

IP4D – Sustainable Production of and Fair Trade in Creative Expressions

Dr. Volker Grassmuck, Ph.D.

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The point is not giving more to the poor but stealing less from them.
(Jean Ziegler)

The digital revolution provides great opportunities for free culture, i.e. cultural expressions that are free to circulate and build on. In this brief text I want to highlight three points: the overall idea of a Social Contract as well as the Culture Flat-Rate and a system of Fair Trade in creative expressions as two of its components. The guiding question is: How can a global Social Contract between creatives and society be established that ensures the freedom of culture and the sustenance of those who create it?

A new Social Contract

Under conditions of the digital age a new Social Contract between creatives and audiences (Grassmuck, 2008b, 2009) has to be negotiated, a new arrangement for the reciprocal „creative contributions“ by authors and by society (Aigrain 2008).

The current debate on culture is focussed on property rights and their enforcement. The Social Contract is intended to refocus the debate on the issues behind the existing legal rules. The shift from the analogue to the digital knowledge order calls into question the boundaries between private and public, professional and non-professional, commercial and non-commercial.

These are fundamental issues that should not be decided by case law but discussed in a broad inclusive debate by all of society based on empiric data and research. A similar idea under the name 'Creative Pakt' was advanced by Tim Renner (2009), former head of Universal Music Europe, now running the indie label and radio station Motor, and adopted by now-Foreign Minister and Social-Democratic Chancellor candidate Frank-Walter Steinmeier. Alas, in this Pact by industry, politics and artists the users are missing. In a peer-to-peer culture where users of informational goods express themselves publicly, remix existing artefacts, engage in dialogue and thereby become active citizens in a „semiotic democracy“ (Fisher 2004) users cannot be excluded from the negotiations over the future of free culture.

The Social Contract encompasses the whole range of transactions: in markets, through public funding for arts and culture (collective redistribution through taxation and broadcast fees and the

provision of a public knowledge infrastructure for science and education, libraries, museums, archives etc.), through voluntary action (free-licensing and donations (Wikipedia), street performer protocol-style pre-payments and pledges) and through legal regulations (limitations and exceptions in copyright law, including the proposals for a Culture Flat-Rate and the public domain).

Changes are happening on all these layers. Much experimentation is going on in commercial markets. If markets can no longer be based on selling copies, they shift from products to services. This shift together with the establishment of a Knowledge Commons occurred first in free software (Grassmuck 2002). Research has also revealed a growing number of markets that function without IP protection (Grassmuck 2008a), even in advanced areas such as TV formats (Kretschmer 2009).

The new Social Contract needs to be global and inclusive. National egotism that is still very much at work in the Creative Industries discourse needs to be overcome. We need a knowledge order that serves the common good of the globally largest number of creatives and citizens.

A Culture Flat-Rate to end copyright extremism and bring information freedom and remuneration for authors to the Internet

The urge to free-license one's own works arose in parallel with the rise of the culture industry in the 20th century, long before GPL and CC (Grassmuck 2008b). Commentators on the CC licensing model have pointed out the shortcomings of private ordering. Lessig himself in the afterword to *Free Culture* (2004) describes a two-part process: First a bottom-up movement that then needs to be complemented by law making.

The debate on a lump-sum levy legalising file-sharing started immediately after the launch of Napster. Ten years later it has much advanced and diversified. Legal, technical and economic feasibility studies, two book-length exposes of the model (Fisher 2004, Aigrain 2008) and a great number of articles have been published. Currently copyright countries seem to favor private, B2B or B2C models of flatrate remuneration, while droit d'auteur countries tend towards legal models, extending the time-proven private copying exception to the Internet.

In 1965 the German lawmaker acknowledged that private copying cannot be prevented, therefore it needs to be legalised, ensuring remuneration to creatives through a levy on recorders and recordable media (Hugenholtz/Guibault/van Geffen 2003: 11 ff.). In analogy, the Culture Flat-Rate introduces the legal permission to copy and make available published works under copyright by private persons for non-commercial purposes, and in return a monthly levy is paid by broadband Internet users, collected by ISPs and collectively managed by the communities of authors, i.e. collecting societies.

The debate made a great leap forward in 2005 by the efforts of the French Alliance Public-Artistes.¹ It has made significant progress in recent months in Germany and in many other countries, including France, Sweden, the Isle of Man, Canada, Norway and also in Brazil. The proposal pioneered by a few law scholars, adopted by artists, consumers and representatives from culture industry has now arrived at the center of society (Grassmuck 2008c, 2009). How the existing expertise could be applied in an emerging country like Brazil and in developing nations is subject of my ongoing research.

¹ <http://alliance.bugweb.com>

Parallel to file-sharing, the issue of remixing came into focus of the international debate. A number of scholars suggested a copyright exception or exemption as the solution (Gowers 2006, Hilty 2007, Hugenholtz/Okediji 2008, Wu 2008, Lessig 2008). The EU Commission asked for the need for an exception for user-created content in the consultation on its Green Paper on Copyright (2008). If a remixing exception were introduced and made subject to a levy, this could be managed together with the file-sharing exception.

Thus freedoms that are now established in but restricted to the space of free-licensing would be transposed into law, providing solutions to the issues of free non-commercial circulation, remixing and of out-of-print and orphaned works. In other words, the CC options NC and SA would be implemented in law. The pioneering work of CC would be sublated on a higher plane.

Fair Trade in Creative Expressions

Postindustrial nations are re-orientating themselves towards Creative Industries. In this grand vision for the new phase of capitalism the remainder of the world figures as consumer market, as outsourcing market for menial creative tasks and as source for cultural raw materials to be 'harvested.' The 'harvesting' is being conducted by multinational corporations from the global North, like Monsanto, Pfizer and the four major music labels that even market Southern artists to Southern audiences. The resulting value flow is dramatically visualised here:

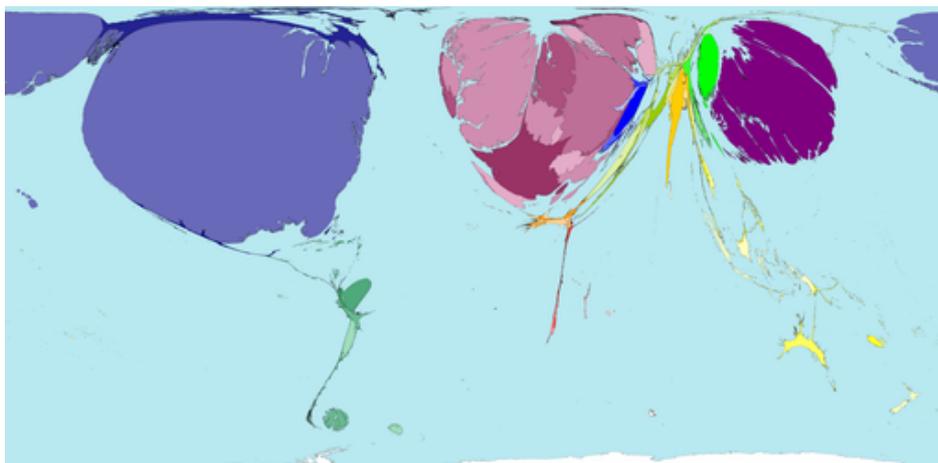


Illustration 1: Territory size shows the proportion of worldwide earnings (in purchasing power parity) from copyright royalties and patent license fees that were earned there in 2002. Over half (53%) of these payments were received in one territory: the United States. (<http://www.worldmapper.org/display.php?selected=168>)

During the last decade a number of core issues have been recognised by the international community. ICT4D is a well-established instrument in development policies. IP in health has made advances, leading to wider production of generics and new systems for the funding the development of drugs for neglected diseases. Equitable benefit sharing agreements are emerging that counter biopiracy and bring royalties to lesser-developed countries.

A copyright framework for development has not yet received the same attention. UNCTAD held a series of workshops in 2001 on the economic potential of music for LDCs. The 2005 UNESCO Convention on Cultural Diversity was another landmark in favouring the cultural expressions of all

countries, including preferential treatment for developing countries' cultural goods and services as well as cultural practitioners. In the strategic realignment that followed adoption of the Development Agenda, „facilitating the Use of IP for Development“ has been made one of nine strategic goals of WIPO.² In April 2009, the European Commission organised an international colloquium on „Culture and Creativity as Vectors of Development.“ It concluded with the adoption of the Brussels Declaration by Artists and Cultural Professionals and Entrepreneurs (2009).

Also cultural professionals have realised the need for action. The Fair Music Initiative of the Music Information Center Austria (MICA) is a good example.³ In its Fair Music Manifesto it calls for contract standards that secure fair remuneration for artists and a code of conduct for the music business, so that fairness and justice, including in international trade, become the norm. It strives to establish a quality mark certifying that these values have been adhered to in the production and dissemination of cultural goods.

The free culture movement is increasingly adopting a global perspective. This is also expressed in a growing number of events like the Free Culture Forum in Barcelona⁴ in October 2009 and the World Forum on Free Culture in Sao Paulo in 2010 currently under preparation.

At the core of the new global Social Contract between creatives and audiences lie the principles of cooperation, trust, fairness and transparency. In order to get there we urgently need a de-escalation of the „war on copying,“ a memorandum on panic-driven short-sighted regulations and space for reflection and debate.

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4 <http://fcforum.net/>

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The author

Volker Grassmuck is a media sociologist and free-lance author, has conducted research on the knowledge order of digital media, on copyright and the knowledge commons at Free University Berlin, at Tokyo University and at Humboldt University Berlin and will continue to do so at the University São Paulo from mid-2009 where he will join the Grupo de Pesquisa em Políticas Públicas para o Acesso à Informação, Escola de Artes, Ciências e Humanidades, Universidade de São Paulo, directed by Prof. Pablo Ortellado. He was project lead of the conference series Wizards of OS and the copyright information portal iRights.info, and co-founded the initiatives mikro and privatkopie.net.