

## Copyright & Art

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### A. Introduction

*What is the impact of copyright (and neighbouring rights<sup>1</sup>) on art – on the conditions for artistic production as well as on other art-related practices in modern societies like trading, conserving, exhibiting, performing, reproducing and distributing works of art or reproductions thereof in various media? And what is the particular relevance of art (and of aesthetic concepts, or theories of art) for copyright? Why should the dogmatics of copyright be concerned with aesthetics at all, and what function do aesthetic concepts fulfil in the conceptual structure of copyright and in the context of its legitimization?*

These questions, although apparently interrelated, differ in direction: The latter focus on the *dogmatics* of copyright and try to elucidate the normative import of art and aesthetics as well as the implicit aesthetic theory of the law (*if it can be shown that there is, indeed – and inevitably – an aesthetic implied in the legal regulations concerning the production and circulation of goods of the mind<sup>2</sup>*); the first one aims

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<sup>1</sup> Although the discussion cannot be restricted to copyright properly, since it is to include further aspects of author's rights and neighbouring rights, we prefer to use the term 'copyright' instead of 'intellectual property' because other important fields of intellectual property, like patent law, trademark law or trade secrets regulations, are left out of consideration. The tension between copyright, as it evolved in particular in the British and American traditions of common law, and conceptions of author's rights, as they have been established primarily in the civil law of continental European states since the late eighteenth century, is a central and much debated issue in international intellectual property law (*cf.* BRAD SHERMAN AND LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* (1999); ELMAR WADLE, *GEISTIGES EIGENTUM – BAUSTEINE ZUR RECHTSGESCHICHTE* (1996–2002); E. WADLE, ED., *HISTORISCHE STUDIEN ZUM URHEBERRECHT IN EUROPA* (1993); György Boytha, *Die historischen Wurzeln der Vielfältigkeit des Schutzes von Rechten an Urheberwerken*, in: *DIE NOTWENDIGKEIT DES URHEBERRECHTSSCHUTZES IM LICHT SEINER GESCHICHTE* (ROBERT DITTRICH, ed., 1991), pp. 69–90. On the problem of accepting 'intellectual property' in the sense of a so-called 'geistiges Eigentum' within the dogmatic structure of property law as it is conceived in the continental European legislations, see MANFRED REHBINDER, *URHEBERRECHT* (13<sup>th</sup> ed., 2004) p. 56 f; CYRILL P. RIGAMONTI, *GEISTIGES EIGENTUM ALS BEGRIFF UND THEORIE DES URHEBERRECHTS* (2001).

<sup>2</sup> See Linda Zionkowski, *Aesthetics, Copyright, and the 'Goods of the Mind'*, 15 *BRITISH JOURNAL FOR EIGHTEENTH-CENTURY STUDIES* 163 (1992); ROBERTA KEVELSON, ED., *LAW AND AESTHETICS* (1992);

at a *pragmatic* analysis of copyright law that should contribute to deepening our understanding of copyright through the examination of the effects it has on the practices governed by it.

A pragmatic analysis of copyright law, which must also take into consideration the economic dimension of the practices governed by this law<sup>3</sup>, will be relevant not only to lawmakers and legal scholars, but in principle to all those interested in the social, political and aesthetic consequences of legal regulations in this increasingly important dimension of modern societies<sup>4</sup>. In particular, an investigation of the impact of copyright law on art will prove rewarding to scholars interested in elucidating the structure and the functions of the 'modern system of the arts'<sup>5</sup>, the meaning of the modern concepts of (fine) 'art'<sup>6</sup> and 'aesthetic'<sup>7</sup> in general, as well as of a number of more specific concepts, like the notions of 'authorship'<sup>8</sup>, 'original-

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Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 SOUTHERN CALIFORNIA LAW REVIEW 247 (1998); COSTAS DOUZINAS & LYNDY NEAD, EDS., LAW AND THE IMAGE. THE AUTHORITY OF ART AND THE AESTHETICS OF LAW (1999).

<sup>3</sup> See REHBINDER, URHEBERRECHT (2004), pp. 2-5; RUTH M. TOWSE, CREATIVITY, INCENTIVE AND REWARD. AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE (2001).

<sup>4</sup> ADAM THIERER & WAYNE CREWS, EDS., COPY FIGHTS. THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE (2002).

<sup>5</sup> See Paul Oskar Kristeller, *The Modern System of the Arts. A Study in the History of Aesthetics*, 12 JOURNAL OF THE HISTORY OF IDEAS 496 (1951).

<sup>6</sup> See ROLAND BLUHM & REINOLD SCHMÜCKER, EDS., KUNST UND KUNSTBEGRIFF. DER STREIT UM DIE GRUNDLAGEN DER ÄSTHETIK (2002); REINOLD SCHMÜCKER, WAS IST KUNST? EINE GRUNDLEGUNG (1998); ROBERT STECKER, ARTWORKS. DEFINITION, MEANING, VALUE (1997).

<sup>7</sup> See BERND KLEIMANN, DAS ÄSTHETISCHE WELTVERHÄLTNIS. EINE UNTERSUCHUNG ZU DEN GRUNDLEGENDEN DIMENSIONEN DES ÄSTHETISCHEN (2002); Karl Heinz Barck and Dieter Kliche, *Ästhetik, ästhetisch*, in VOL. 1 ÄSTHETISCHE GRUNDBEGRIFFE 308, 400 (BARCK et al., eds, 2000); MARC JIMENEZ, QU'EST-CE QUE L'ESTHÉTIQUE? (1997); WOLFGANG WELSCH, ED., DIE AKTUALITÄT DES ÄSTHETISCHEN (1993); Pierre Bourdieu, *The historical genesis of a pure esthetics*, 46 JOURNAL OF AESTHETICS AND ART CRITICISM 201 (1987).

<sup>8</sup> See FOTIS JANNIDIS, GERHARD LAUER ET AL., EDS., TEXTE ZUR THEORIE DER AUTORSCHAFT (2000); F. JANNIDIS, G. LAUER ET AL., EDS., RÜCKKEHR DES AUTORS. ZUR ERNEUERUNG EINES UMSTRITTENEN BEGRIFFS (1999); ERICH KLEINSCHMIDT, AUTORSCHAFT. KONZEPTE EINER THEORIE (1998); MARTHA WOODMANSEE AND PETER JASZI, EDS., THE CONSTRUCTION OF AUTHORSHIP. TEXTUAL AP-

ity<sup>9</sup> and individual 'works of art'<sup>10</sup>, to name but a few. These concepts are not 'given' but have emerged under certain historical conditions, in order to fulfil a particular task in the more or less autonomous spheres of validity typical for the differentiated patterns of communication in modern society. The concepts are also grounded within certain institutions<sup>11</sup>.

The social worlds of jurists and of artists or art theorists often appear as mutually impenetrable; the 'juridical' and the 'aesthetic' are usually considered as more or less autonomous spheres of the modern world<sup>12</sup>. In order to analyze in detail the institutions of the artworld (or artworlds), however, taking seriously the social constitution of the normative concepts that are indispensable for our art-related practices, it becomes indispensable for art theorists to take into consideration the legal dimension, in particular the impact of copyright law on these art-related practices. Legal norms and decisions provide the binding framework of social institutions in modern society<sup>13</sup>. Being the result of historical experience, they bear the traces of previous conflicts<sup>14</sup> and they lay the tracks that most of us follow up most of the time – even in the artworld, where the basic rule of conduct is to try to do something unprecedented.

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PROPRIATION IN LAW AND LITERATURE (1994); Peter Lamarque, *The Death of the Author: An Analytical Autopsy* 30 BRITISH JOURNAL OF AESTHETICS 319 (1990); Michael Nesbit, *What is an Author* 73 YALE FRENCH STUDIES 229 (1983); JOHN CAUGHIE, ED., THEORIES OF AUTHORSHIP (1981).

<sup>9</sup> See BORIS GROYS, ÜBER DAS NEUE. VERSUCH EINER KULTURÖKONOMIE (1999); ROSALIND E. KRAUSS, THE ORIGINALITY OF THE AVANT-GARDE, AND OTHER MODERNIST MYTHS (1986).

<sup>10</sup> See NICHOLAS WOLTERSTORFF, WORKS AND WORLDS OF ART (1980); RICHARD WOLLHEIM, ART AND ITS OBJECTS (2<sup>nd</sup> ed., 1980).

<sup>11</sup> See GEORGE DICKIE, ART AND THE AESTHETIC. AN INSTITUTIONAL ANALYSIS (1974); G. DICKIE, THE ART CIRCLE (1997); HENRY SUSSMAN, THE AESTHETIC CONTRACT. STATUTES OF ART AND INTELLECTUAL WORK IN MODERNITY (1997).

<sup>12</sup> See JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS, VOL. 2 (1981), pp. 286 & 518; MAX WEBER, VOL. 1, GESAMMELTE AUFSÄTZE ZUR RELIGIONSSOZIOLOGIE (1920), pp. 1 ff & 520 ff.

<sup>13</sup> See NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT (1993).

<sup>14</sup> For the earlier development of German author's rights law this was shown by LUDWIG GIESEKE, VOM PRIVILEG ZUM URHEBERRECHT. DIE ENTWICKLUNG DES URHEBERRECHTS IN DEUTSCHLAND BIS 1845 (1995).

## B. Does Copyright Law Shape Art, or Does Art Shape Copyright Law?

In the course of efforts towards an international harmonization of intellectual property law<sup>15</sup>, profound differences in the legal treatment of art – in particular between the Anglo-American traditions of common law and some continental European civil law jurisdictions – have come to the fore<sup>16</sup>. For example, the question of whether author's rights should be limited to copyright in a rather narrow sense or include further ('moral') rights, such as the authoritative control over the integrity of a work of authorship, once it has been accomplished<sup>17</sup>, but also more general questions concerning, for example, the status of art in public life or the freedom of artistic expression<sup>18</sup>. While the juridical issues have been extensively discussed<sup>19</sup>, the impact of the different regulations on the legal status of art (as well as of artists and of owners and users of artwork) and the consequences they bear

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<sup>15</sup> See Haimo Schack, *Europäisches Urheberrecht im Werden*, 8 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 799 (2000); J. A. L. STERLING, *WORLD COPYRIGHT LAW* (2<sup>nd</sup> ed. 2003); PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT. PRINCIPLES, LAW, AND PRACTICE* (2001).

<sup>16</sup> See JULIA ELLINS, *COPYRIGHT LAW, URHEBERRECHT UND IHRE HARMONISIERUNG IN DER EUROPÄISCHEN GEMEINSCHAFT* (1997); A. Rahmatian, *Non-assignability of Authors' Rights in Austria and Germany and its Relation to the Concept of Creativity in Civil Law Jurisdictions Generally: A Comparison with UK Copyright Law*, 11 ENTERTAINMENT LAW REVIEW 95 (2000).

<sup>17</sup> See MARKUS A. FEDERLE, *DER SCHUTZ DER WERKINTEGRITÄT GEGENÜBER DEM VERTRAGLICH NUTZUNGSBERECHTIGTEN IM DEUTSCHEN UND US-AMERIKANISCHEN RECHT* (1998); BEATRIX JAHN, *DAS URHEBERPERSÖNLICHKEITSRECHT IM DEUTSCHEN UND BRITISCHEN RECHT* (1993); Jeff Berg, *Moral Rights: A Legal, Historical and Anthropological Perspective*, 6 INTELLECTUAL PROPERTY JOURNAL 341 (1991).

<sup>18</sup> HEINRICH HEMPEL, *DIE FREIHEIT DER KUNST. EINE DARSTELLUNG DES SCHWEIZERISCHEN, DEUTSCHEN UND AMERIKANISCHEN RECHTS* (1991).

<sup>19</sup> Cf. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 JOURNAL OF LEGAL STUDIES 95 (1997); CHRISTOPHER WADLOW, *ENFORCEMENT OF INTELLECTUAL PROPERTY IN EUROPEAN AND INTERNATIONAL LAW* (1998); William R. Cornish, *The International Relations of Intellectual Property*, 52 CAMBRIDGE LAW JOURNAL 46 (1993); Adolf Dietz, *Mutation du droit d'auteur, changement de paradigme en matière de droit d'auteur?*, 138 REVUE INTERNATIONALE DE DROIT D'AUTEUR 23 (1988); Haimo Schack, *Die grenzüberschreitende Verletzung allgemeiner und Urheberrechtspersönlichkeitsrechte*, 108 ARCHIV FÜR URHEBER-, FILM-, FUNK- UND THEATERRECHT (UFITA) 51 (1988); Markus A. Frey, *Die internationale Vereinheitlichung des Urheberrechts und das Schöpferprinzip*, 98 ARCHIV FÜR URHEBER-, FILM-, FUNK- UND THEATERRECHT (UFITA) 53 (1984). The recent German *HANDBUCH DES URHEBERRECHTS* (ed. by Ulrich LOEWENHEIM, 2003) offers an almost encyclopaedic overview of the juridical discussion with a wealth of further references.

for the actual conditions of the production, distribution and appreciation of art has largely been neglected in critical debates thus far<sup>20</sup>.

Compelling though it should appear to examine the legal framework of the social institutions and practices of the artworld, as to be found in copyright and other legal regulations concerning author's rights, for an institutional analysis of the meaning of art and of aesthetic concepts, this approach has never been seriously pursued. Some very important work has been done in recent years in the historical examination of the co-evolution of modern aesthetic theories and copyright law, focusing in particular on eighteenth-century Europe<sup>21</sup>. What was missing, however, in discussions about art and copyright, was an examination not so much of how our ideas of art and of intellectual property originally appeared on the scene, but, rather, of how they actually work<sup>22</sup>. Such a pragmatic analysis can only be achieved in a comparative approach, paying attention to the significant differences between copyright regimes of different legal systems. It requires interdisciplinary cooperation between legal scholars, art theorists, and social scientists<sup>23</sup>.

Following this research strategy, there will be more to be learned for aesthetic scholars than just a more adequate understanding of the social institutions and normative frameworks of our art-related practices. The impact of copyright on art

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<sup>20</sup> BEATE V. MICKWITZ, *STREIT UM DIE KUNST. ÜBER DAS SPANNUNGSREICHE VERHÄLTNISS VON KUNST, ÖFFENTLICHKEIT UND RECHT. FALLSTUDIEN AUS DEM 19. UND 20. JAHRHUNDERT MIT DEM SCHWERPUNKT DEUTSCHLAND* (1996).

<sup>21</sup> See Tanehisa Otabe, *Die moderne Eigentumslehre und der Begriff der Kunst. Zur Politik der modernen Ästhetik*, 21 *JOURNAL OF THE FACULTY OF LETTERS, THE UNIVERSITY OF TOKYO, AESTHETICS* 141 (1996); MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET. REREADING THE HISTORY OF AESTHETICS* (1994); Annie Becq, *Creation, aesthetics, markets: origins of the modern concept of art*, in *EIGHTEENTH CENTURY AESTHETICS AND THE RECONSTRUCTION OF ART*, 240, 254 (P. MATTICK Jr., ed., 1993); MARK ROSE, *AUTHORS AND OWNERS. THE INVENTION OF COPYRIGHT* (1993); DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* (1992); HEINRICH BOSSE, *AUTORSCHAFT IST WERKHERRSCHAFT. ÜBER DIE ENTSTEHUNG DES URHEBERRECHTS AUS DEM GEIST DER GOETHEZEIT* (1981); Gerhard Plumpe, *Eigentum – Eigentümlichkeit. Über den Zusammenhang ästhetischer und juristischer Begriffe im 18. Jahrhundert*, 23 *ARCHIV FÜR BEGRIFFSGESCHICHTE* 175 (1979).

<sup>22</sup> ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* (1998).

<sup>23</sup> Some pioneering case studies can be found now in the collection of recent articles by NATHALIE HEINICH & BERNARD EDELMAN: *L'ART EN CONFLITS. L'ŒUVRE DE L'ESPRIT ENTRE DROIT ET SOCIOLOGIE* (2002).

reaches into very fundamental problems concerning the ontology of artwork<sup>24</sup>. Not only continental European traditions of art law but also the *Berne Convention for the Protection of Literary and Artistic Works* have come to conceive of a work of art as a complex object, somehow materially embodied and perceivable through the senses and at the same time immaterial, 'spiritual' or of the kind of Platonic ideas (cf. esp. Art. 6<sup>bis</sup>). Usually the jurisdiction concerning works of art distinguishes between various rights in the same object, some of which can be sold and transmitted, whereas others remain the exclusive possession of the author and of his or her legal successors for a certain term after the death of the author. This calls for a philosophical investigation of the constitution of this kind of complex objects and about the relations between the 'parts', 'tiers' or 'aspects' and the 'whole'. In dealing with copyright problems concerning works of art, jurists have established sophisticated methods for determining the (often contested) identity of works of art<sup>25</sup> that could be instructive for philosophical debates concerning the ontology of artwork<sup>26</sup>. On the other hand, some of the *ad hoc* solutions developed by jurists when confronted with particular cases could also profit from taking into consideration advanced theoretical arguments as they have been elaborated in the philosophy of art<sup>27</sup>, in ontology<sup>28</sup>, contemporary music<sup>29</sup> or literary theory<sup>30</sup>.

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<sup>24</sup> Of course, the ontological puzzles raised in the context of intellectual property are not limited to those particularly puzzling entities we call 'works of art'; on further problems emerging with the implementation of the cyberspace cf. DAVID R. KOEPEL, *THE ONTOLOGY OF CYBERSPACE: PHILOSOPHY, LAW, AND THE FUTURE OF INTELLECTUAL PROPERTY* (2000).

<sup>25</sup> See ULRICH LOEWENHEIM, ED., *HANDBUCH DES URHEBERRECHTS* (2003); SIMON STOKES, *ART AND COPYRIGHT* (2001); G. Gervaise Davis, *Pixel Piracy, Digital Sampling & Moral Rights, Multimedia und Urheberrecht: Ein Dilemma des digitalen Zeitalters*, 30 *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR), INTERNATIONALER TEIL* 888 (1996); Stephen Clark, *Of Mice, Men, and Supermen: The Copyrightability of Graphic and Literary Characters*, 28 *ST. LOUIS UNIVERSITY LAW JOURNAL* 959 (1984).

<sup>26</sup> See Klaus Petrus, *Was sind Kunstwerke? Grundzüge einer Konstitutionstheorie der Kunst*, 47 *ZEITSCHRIFT FÜR ÄSTHETIK UND ALLGEMEINE KUNSTWISSENSCHAFT* 217 (2002); MICHEL HAAR, *L'ŒUVRE D'ART. ESSAI SUR L'ONTOLOGIE DES ŒUVRES* (1994); NELSON GOODMAN AND CATHERINE Z. ELGIN, *REVISIONEN*, (1989); CLAUDIA RISCH, *DIE IDENTITÄT DES KUNSTWERKS* (1986); Jay E. Bachrach, *Type and Token and the Identification of the Work of Art*, 31 *PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH* (1971); PETER F. STRAWSON, *INDIVIDUALS. AN ESSAY IN DESCRIPTIVE METAPHYSICS* (1959); Joseph Margolis, *The Identity of a Work of Art*, 68 *MIND* 34 (1959).

<sup>27</sup> See ARTHUR C. DANTO, *THE TRANSFIGURATION OF THE COMMONPLACE* (1981); NELSON GOODMAN, *LANGUAGES OF ART. AN APPROACH TO A THEORY OF SYMBOLS* (2<sup>nd</sup> ed., 1976).

<sup>28</sup> See R. SCHMÜCKER, ED., *IDENTITÄT UND EXISTENZ. STUDIEN ZUR ONTOLOGIE DER KUNST* (2003); Julian Dodd, *Musical Works as Eternal Types*, 40 *BRITISH JOURNAL OF AESTHETICS* 424 (2000); MARIA E. REICHER, *ZUR METAPHYSIK DER KUNST. EINE LOGISCH-ONTOLOGISCHE UNTERSUCHUNG DES WERKBEGRIFFS* (1998);

Although art and aesthetic theory are hardly essential for the existence and legitimacy of copyright, in a way, similar to how the latter is crucial for the maintenance and flourishing of the arts or of certain art-related practices, the relationship between copyright and art (and also the relationship between copyright and aesthetic theory) is not a one-way street. The conceptions of intellectual property and of a 'work of authorship' that seem to be indispensable in the dogmatic setup of copyright law necessarily draw on certain ideas of artistic production, authorship, creativity, and individuality. The legal framework of copyright preserves and reinforces these ideas of artistic production, like the requirement of distinct traces of 'originality' in a particular 'work of authorship'<sup>31</sup>, in spite of the fact that many of the practices involved in the actual production of art never really complied with these standards and that the avantgarde movements of the 20<sup>th</sup> century have seriously challenged these traditional ideas<sup>32</sup>. The interdependency between copyright and

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GEORGE CURRIE, AN ONTOLOGY OF ART (1989); FRANZ V. KUTSCHERA (1989); Eddy M. Zemach, *How Paintings Are*, 29 BRITISH JOURNAL OF AESTHETICS 65 (1989); WOLFGANG KÜNNE, ABSTRAKTE GEGENSTÄNDE (1983); ROMAN INGARDEN, UNTERSUCHUNGEN ZUR ONTOLOGIE DER KUNST. MUSIKWERK – BILD – ARCHITEKTUR – FILM (1962).

<sup>29</sup> See Albrecht Wellmer, *Das musikalische Kunstwerk* in FALSCHER GEGENSÄTZE, 133, 175 (A. KERN & R. SONDEREGGER, eds., 2002); Eberhard Ortland, *Zur Konstitution des musikalischen Gegenstandes* in KLANG – STRUKTUR – METAPHER. MUSIKALISCHE ANALYSE ZWISCHEN PHÄNOMEN UND BEGRIFF, 3, 27 (M. POLTH et al., eds., 2000); Maria E. Reicher, *What is it to Compose a Musical Work?*, 58, 59 GRAZER PHILOSOPHISCHE STUDIEN 203 (2000); LYDIA GOEHR, THE IMAGINARY MUSEUM OF MUSICAL WORKS (1992).

<sup>30</sup> See GÉRARD GENETTE, L'ŒUVRE D'ART (1994–1997); David I. Holmes, *Authorship Attribution*, 28 COMPUTERS AND THE HUMANITIES 87 (1994); HEINRICH PLETT, ED., INTERTEXTUALITY (1991); Robert Stecker, *Apparent, Implied, and Postulated Authors*, 11 PHILOSOPHY AND LITERATURE 258 (1987); ULRICH BROICH & MANFRED PFISTER, EDS., INTERTEXTUALITÄT (1985); HARALD FRICKE, NORM UND ABWEICHUNG. EINE PHILOSOPHIE DER LITERATUR (1981); E. D. Hirsch, Jr., *What Isn't Literature?*, in 24, 34 WHAT IS LITERATURE? (P. HERNADI, ed., 1978); Stein H. Olsen, *Defining a Literary Work*, 35 JAAC 133 (1976); JULIA KRISTEVA, LA RÉVOLUTION DU LANGAGE POÉTIQUE (1974); Monroe C. Beardsley, *The Concept of Literature*, 23, 29 LITERARY THEORY AND STRUCTURE (F. BRADY ET AL., EDS., 1973); UMBERTO ECO, OPERA APERTA (2<sup>nd</sup> ed., 1967).

<sup>31</sup> E. g. United States Copyright Act of 1976, 17 U.S.C. § 102, comm. M. A. LEAFFER, UNDERSTANDING COPYRIGHT LAW (1995) § 2.7 [A]; see also Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINNESOTA LAW REVIEW 579 (1985); Sam Ricketson, *The Concept of Originality in Anglo-Australian Copyright Law*, 39 JOURNAL OF THE COPYRIGHT SOCIETY OF THE USA 265 (1992); German UrhG of 1965, § 2; comm. Ulrich Loewenheim in: URHEBERRECHT. KOMMENTAR (GERHARD SCHRICKER, ED., 2<sup>nd</sup> ed., 1999), § 2, Rn. 25.

art, thus, is not simply a harmonious relationship of mutual support, but a more complex bond: tension ridden, open to interferences in either directions and in many aspects calling for reconceptualization.

The need for a more adequate understanding of the interdependencies and interferences between copyright and art becomes more urgent today due to a number of factors, more or less closely interrelated. Most noteworthy among them is the growing importance of intellectual property in the 'information age'<sup>33</sup>, accompanied by significant changes in copyright legislation<sup>34</sup> with respect to the emerging technological possibilities of world-wide computer networks<sup>35</sup> and other media of mass reproduction of works of authorship<sup>36</sup>. Technological innovations produce altogether new kinds of objects of (potential) copyrights as well as new possibilities for copyright violation. They can and actually do affect the ontological constitution as well as the legal status even of previously established objects or practices of art in many ways. For instance, much of the world's cultural heritage in the visual arts as well as in the performing arts, motion pictures and music has become subject to

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<sup>32</sup> See CHRISTINE FUCHS, AVANTGARDE UND ERWEITERTER KUNSTBEGRIFF. EINE AKTUALISIERUNG DES KUNST- UND WERKBEGRIFFS IM VERFASSUNGS- UND URHEBERRECHT (2000); GERHARD RAU, ANTIKUNST UND URHEBERRECHT. ÜBERLEGUNGEN ZUM URHEBERRECHTLICHEN WERKBEGRIFF (1978); ULI SCHENK, DER URHEBERRECHTLICHE WERKBEGRIFF UNTER BESONDERER BERÜCKSICHTIGUNG DER PROBLEME DER 'NEUEN MUSIK' (1977).

<sup>33</sup> See ROCHELLE COOPER DREYFUSS ET AL., EDs., EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY. INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY (2001); ADAM D. MOORE, INTELLECTUAL PROPERTY & INFORMATION CONTROL. PHILOSOPHIC FOUNDATIONS AND CONTEMPORARY ISSUES (2001); INTERNATIONALE GESELLSCHAFT FÜR URHEBERRECHT (ED.), SCHUTZ VON KULTUR UND GEISTIGEM EIGENTUM IN DER INFORMATIONSGESELLSCHAFT (1998).

<sup>34</sup> E. g. the US Digital Millenium Copyright Act of 1998 and the German *Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft* of 10 September 2003; comm. AXEL-ARTUR WANDTKE & WINFRIED BULLINGER, PRAXISKOMMENTAR ZUM URHEBERRECHT, Erg. Bd.: GESETZ ZUR REGELUNG DES URHEBERRECHTS IN DER INFORMATIONSGESELLSCHAFT (2003).

<sup>35</sup> See JÜRGEN ENSTHALER, ED., HANDBUCH URHEBERRECHT UND INTERNET (2002); ALBRECHT HALLER, MUSIC ON DEMAND: INTERNET, ABRUFDIENSTE UND URHEBERRECHT (2001); L. EDWARDS & C. WAELDE, EDs., LAW AND THE INTERNET (2000); CLIVE GRINGRAS, THE LAWS OF THE INTERNET (1997); P. B. HUGENHOLTZ, ED., THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT (1996).

<sup>36</sup> See H. P. GÖTTING, ED., MULTIMEDIA, INTERNET UND URHEBERRECHT (1998); Les Watkins, *The Digital Performance Right in Sound Recordings Act of 1995: Delicate Negotiations, Inadequate Protection*, 20 COLUMBIA-VLA JOURNAL OF LAW AND THE ARTS 323 (1996).



copyright again due to the procedures of digital reproduction, storage and distribution – even if centuries have passed since the lifetime of the authors of the original works.

### C. Conflicts in the Economics and Culture of Copyright Law

Copyright law does not merely react to technological developments<sup>37</sup>. It also plays a much more active part in establishing and shaping the social and economic conditions not only for the exchange of information or for the production, circulation and appreciation of art (among other kinds of contents), but also for the development of the hardware aspect of communication technologies. For example, the function of copyright in protecting the investments required for the costly productions of the music and motion-picture industries<sup>38</sup> goes hand in hand with secondary effects in the development and marketing of multi-media technologies like CD, DVD or MP3-Players, which serve either to increase the possibilities for a most profitable exploitation of copyrights in certain works of authorship<sup>39</sup> or appear in some cases as challenges for such chains of exploitation<sup>40</sup>. In this respect, the much debated turn in recent copyright legislation – to provide sanctions not just for the infringement of copyright directly but to penalize the circumvention of technological barriers installed to prevent unauthorized copying in the first place<sup>41</sup> – might appear as an adequate step: adequate to the hybrid realities of the multi-media system which is neither simply a physical matter nor just a form of possible

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<sup>37</sup> Elmar Wadle, *Die Entfaltung des Urheberrechts als Antwort auf technische Neuerungen*, 106 UFITA 203 (1987); see also THOMAS PLATENA, *DAS LICHTBILD IM URHEBERRECHT. GESETZLICHE REGELUNG UND TECHNISCHE WEITERENTWICKLUNG* (1998).

<sup>38</sup> See RICHARD E. CAVES, *ECONOMICS OF THE CREATIVE INDUSTRIES* (2000); JACQUES ATTALI, *NOISE. THE POLITICAL ECONOMY OF MUSIC* (1985).

<sup>39</sup> Florine Schöner, *Multimedia – Revolution der Musik- und Medienwirtschaft*, in *COPYRIGHT. MUSIK IM INTERNET* 83, 108 (R. FLENDER & E. LAMPSON, eds., 2001).

<sup>40</sup> GILIAN DAVIES & MICHELE E. HUNG, *MUSIC AND VIDEO PRIVATE COPYING. AN INTERNATIONAL SURVEY OF THE PROBLEM AND THE LAW* (1993).

<sup>41</sup> WPPT, Art. 18; US Digital Millennium Copyright Act of 1998; German UrhG (as revised 2003) § 95a; see also Cyrill P. Rigamonti, *Schutz gegen Umgehung technischer Massnahmen im Urheberrecht aus internationaler und rechtsvergleichender Perspektive*, 54 GRUR Int. (2005), 1-14.

communication. The turn from a normative obligation to the sanctioning of technological means of effective prevention through criminal law marks a very fundamental rearrangement of relations between copyright holders and the public, if not a shift away from liberal democracy altogether, as some have suspected<sup>42</sup>.

To a large extent, conflicts about copyright arise from antagonistic interests of authors, publishers (or distributors) and users. The economic dimension and the practical consequences of establishing intellectual property regimes one way or another must certainly not be neglected. However, there is more at stake in debates about copyright than the question of who should profit and who would have to pay. Mere economic antagonisms could be settled sooner or later by some kind of trade-off that should be acceptable to either side as fair. If some of the differences between certain particular regimes of intellectual property have seemed insurmountable so far in the negotiations about possible forms of an international harmonization<sup>43</sup>, this might have been due – partly at least<sup>44</sup> – to irreconcilable conceptions of the nature and objectives of artistic practices, of works of art, aesthetic merit, authorship, creativity, and individuality, more or less deeply rooted in cultural traditions on either side. The high esteem of ‘originality’, for example, which arose in European cultures during the eighteenth century<sup>45</sup>, more or less at the same time as the emergence of copyright, would be hardly comprehensible from the background of Chinese traditional conceptions of art and of artistic achieve-

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<sup>42</sup> LAWRENCE LESSIG, *FREE CULTURE. HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

<sup>43</sup> See U. LOEWENHEIM, ED., *HANDBUCH DES URHEBERRECHTS* (2003), 892; ADAM D. MOORE, ED., *INTELLECTUAL PROPERTY. MORAL, LEGAL, AND INTERNATIONAL DILEMMAS* (1997); SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986* (1987); BERNARD EDELMAN, *DROITS D’AUTEUR ET DROITS VOISINS [...] COMMENTAIRE*, (1987).

<sup>44</sup> See SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW. THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003); ROBERT L. OSTERGARD JR., *THE DEVELOPMENT DILEMMA. THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS IN THE INTERNATIONAL SYSTEM* (2003); CHRISTOPHER MAY, *A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS. THE NEW ENCLOSURES?* (2000); Peter Drahos, *Decentering Communication: The Dark Side of Intellectual Property*, in 249 *FREEDOM OF COMMUNICATION* (T. CAMPBELL & W. SADURSKI, eds., 1994).

<sup>45</sup> ROLAND MORTIER, *L’ORIGINALITE. UNE NOUVELLE CATEGORIE ESTHETIQUE AU SIECLE DES LUMIERES* (1982).

vement<sup>46</sup>. And the protection of author's 'moral rights' in continental European art law as well as the unique position provided for the freedom of artistic expression in the German constitution (Art. 5 III GG) and in some other legal systems<sup>47</sup>, draws on certain philosophical arguments propagated by German idealist philosophers around the turn of the nineteenth century. These were arguments about public spirit and the relevance of artwork as a necessary medium of the self-expression and self-realization, not so much of the authors' individual minds but of a more-than-individual spirit. Many states – particularly the United States of America – are not prepared to accept such a privileged position for artistic production, and even among those who want to defend it, the philosophical basis of the 'classical' justification of the doctrine seems to be hardly accepted any more. If it is to be defended, the justification seems to need further arguments – or, rather, the assumptions about the particular nature of art and about the particular function of art for modern society that are implied in this crucial point of art law call for an explicit rational reconstruction. These and other apparent (or purported) incompatibilities between different aesthetic conceptions and cultural traditions require further elucidations in comparative aesthetics as well<sup>48</sup>.

First of all, it is necessary to acknowledge that such differences actually exist and that they cause frictions in the international relations of intellectual property. A more adequate account of the obstacles to an international harmonization of copyright requires a more detailed analysis of these frictions and the conceptual incompatibilities involved. Approaches towards possible solutions might be derived partly through a process of successive critical revision of aesthetic conceptions and cultural traditions, partly through the efforts of jurists to develop viable solutions for unresolved differences.

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<sup>46</sup> See ZHI WEI, *DER URHEBERRECHTSSCHUTZ IN CHINA MIT HINWEISEN AUF DAS DEUTSCHE RECHT* (1995); William P. Alford, *Don't Stop Thinking About ... Yesterday. Why There was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 *JOURNAL OF CHINESE LAW* 3 (1993).

<sup>47</sup> See Erhard Denninger, *Freiheit der Kunst*, in *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, vol. 6, (J. ISENSEE & P. KIRCHHOF, eds., 1989) § 146; Peter Häberle, *Die Freiheit der Kunst in kulturwissenschaftlicher und rechtsvergleichender Sicht*, in 37, 87 *KUNST UND RECHT IM IN- UND AUSLAND* (W. BERKA eds., 1994); HEINRICH HEMPEL, *DIE FREIHEIT DER KUNST. EINE DARSTELLUNG DES SCHWEIZERISCHEN, DEUTSCHEN UND AMERIKANISCHEN RECHTS* (1991).

<sup>48</sup> See Eberhard Ortland, *Comparative Aesthetics – Beyond Universalism and Relativism*, in 13 *DIALOGUE AND UNIVERSALISM* 123, 131 (2003); E. Ortland, *Über Gegenstände, Methoden und Voraussetzungen komparativer Ästhetik*, in *KOMPARATIVE ÄSTHETIK. KÜNSTE UND ÄSTHETISCHE ERFAHRUNGEN ZWISCHEN ASIEN UND EUROPA*, 55, 73 (R. ELBERFELD & G. WOHLFART, eds., 2000).

#### D. Learning the Laws of Cohabitation: What Lies Ahead for Copyright and Art

Copyright problems of contemporary art, in particular, include intriguing incompatibilities between traditional assumptions of the identity of a permanent, 'fixed' work of art as it is typically expected in copyright law, and the more ephemeral, dynamic, if not altogether transient character of certain happenings or improvised performances<sup>49</sup>. What is the legal status of 'secondary' traces, such as tape recordings, photographs or video documents, with respect to such works that exist for most of the people (who won't have been present at the actual event) only in a mediated form through such reproductions? This may be uncontroversial for the audio recordings of Keith Jarrett's famous "Köln Concert" (1981). But it is a complicated question when photographers claim copyright for their photographic work depicting, for example, a particular view of a particular scene in front of the Berlin *Reichstag*, wrapped in silver cloth by Christo & Jeanne Claude (1995) who, in turn, claim that every photo depicting their work is nothing but a reproduction of this work – and therefore piracy if they have not authorized it<sup>50</sup>. The tension between *artistic practice* and *copyright dogmatics* raises the question whether (and if so, in which direction) copyright law needs to be modified in order to become more adequate to contemporary art, or whether even contemporary art can at best be understood within the conceptual framework of traditional aesthetics and copyright law.

Conflicts between copyright and the claims of artists for a particular *freedom of artistic expression* – as well as conflicts between copyright and the public interest<sup>51</sup> – become more urgent with the ongoing expansion of copyright. Prevailing copyright in older works of art may be an obstacle for the demands of the production of new works of art; some artistic projects could never be realized at all due to the

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<sup>49</sup> Thomas Dreier, *Copyright Aspects of the Preservation of Nonpermanent Works of Modern Art*, in 63, 66 MORTALITY - IMMORTALITY, THE LEGACY OF 20<sup>TH</sup>-CENTURY ART (M. A. CORZO, ed., 1999).

<sup>50</sup> *Bundesgerichtshof* (German Federal Court of Justice), Decision of 24 January 2002 - *Verhüllter Reichstag*, Az.: I ZR 102/99; see also the comments by Haimo Schack, 57 JURISTENZEITUNG (2002), 1007-1008; and B. Dix, *Christo und der verhüllte Reichstag*, [www.kunstrecht.de/news/2002/02urh01.htm](http://www.kunstrecht.de/news/2002/02urh01.htm).

<sup>51</sup> See ERIC PAHUD, DIE SOZIALBINDUNG DES URHEBERRECHTS (2000); FELIX LEINEMANN, DIE SOZIALBINDUNG DES 'GEISTIGEN EIGENTUMS'. ZU DEN GRUNDLAGEN DER SCHRANKEN DES URHEBERRECHTS ZUGUNSTEN DER ALLGEMEINHEIT (1998); FERDINAND MELICHAR, SCHRANKEN ZUGUNSTEN DER ALLGEMEINHEIT BEIM URHEBERRECHTSSCHUTZ VON SPRACHWERKEN UND WERKEN DER MUSIK (1987).

impossibility of attaining necessary permissions by unwilling copyright holders. Thus, copyright can exert an impeding or even destructive influence on further artistic production<sup>52</sup>. This problem has not been sufficiently acknowledged in the current literature on copyright and art, which is largely concerned with demonstrating the indispensability of copyright for sustaining a broad supply of cultural goods and for fostering innovation in the arts as well as in other spheres of modern culture<sup>53</sup>. The discussion of cases where conflicts of this type have come to the fore<sup>54</sup> can contribute substantially to elaborating distinctive profiles of the different relationships between legal regimes and aesthetic theories.

For instance, a literary work, drama or film might require the use of certain sentences or the allusion to a literary character that is the intellectual property of some third party. This was the case with Heiner Müller's last drama, "*Germania 3. Gespenster am toten Mann*" (1996), which contained passages borrowed from Hölderlin, Kleist (unproblematic, since they have already fallen into the public domain) and Bertolt Brecht (which provoked litigation)<sup>55</sup>. Although this kind of intertextual relationship is different in principle from the types of artwork defined as 'derivative' or 'compound', it is difficult in some cases to judge these differences. Similar questions arise with respect to music. Besides the 'classical' problems of musical quotations, adoptions of melodic lines (often transposed, therefore not 'identical', but still recognizable) rhythmic patterns or other parts of a musical composition<sup>56</sup>, the new possibilities of producing music with electronic and digital equipment as well as certain styles in contemporary popular music like 'rap' or the

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<sup>52</sup> See Eberhard Ortland, *Urheberrecht und ästhetische Autonomie*, 52 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 773, 792 (2004); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS. THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001).

<sup>53</sup> See GERHARD SCHRICKER ET AL., EDS., GEISTIGES EIGENTUM IM DIENST DER INNOVATION (2001); AXEL-ARTUR WANDTKE, *Urheberrecht pro Kunstfreiheit*, 35 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT (ZUM) 484, 489 (1991).

<sup>54</sup> Hans Heinrich Schmieder, *Freiheit der Kunst und freie Benutzung urheberrechtlich geschützter Werke*, 93 UFITA 63 (1982).

<sup>55</sup> *Bundesverfassungsgericht* (Federal Constitutional Court) Decision of 29 June 2000, Az.: 1 BvR 825/98; on this case see also Peter Garloff, *Copyright und Kunstfreiheit - zur Zulässigkeit ungenehmigter Zitate in Heiner Müllers letztem Theaterstück*, GRUR 54 (2001), 476-482.

<sup>56</sup> See ARNDT BERGER, DIE WANDERENDE MELODIE IM URHEBERRECHT (2000); THEODOR W. ADORNO, *Musikalische Diebe, unmusikalische Richter*, in: IMPROMPTUS 131-135 (1968).

DJ-culture have produced new conflicts concerning the wide-spread practices of sound sampling<sup>57</sup>. In contemporary theatre, the art of the director and of the actors has attained more and more an autonomous status; the performance of a theatre production claims independence from the instructions given in the text of the drama to a greater or lesser extent<sup>58</sup>. Similar arguments can be developed for film and video productions, but also for musical performances and dance. Even more complicated is the relationship between works of "appropriation art" and those previously existing artworks that they adopt or reiterate<sup>59</sup>. Such developments in contemporary art raise the question of how to secure the freedom of artistic production without jeopardizing copyright altogether – and whether aesthetic theories can supply criteria for the distinction between cases of appropriation that are to be considered as artworks in their own right, and other cases that cannot legitimately claim to be works of art but must be considered as derivative or simply as reproductions of the previously existing works.

The duration of copyright terms is a highly controversial issue. Long terms of copyright protection established successively during the twentieth century seem to have become counterproductive in many ways. For example, the fees owed to the publishing companies by anyone who wants to give a public performance of contemporary music – but not in the case of performances of 'classical' pieces by composers, who died more than seventy years ago – seem to work in effect like a

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<sup>57</sup> See MARKUS HÄUSER, SOUND UND SAMPLING. DER SCHUTZ DER URHEBER, AUSÜBENDEN KÜNSTLER UND TONTRÄGERHERSTELLER GEGEN DIGITALES SOUNDSAMPLING NACH DEUTSCHEM UND US-AMERIKANISCHEM RECHT (2002); MICHAEL FROMM, URHEBERRECHT IN DER BEWERTUNG DES SAMPLING IN DER MUSIK (1994); C. Cutler, *Plunderphonics*, in 67, 58 SOUNDING OFF. MUSIC AS SUBVERSION/RESISTANCE/REVOLUTION (R. SAKOLSKY & F. WEI-HAN HO, eds., 1996).

<sup>58</sup> See EIKE WILHELM GRUNERT, WERKSCHUTZ CONTRA INSZENIERUNGSKUNST. DER URHEBERRECHTLICHE GESTALTUNGSSPIELRAUM DER BÜHNENREGIE (2002); ROSWITHA KÖRNER, DER TEXT UND SEINE BÜHNENMÄSSIGE AUFFÜHRUNG. URHEBERRECHTLICHE UND THEATERWISSENSCHAFTLICHE UNTERSUCHUNG ÜBER DIE INSZENIERUNG (1999); PETRA WRONEWITZ ET AL., EDS., DAS THEATER UND DAS URHEBERRECHT. VERSUCHE EINER AUFKLÄRUNG (1999); AXEL-ARTUR WANDTKE ET AL., EDS., THEATER UND RECHT (1994); ANDREA FRANCESCO G. RASCHÉ, FÜR EIN URHEBERRECHT DES BÜHNENREGISSEURS. EINE RECHTSVERGLEICHENDE STUDIE MIT SPEZIELLER BERÜCKSICHTIGUNG DER THEATERSEMIOTIK UND DER FOLGEN FÜR DIE BÜHNENPRAXIS (1989).

<sup>59</sup> See Haimo Schack, *Appropriation Art und Urheberrecht*, in URHEBERRECHT IM INFORMATIONSZEITALTER. Festschrift W. Nordemann 107, 113 (U. LOEWENHEIM, ed., 2004); Lynne A. Greenberg, *The Art of Appropriation. Puppies, Piracy, and Postmodernism*, 11 CARDOZO ARTS AND ENTERTAINMENT LAW JOURNAL 1, 21 (1992); John Carlin, *Culture cultures. Artistic appropriation and intellectual property law*, 13 COLUMBIA-VLA JOURNAL OF LAW & THE ARTS 103, 143 (1988); ROMANA REBBELMUND, APPROPRIATION ART. DIE KOPIE ALS KUNSTFORM IM 20. JAHRHUNDERT (1999).

tax imposed on performing contemporary music and thereby lead to a reduction of the presence of innovative compositions in most concert programmes. Copyright protection of monopolized editions as well as of 'authorized' exclusive (but sometimes aesthetically inadequate) translations of literary texts originally written in a foreign language, can impede and distort considerably the accessibility of these works, as it was the case with the German translations of the Spanish poet García Lorca for many years.

However, even if in some cases copyright may be an obstacle for the demands of the production of new works of art, it would be much too simple to claim that copyright protects primarily the works of dead authors against the demands of the living. The impact of copyright on artistic production cannot be reduced to this negative aspect, although it is important to recognize that intellectual property does indeed lead to considerable restrictions for the freedom of artistic expression. More important, and in some aspects less explored, are the 'positive', productive effects of copyright on artistic practices. Far beyond the economic incentives secured by copyright – which often seem to be less important for the creative artists than for the producers, publishers and distributors of reproductions<sup>60</sup> – copyright norms can under certain circumstances have a considerable impact on artists' decisions, even on decisions concerning the actual form of their creations, because they might make certain artistic strategies particularly attractive and others rather hard to pursue. Following this line of analysis, the implicit aesthetics of copyright law can be conceived of in a new way; as consisting not merely of certain aesthetic doctrines presupposed for the comprehensibility of some very basic legal concepts of copyright. The question must be raised whether there is something like a positive aesthetics doctrine, a doctrine privileging certain forms or stylistic preferences, implied in the seemingly neutral framework of copyright law – and what this might mean for our aesthetic ideas.

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<sup>60</sup> Reh binder, *Urheberrecht* (2004), 61-62.