant exclusive rights in information or not, the answer is 'no'.

D. Property Rights to Information Need to be Justified and Limited

Exclusive rights to information require a clear justification. Exclusive rights are exceptions to the general rule that information is and should be freely available. Therefore, these exceptions need to be limited to their purpose. There has to be a legitimate interest that underlies the property right.

E. Property Rights in Information Need to be Constitutionally Justified

There are, in fact, a lot of interests which might justify exclusive property rights. Elements such as power, work, labour and energy are often used in order to claim rights. However, the interest has to be 'legitimate'. This legitimation can only be found via meta-rules. Meta-rules are for example constitutional rules that determine legitimate interests and non-legitimate interests. The Universal Declaration of Human Rights (UDHR) for instance grants

- Respect for the dignity of human beings (Art. 1);
- Confidentiality (Arts 1, 2, 3, 6);
- Equality of opportunity (Arts 2, 7);
- Privacy (Arts 3, 12);
- The right to freedom of opinion and expression (Art. 19);
- The right to participate in the cultural life of the community (Art. 27);

²³ See also T. Hoeren, 'Information als Gegenstand des Rechtsverkehrs – Prolegomena zu einer Theorie des Informationsrechts', 1 *MMR-Beil* 9, 6 (1998).

- The right to the protection of the moral and material interests resulting from any scientific, literary or artistic production (Art. 27).

However, the concept of linking intellectual property²⁴ to constitutional property protection is misleading. It stems from a Prussian discussion in 1830 in which the public had to be convinced of the necessity of a copyright law. It came in handy to say that copyright was some kind of property. Luckily though, it cannot be considered property as it is limited in time. Even though it might be protected just like property under the constitution and is also known as 'intellectual property' in English, copyright has nothing to do with property.

F. Property Rights that are not Constitutionally Justified Cannot be Accepted

Let us check constitutional rules for possible justifications. In copyright law, the reason for granting exclusive rights is creativity. Granting rights is thus justified under Art. 27 UDHR. The same applies to patent protection, which serves to protect scientific innovation. Data protection protects a citizen's legitimate interest in privacy and his interest in determining whether and how his personal data may be used (Arts 3, 12 UDHR).

But there are intellectual property rights which cannot be clearly justified. Trademark protection, for instance, is based on the protection of consumers and producers against misleading advertisements. Originally, trademarks were protected as an element of competition. However, why should a society grant anyone an exclusive right to a trademark for an unlimited period of time on the basis of a simple registration? Another example is the database protection provided for in the EU Database Protection Directive.²⁵ The exclusive right to a database is attributed to the producer of the database, i.e. to the person who put labour, time and/or money into the creation of a database. Many people put a lot of energy into building things like self-made wooden houses or making ships out of matches. Nevertheless, we do not grant them an exclusive right in anything apart from the property in the products used.

²⁴ L. Gieseke, *Vom Privileg zum Urheberrecht*, Baden-Baden: Nomos (1995), 157.

²⁵ Art. 7 Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases, OJEC 1996 L 77, 20.

Similarly, there is no need to protect digital rights management (DRM) systems against unauthorized access. The fact that someone uses a key to lock a door does not give him the right to sue anyone who is using another key to open it. We protect people against trespassing; but we do not protect the key system as such.

G. Balance of Rights

Even though we have found a justification for a property right to information that does not mean that everything is solved. Exclusive rights intermingle with other exclusive rights; they interfere with fundamental rights protected by the Constitution as well. Therefore, we need to find a system to balance legitimate interests. If necessary, the conflicting rights have to be restricted equally; the opposing protected legal interests must be balanced against each other in each individual case in light of general and specific considerations. According to the Constitution's underlying intention, both concerns are essential aspects of a liberal-democratic society. Therefore, neither of them can claim precedence as a matter of principle. The view of humanity taken by the Constitution and the corresponding structure of the community within the State require respect for all conflicting rights. In case of conflict, both concerns of the Constitution must be adjusted, if possible. If such an adjustment cannot be achieved, it has to be determined which interest is to be set back having regard to the nature of the case and to any special circumstances. For this purpose, both concerns of the Constitution, centred as they are on human dignity, must be regarded as the nucleus of the system of constitutional concerns.

H. The Impact of Functionality

Lawyers can learn from technicians that functionality is an integral part of a regulation in information law. A policy-decision has to be technically well made. Regulation is a craft in itself. Thus, it has to be made in a suitable, functional way. Each policy decision has to be evaluated *ex ante* and *ex post* in order to check its functionality. Therefore, the technical question of functionality has a regulatory dimension. The question is whether the stated objectives have been achieved. The target of a regulation as well as its mechanisms need to be analysed and clarified. There are a lot of examples where information law regulations have not

been made correctly. The EU Software Directive, for instance, contains more than twenty technical mistakes.²⁶

However, it is also true that functionality is a necessary but not a sufficient condition guaranteeing informational justice. Even a regulation that is well drafted in regard of pre-existing policy aims can nevertheless violate informational justice.

I. The Impact of Efficiency

The above-mentioned reference to fundamental freedoms in general and the proportionality principle in particular has its limitations. These dogmatic instruments do not bind the legislator, but they do narrow the parameters within which the legislator remains free to act. Thus, the constitutionality of a legislative act by no means implies that it is appropriate or reasonable. Courts will only intervene if the unconstitutionality is obvious. Defining a legitimate aim is a task primarily for the legislator, not for the courts. A court can invalidate the statute only if it is 'evidently' not conducive to the legislative aim. It is sufficient for a legislative measure if it is only partly conducive in the end. Therefore, additional instruments have to be found to determine the reasonableness or, more explicitly, the 'justness' behind a legislative act.

One element might be the economic analysis of law and its reference to efficiency. As research has shown, economic criteria might be used to determine the reasonableness of legislative acts. Efficiency is, indeed, one of the aims of regulation, not only in information law. For each policy decision, it has to be checked whether the outputs are proportionate to the costs and resources used. Efficiency also includes sustainability in order to determine whether the benefits achieved last over time. Economic analysis thus helps to obtain quantitative estimates of the likely effects of initiatives on affected groups. Within a cost-benefit analysis, all negative and positive effects of policy measures on the society can be monitored.

However, the commonly used Kaldor-Hicks measure of economic efficiency tries to measure all interests involved in monetary terms rather than in terms of preference satisfaction. The economic system is open to a wide range of values, but these are incorporated only to the extent that they are reflected in preferences, which in turn can be economically measured. Efficiency presupposes that every human action, desire and

²⁶ Directive 2009/24/EC of the European Parliament and the Council of 23 April 2009 on the legal protection of computer programs, OJEU 2009 L111, 16 (recast).

interest can be regarded as an element of efficiency. Humans do not, however, always act as a *homo oeconomicus*.²⁷ They act emotionally; they are sometimes altruistic, their interests are often led by considerations which cannot be classified as rationalistic egoism. Economic theory has a tendency to reduce values to a mere element of efficiency.

J. The Impact of Procedural Justice

Procedural justice²⁸ is concerned with making and implementing decisions according to fair processes.²⁹ People feel affirmed if the procedures that are adopted treat them with respect and dignity, making it easier to accept outcomes, even ones they do not like. Therefore, the principle of procedural justice is not only binding in the area of parliamentary decisions.³⁰ The democratic legitimation of parliaments is very important, but not sufficient. Important regulatory decisions are today made within the government, by ministers, counsellors and lobbyists. Due to the changing mechanism of policy-making, it is thus necessary to control the preparatory steps before a policy is discussed and decided upon in parliament. This is especially true for the decision-making process in

²⁷ The usability of the concept has been widely discussed in Germany; see H. Eidenmüller, 'Der homo oeconomicus und das Schuldrecht', 60 JZ 5, 216 (2005), against F. Rittner, 'Critical Remarks', 60 JZ 13, 670 (2005).

²⁸ A. Bora, 'Procedural Justice as a Contested Concept: Sociological Remarks on the Group Value Model', 8 Social Justice Research 2, 175 (1995); A. Epp, 'Divergierende Konzepte von "Verfahrensgerechtigkeit", Eine Kritik der Procedural Justice Forschung', WZB Discussion Paper, No. FS II 98-302 (1998); K. F. Röhl, 'Verfahrensgerechtigkeit (Procedural Justice): Einführung in den Themenbereich und Überblick', 14 Zeitschrift für Rechtssoziologie 1, 1 (1993); T. R. Tyler, 'What is Procedural Justice? Criteria used by citizens to assess the fairness of legal procedures', 22 Law and Society Review 1, 103 (1988); T. R. Tyler, *Why People Obey the Law*, Yale University Press (1990); T. R. Tyler, 'Legitimizing Unpopular Public Policies: Does procedure matter?', 14 Zeitschrift für Rechtssoziologie 1, 47 (1993).

²⁹ T. Hoeren, 'Was Däubler-Gmelin und Hunzinger gemeinsam haben – Die zehn Verfahrensgebote der Informationsgerechtigkeit', 55 NJW 45, 3303 (2002).

³⁰ G. Teubner and H. Willke, 'Kontext und Autonomie: Gesellschaftliche Selbststeuerung durch reflexives Recht', 4 Zeitschrift für Rechtssoziologie 1, 4 (1984); H. Willke, 'Kontextsteuerung durch Recht? Zur Steuerungsfunktion des Rechts in polyzentrischer Gesellschaft', in M. Glagow and H. Willke (eds), *Dezentrale Gesellschaftsteuerung. Probleme der Integration polyzentrischer Gesellschaften*, Pfaffenweiler: Centaurus (1987), 3.

Brussels.³¹ Due to the fact that parliamentary control does not work at the EU level to the same extent that it does in the EU's member states, the European Commission and the EU Council of Ministers should be obliged to stick to the rules of procedural justice as well. The lack of procedural justice in Brussels is one of the reasons why the European institutions are regarded widely as remote and secretive.

V. CONSEQUENCES IN THE AREA OF INFORMATION LAW

The new model has a lot of impact in the area of information regulation, especially in copyright law.

A. Copyright Law as One Part of Information Law

Copyright law is thus to be considered as being a part of a broader area of law – information law.³² Information law is a term which is being discussed more and more worldwide. It is a new model that tries to stress the common lines between the various industries of film, software, telecommunications, media and entertainment. Copyright law has to be regarded in a different way than the traditional perspective. Copyright protects information. It is, indeed, even the Magna Carta of information law. However, it has to be considered as only one of the various elements of information law. Media law, public access rights, privacy regulations, antitrust issues of access to information – all these topics are intermingled, and have to be considered together. They are bound to each other even though they sometimes have divergent approaches. However, there remains one final question: How do we define rights in information versus the public domain?

³¹ P. Moser, G. Schneider and G. Kirchgässner (eds), *Decision Rules in the European Union: A Rational Choice Perspective*, New York (2000).

³² See G. Hansen, *Warum Urheberrecht? Die Rechtfertigung des Urheberrechts unter besonderer Berücksichtigung des Nutzerschutzes*, Baden-Baden: Nomos (2009), 53; T. Kreutzer, 'Das Modell des deutschen Urheberrechts und Regelungsalternativen. Konzeptionelle Überlegungen zu Werkbegriff, Zuordnung, Umfang und Dauer des Urheberrechts als Reaktion auf den urheberrechtlichen Funktionswandel', 2 JIPITEC, 1 (2008).

B. Mentality Change within the Copyright Area

If we take this approach as a new axiomatic way of understanding copyright, then the looking glasses of lawyers have to be changed. What is necessary now is to reform copyright law in 'information's image'. Traditional copyright thinking still uses the old philosophical concepts of the 19th century. As copyright law has been an area taught and practised by a small circle of experts, it has become self-referential, autopoietic, only fixed upon itself, unable to move. The world changed – but not the copyright lawyers. The philosophical concept remained unchanged, although the rest of the world has totally changed. This was fine as long as copyright only dealt with the protection of fine arts. But at least with the inclusion of software and databases in copyright law, things changed. Wide parts of our society and industry are now affected by copyright. The shock for traditional copyright lawyers was apparent when EFF³³ and others protested against the DeCSS³⁴ decisions.³⁵

C. General Principle: Freedom of Information

It is not mandatory to interpret copyright protection broadly (and vice versa, exemptions in copyright as narrowly tailored). The general rule about any intellectual property is freedom of information. This meta-rule determines that any information can be used by everybody for free. This rule leads to a different understanding of the old copyright distinction between ideas and expression. It must be vexing for traditional copyright lawyers that they were unable to find a workable borderline between the free use of ideas and protectable expressions. Centuries have passed alongside attempts to define these terms; but as the discussion on the protectability of show formats has demonstrated, no solution was found. This difficulty has to do with the relationship between copyright law and information law. The concept of free ideas in copyright only relates to the meta-concept of information law that information is the common heritage of mankind and, thus, free to be used by everybody.

³³ The EFF is the Electronic Frontier Foundation, a non-profit lobbying organization based in California.

³⁴ DeCSS is one of the first free software products capable of decrypting content on a commercially produced DVD.

³⁵ See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000).

D. Do Not Protect the Sweat of the Brow!

Copyright is an exception that needs further justification. The statutory act of reducing the public domain in favour of a long and extensive copyright protection can only be made where exceptional circumstances justify that step. This is the case if a high level of originality and creativity is embodied in a specific work. Only where a certain expression has individuality and represents some creativity, can an attribution of exclusive rights under the copyright regime be justified.

As copyright protection is an exception to the general principle of free use, it needs to be justified. Its justification is creativity. However, if we reduce the standard of originality, we get a huge crisis of legitimation. We then grant the same high level of protection as originally foreseen for 'real' creators to such strange people as software developers. The European standard of a 70 years pma protection for IT products shows the imbalance and increasing inappropriateness of copyright law. Far-reaching copyright protection should only be granted to works that really deserve it.

E. Exemptions are not Exceptions

Copyright laws throughout the world contain varieties of exemptions for the sake of access to information. These exemptions are commonly regarded as exceptions by copyright lawyers. This leads to the concept that these limitations have to be interpreted in a very narrow, restrictive sense. However, this concept violates informational justice. Limitations usually are balancing the interests of copyright holders versus the public interest. They are not exceptions. If there is anything like an exception in copyright law, it is the principle of copyright protection itself, since it is by way of exception that it takes information out of the public domain.

Copyright law becomes more and more unbalanced. Due to the extreme lobbyism of Hollywood & Co., the scope of copyright protection has been extended worldwide. However, the number of limitations securing public interests have been reduced at the same time, as can be seen in the European InfoSoc Directive.³⁶ This growing imbalance

³⁶ Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJEC 2001 L167, 10.

between information rights and information access safeguards has to be examined carefully and criticized.³⁷

F. Art. 9(2) RBC does not Provide for Valid Criteria for Balancing Rights

In copyright doctrine, it has become a common view that Art. 9(2) of the Revised Berne Convention (RBC) can be used as a balancing rule. Art. 9(2) RBC includes the so-called three-step test. According to that test, reproductions permitted by the copyright laws of the members of the Union must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author. However, this rule is only made to serve as a principle within the copyright system itself. It is a provision written by copyright lawyers more than a century ago. The rule does not reflect the constitutional bonds of copyright law.³⁸ It is one-sided and imbalanced as it merely claims copyright protection to be the general rule and exemptions to be interpreted narrowly for the sake of copyright holders. You could read the rule from an (extreme) information law perspective: 'Copyright law must not conflict with a normal exploitation of the work by the society and must not unreasonably prejudice the legitimate interests of the users'. This anti-rule would, however, be one-sided as well. The image of balancing mentioned above tries to combine the legitimate interests of both sides, authors and users: 'Copyright law, including the rights granted to authors and exemptions granted to users must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of authors and users'.

Thus, in 2010 the German Constitutional Court held that in terms of the Constitution, property was one of the constituent features of copyright law.³⁹ Furthermore, the Court stated in its landmark decision *Germania 3*: 'Dabei ist grundsätzlich zu beachten, dass mit der Veröffentlichung ein Werk nicht mehr allein seinem Inhaber zur Verfügung steht. Es tritt bestimmungsgemäß in den gesellschaftlichen Raum und kann

³⁷ G. Pessach, 'Toward a New Jurisprudence of Copyright Exemptions', 55 *IDEA* 287 (2015).

³⁸ See R. M. Hilty and K. Köklü, 'Limitations and Exceptions to Copyright in the Digital Age: Four Cornerstones for a Future-Proof Legal Framework in the EU', in I. A. Stamatoudi (ed.), *New Developments in EU and International Copyright Law*, W. Kluwer (2016), 283.

³⁹ Bundesverfassungsgericht [BVerfG] [federal constitutional court], Dec 21, 2010, 113 *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 225, 2011.

damit zu einem eigenständigen, das kulturelle und geistige Bild der Zeit mitbestimmenden Faktor werden'.⁴⁰ This shows the tension between property on the one side and freedom of information and the needs of culture on the other side, which are both being protected by constitutional law. Well, that is nice to know. But how can I get them together? Here, the Constitutional Court does not provide any advice. Instead, we are being fobbed off with the term 'practical concordance': 'Beide Schutzgüter müssen zu einer möglichst optimalen Entfaltung gebracht werden im Wege der praktischen Konkordanz'.⁴¹ We learn that this demands great creative freedom for the legislator.⁴²

VI. TOWARDS A MODERN COPYRIGHT LAW

In the age of Internet 4.0, copyright law is the Magna Carta of the information law's knowledge order,⁴³ yet it ensnares itself in a crisis.⁴⁴ In the coming years, we will experience a collapse of copyright law, a type of hypertrophy. Why? Several developments can be 'blamed' for this.

A. The Extension of the Scope of Protection

First, there is an enormous extension of the scope of protection in copyright law. Who actually would have anticipated the fact that we place programming codes on the same level as Günter Grass and Heinrich

⁴⁰ 'In this regard it is important to consider that once it is published the work no longer is at the disposal of the author. It purposively enters the public sphere and thus can turn into an autonomous factor affecting the culture and spirit of a time', Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jun 29, 2000, 54 Neue Juristische Wochenschrift [NJW] 598, 2001.

⁴¹ 'Through practical concordance both the protected values are to be brought to as optimal an evolvment as possible', see M. Leistner and G. Hansen, 'Die Begründung des Urheberrechts im digitalen Zeitalter. Versuch einer Zusammenführung von individualistischen und utilitaristischen Rechtfertigungsbemühungen', 110 GRUR 6, 479 (2008).

⁴² Further reflections on that decision are in C. Geiger and E. Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the boundaries of exclusivity through freedom of expression', 45 IIC 3, 316 (2014).

⁴³ T. Hoeren, 'Urheberrecht 2000 – Thesen für eine Reform des Urheberrechts', MMR 3 (2000).

⁴⁴ See M. Leistner, 'Copyright Law on the Internet in Need of Reform: Hyperlinks, online platforms and aggregators', 12 JIPLP 2, 136 (2017).

Böll?⁴⁵ That is exactly what has happened; it is written down in our copyright law. Caused by European developments, each item of software, no matter how trivial and banal, is protected for 70 years after the death of its creator. This is a radical decision that also has fatal effects on the software industry. Programmers now are the *littérateurs* and the creators. More recently, databases are protected by copyright law as a matter of protecting investment as such.⁴⁶ Every collection of information material is protected even if it is not inventive, provided that it is the result of a not irrelevant amount of time, cost and effort. If this is so, we protect the collection of customs tariffs, the numbering of stamps in philatelic catalogues, lists of musical hits, collections of poem titles, and so on and so forth. All of these are provided with a monopoly right. However, this is not the end. Even the traditional reluctance, at least of German copyright law, to grant protection to applied arts has found an end. The Federal Court of Justice, for instance, has been impressed by noise protection walls and their design.⁴⁷ Courts have also shown enthusiasm for belling stags on skirts.⁴⁸ Following the 'leading' case '*Geburstagszug*',⁴⁹ we have to grant copyright to odd things, such as a coloured wooden train with birthday candles or to a cinerary urn decorated with a roaring stag.⁵⁰ The perversity, however, is not limited to these examples. We started early on to protect each and every photo.⁵¹ As photographers popped up a hundred years ago, the lawmaker did not know how to treat them. They were peculiar people with a big black cloth and huge large format cameras, who eventually just replicated reality. Could one grant copyright protection for something like that? To this state of emergency, the lawmaker reacted by saying: 'You know what, we will do it this way:

⁴⁵ See also K. Zscherpe, 'Urheberrechtsschutz digitalisierter Werke im Internet', MMR 404 (1998).

⁴⁶ T. Ehmman, 'Datenbankurheberrecht, Datenbankherstellerrecht und die Gemeinschaft der Rechtsinhaber. Zugleich Besprechung von BGH "Gedichttitelliste I und II"', 110 GRUR 6, 474 (2008).

⁴⁷ Bundesgerichtshof [BGH] [Federal Court of Justice] May 12, 2010, 113 Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 59, 2011 – Lärmschutzwand.

⁴⁸ Amtsgericht Leipzig [AG Leipzig] [District Court of Leipzig] Oct 23, 2001, 17 NJW Rechtsprechungs-Report Zivilrecht [NJW-RR] 619, 2002.

⁴⁹ Bundesgerichtshof [BGH] [Federal Court of Justice] Nov 13, 2013, 45 IIC 831, 2014.

⁵⁰ Oberlandesgericht Köln [OLG Köln] [Supreme Regional Court] Feb 20, 2015, 15 GRUR – Rechtsprechungs-Report [GRUR-RR] 275, 2015.

⁵¹ See also T. Büchner, 'Schutz von Computerbildern als Lichtbild(werk)', 55 ZUM 7, 549 (2011).

each photo shall be protected!' Mother's snapshots taken in Mallorca benefit from the protection of copyright law; we no longer ask for originality.

B. Extension of the Period of Protection

However, as if this is not enough: The period of protection was extended considerably. Queen Anne – for good reasons – established a period of protection of 14 years starting with the date of publication. Think of the United States' Constitution, which in its Art. I, § 8 empowers Congress to provide for (patent and) copyright protection 'for limited times' only, since copyright should be limited for social reasons. It started harmlessly as well in Germany. Protection was to be granted for ten years after the author's death. This was extended to 30 years in 1870, to 50 years in 1934, and to 70 years in 1965.⁵² This is a very long period of time and the reason why singing 'Happy Birthday to You' in a Munich pub may cause problems with collecting societies, as the song is still protected.⁵³

Yet, the problem of extended periods of protection has been recognized over the centuries. In 1774 a famous lawsuit was filed in the British House of Lords contesting the extension of the period of protection. It only failed because the judges said: 'We do not have any meta rule applying to periods of protection. How shall we decide whether 50 years, 70 years or whatever are or are not fair'.⁵⁴ Two hundred years later the whole issue once again came up in the United States with the legendary Sonny Bono Extension Act.⁵⁵ The problem was that protection for Mickey Mouse was about to end. Due to the Disney Corporation's skilful and aggressive lobbying, the period of protection was extended from 28 to 70 years after the author's death. And, facing violent protest by many citizens, in 2003 the US Supreme Court Justice Ginsburg was only able to say with respect to the Copyright Term Extension Act of 1998: 'If you

⁵² H. Sattler, *Das Urheberrecht nach dem Tode des Urhebers in Deutschland und Frankreich*, V&R unipress (2010), 23.

⁵³ See also T. Hoeren, 'Happy Birthday to You: Urheberrechtliche Fragen rund um ein Geburtstagsständchen (Happy Birthday to You: Copyright Questions Relating to a Birthday Song)', *Festschrift für Otto Sandrock zum 70. Geburtstag* 357 (2000). As a result of several court decisions rendered in the United States at the end of 2015, that song is bound to fall into the public domain.

⁵⁴ *Donaldson v. Becket*, Hansard 1st ser. 17 (House of Lords acting as the final court of appeal for Great Britain 1744).

⁵⁵ Copyright Act, 17 U.S.C. § 302 (a) (1978). In addition, P. Haggerty, 'The Constitutionality of the Sonny Bono Copyright Term Extension', 70 U. Cin. L. Rev. 651 (2002).

think, these are only extreme cases, you have to know that the politicians in Brussels again think about an absurd extension. This happens because the phonogram producers, so basically the music producers, again want to extend their period of protection from 50 to 70 years'.⁵⁶

C. The Rights-Buyout Problem

It is often the case that the big media distributors, both publishers and other commercializers, hide behind the 'creative'. The press and the politicians talk about the economy and the needs of creators. In truth, these discussions are not about creators, because they usually transfer their rights in rights-buyout contracts to the commercializers.⁵⁷ The result, for example, is that a professor of medicine has to pay US\$ 80,000 for the publication of a 15-page article. However, if the professor wants to read the article, he has to buy the magazine for the price of US\$ 50,000 annually.⁵⁸ The author yields his rights completely and has to buy them back with public funds. Similar things happen in the film industry. Many directors of documentary films also work as taxi drivers to earn a living. Their documentaries broadcast by the German TV channels ZDF and Arte are not bad at all, but their rights have been revoked completely in the small print of the contract.

For a few years now, the legal principle of an appropriate remuneration to protect the poor creator has been established.⁵⁹ However, this idea has led to many problems. Indeed, the law says that every creator is eligible

⁵⁶ Statement made during the oral hearing in *Eldred v. Ashcroft*; see also the decision in *Eldred v. Ashcroft*, 537 U.S. 186,205 (2003), where the Court explains the extension of the copyright term by the desire of Congress to match the copyright term the EU extended to 70 years pma by Directive 93/98/ EC of the Council of 29 October 1993 (now Directive 2006/116/EC of the Parliament and the Council on the term of copyright and certain related rights, OJEU 2006 L372,12); see also J. Kreile, 'Der Richtlinien-vorschlag der EU-Kommission zur Schutzfristenverlängerung für ausübende Künstler und Tonträgerhersteller aus Sicht der Filmhersteller', 25 ZUM 2, 113 (2009).

⁵⁷ O. Castendyk, 'Lizenzverträge und AGB-Recht', 51 ZUM 3, 169 (2007); the Federal Supreme Court astonishingly saw no way to forbid rights-buyout agreements under unfair contract terms regulations, Bundesgerichtshof [BGH] [Federal Court of Justice] May 31, 2012, 10 Gewerblicher Rechtsschutz und Urheberrechtsschutz [GRUR] 1031 (2012).

⁵⁸ See as a critical opinion R. Hilty, 'Das Urheberrecht und der Wissenschaftler', 55 GRUR Int 3, 179 (2006).

⁵⁹ M. Schippan, 'Auf dem Prüfstand: Die Honorar- und Nutzungsrechtsregelungen zwischen Zeitungs- und Zeitschriftenverlagen und ihren freien Mitarbeitern', 26 ZUM 10, 782 (2010).

for an appropriate remuneration. However, already Thomas von Aquin has cautioned against legal measures aimed at determining an appropriate price (*iustum pretium*).⁶⁰

D. Limitations

Limitations have also become a problem. If more and more gets protected by copyright law and thus ever more rights are granted, at least the statutory periods of limitation have to be adapted in favour of the general public. Then, in compensation, there ought to be more freedom granted to the general public.⁶¹ But instead what happens is exactly the reverse: for example, we have § 52a of the German Copyright Act favouring research and education by exempting the reproduction of short articles for their use in virtual seminar apparatus. A professor of the Distance University Hagen uploaded approximately 100 pages of a psychology textbook in his virtual seminar apparatus. Now the publisher is suing his university in a test case, because this allegedly exceeds the scope of § 52a.⁶²

E. Expansion of the Neighbouring Rights

The collapse of copyright is induced by the expansion of the ancillary copyright.⁶³ Ancillary copyright was invented for assistant staff. But today the assistant staff not only reserve for themselves all economic rights through buyout-contracts but also work to expand their own ancillary copyright. This struck, for example, the rapper Sabrina Setlur. She used a short music sequence from the group 'Kraftwerk' and was sued because of the sound sampling. She was not sued by the author, because short microseconds of music are not protected by copyright law, but by the producer, on the basis of the phonogram producers' ancillary copyright. The question was: Why should a phonogram producer have more rights than the author? If something is not protected by copyright

⁶⁰ See T. Hoeren, 'Auf der Suche nach dem "iustum pretium": Der gesetzliche Vergütungsanspruch im Urhebervertragsrecht', 3 MMR 8, 449 (2000).

⁶¹ R. Hilty, 'Vergütungssystem und Schrankenregelungen, Neue Herausforderungen an den Gesetzgeber', 107 GRUR 10, 819 (2005).

⁶² Bundesgerichtshof [BGH] [Federal Court of Justice] Nov 28, 2013, 116 Gewerblicher Rechtsschutz und Urheberrechtsschutz [GRUR] 549 (2014). Admittedly, the test failed to the extent the BGH held the copyright use in question to be covered by § 52a German Copyright Act.

⁶³ M. Krause, 'Rechterwerb und Rechteinhaberschaft im digitalen Zeitalter', 55 ZUM 1, 21 (2011).

law, it ought to be unrestrictedly available. However, the German Federal Supreme Court decided that the phonogram producer has a right of action in cases of the appropriation of the smallest shreds of music.⁶⁴ The issue of ancillary copyright for publishers is also difficult to address.⁶⁵ Assistant staff such as phonogram producers, film producers and broadcasting services are privileged by ancillary copyright – but publishers are not. Tucholsky⁶⁶ once said that publishers were blowflies, and apparently the legislator agreed. Now, the newspaper publishers are fighting to be accepted as rightholders within the German collecting societies and are lobbying heavily for an EU neighbouring right for their newspaper articles. This means a fundamental change of direction in copyright law. It used to be cultural law for creative minds. Now it is an economic law for investors.

F. Distinction of Copyright Law from Trademark and Patent Law

Nowadays, the borders between copyright, trademark and patent law are vanishing.⁶⁷ Up until now, we believed that an intersection of these legal fields could hardly exist. However, especially trademark law proves this wrong. Today, each and everything can be protected as a trademark: 'Nichts reimt sich auf Uschi',⁶⁸ 'Vorsprung durch Technik',⁶⁹

⁶⁴ Bundesgerichtshof [BGH] [Federal Court of Justice] Nov 20, 2008, 111 Gewerblicher Rechtsschutz und Urheberrechtsschutz [GRUR] 403 (F.R.G.).

⁶⁵ See M. Kauert, *Das Leistungsschutzrecht des Verlegers*, Walter de Gruyter (2008); D. Frey, 'Leistungsschutzrecht für Presseverleger, Überlegungen zur Struktur und zu den Auswirkungen auf die Kommunikation im Internet', 13 MMR 5, 291 (2010); R. Schweizer, 'Schutz der Leistungen von Presse und Journalisten', 26 ZUM 1, 7 (2010).

⁶⁶ Kurt Tucholsky (1890–1935), leading German writer, columnist and critic.

⁶⁷ M. R. McGuire, 'Kumulation und Doppelschutz, Ursachen und Folgen des Schutzes einer Leistung durch mehrere Schutzrechte', 113 GRUR 9, 767 (2011); A. Ohly, 'Areas of Overlap Between Trade Mark Rights, Copyright and Design Rights in German Law', 56 GRUR Int. 8/9, 704 (2007).

⁶⁸ 'Nothing rhymes with Uschi', registered at the DPMA on 26 January 2011 as a trademark for the comedian Mario Barth Reg. No.: 3020100708204, see M. Lerach, "... die TOOOR macht weit" – Relevanz der Benutzungsmodalitäten für die Schutzfähigkeit sprachlicher Zeichen?', 113 GRUR 10, 872 (2011).

⁶⁹ General Court (EU), case C-398/08, 21 January 2010, *Audi AG v. OHIM*, ECLI:EU:C:2010:29 ('Advantage through Technology').

'Fußball-WM',⁷⁰ the Lindt chocolate bunny's golden ribbon⁷¹ or the hay scented tennis ball.⁷² A trademark lasts eternally – if I continue paying the registration fees my trademark protection never ends. That way I can also protect things that no longer benefit from copyright law. The German Federal Court of Justice once had to deal with the title 'Winnetous Rückkehr' (Winnetou's Return).⁷³ Copyright protection had expired. Still, the Court said that it could be protected under trademark law.

This is also valid for patent law. While formerly we have not had cases where something was protected under both copyright and patent law, we now have software that in particular circumstances can be subsumed under both laws.

VII. FINALLY: THE DIAGNOSIS AND PROCEDURAL META-RULES

This is a dramatic diagnosis. In my opinion, the issue is basically a matter of missing meta-rules. What should a just information law system look like? This question cannot be answered through existing law. We need meta-rules as an instrument to define fair access to information and to guide the implementation of a fair distribution of information.

As legal researchers we can only point out rough mistakes and deconstruct false ideals⁷⁴ or bring awareness to injustice in the process of

⁷⁰ Bundesgerichtshof [BGH] [Federal Court of Justice] April 27, 2006, 108 Gewerblicher Rechtsschutz und Urheberrechtsschutz [GRUR] 850 (F.R.G.).

⁷¹ General Court (EU), case T-336/08, 17 December 2010, *Chocolade-fabriken Lindt & Sprüngli AG v. HABM*, ECLI:EU:T:2010:546.

⁷² OHIM (now EUIPO), Bd. Appeal, case R-156/1998-2, WRP (681) 1999; see K.-H. Fezer, 'Olfaktorische, gustatorische und haptische Marken', 45 WRP 6, 575 (1999); R. Siekmann, 'Erste Entscheidung zur Eintragung einer Geruchsmarke nach der Gemeinschaftsmarkenverordnung', 45 WRP 6, 618 (1999); M. Viefhues, 'Geruchsmarken als neue Markenform', 1 MarkenR 8–9, 249 (1999); Achim Bender, 'Die absoluten Schutzversagungsgründe für die Gemeinschaftsmarke', 2 MarkenR 4, 118 (2000).

⁷³ Bundesgerichtshof [BGH] [Federal Court of Justice] Jan 23, 2003, 56 Neue Juristische Wochenschrift [NJW] 1869 (F.R.G.); see also K.H. Schmidt-Hern, 'Der Titel, der Urheber, das Werk und seine Schutzfrist', 47 ZUM 6, 462 (2003). Winnetou, a heroic, noble-minded Apache chief, is the leading figure in a series of Far West novels by Karl May (1842–1912).

⁷⁴ See T. Hoeren, 'Das Pferd frisst keinen Gurkensalat – Überlegungen zur Internet Governance', 61 NJW 36, 2615 (2008).

lawmaking. Following Habermas and Apel,⁷⁵ everybody should have the right to articulate his or her interests and get involved in the discussion on information law. The current discussion especially lacks sufficient participation. Where are the consumers' associations in copyright law? Who represents the interests of users? Copyright law has never really been an issue of consumer protection policy. In this respect, there is still a lot to be done to save copyright law from hypertrophy, and eventually from collapse.

⁷⁵ See U. Steinhoff, *Kritik der kommunikativen Rationalität: Eine Darstellung und Kritik der kommunikationstheoretischen Philosophie von Jürgen Habermas und Karl-Otto Apel*, Mentis (2006).