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Copyright, creators and society's need for autonomous art – the blessing and curse of monetary incentives

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1. The field of literary and artistic production

Refining Niklas Luhmann's concept of relatively closed social systems with a distinct identity and a boundary between them and their environment,[2] Pierre Bourdieu developed the concept of 'fields' in society. Although constituting an autonomous social space with its own rules, dominance structures and established set of opinions, a field is not isolated from other social spaces and processes surrounding it. The structure of a field results from constant internal

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2 N Luhmann, *Soziale Systeme: Grundriss einer allgemeinen Theorie*, (Suhrkamp, 1984).

fights of competing players for predominance and leadership.[3] A field's degree of autonomy, then, depends on the extent to which external players can influence these internal fights. External factors may have a deep impact on a field's constitution.[4] Given the continuous change of power relations, the structure of a social field is not static and fixed. By contrast, a field has its own history reflecting different stages of development – from the field's genesis as a social space with far-reaching autonomy to the potential loss of this autonomous position as a result of powerful external influences.[5] For the analysis of a given field, it is thus necessary to examine its relationship with the social environment in which it is embedded at a given point in time.

Applying this theoretical model to the field of literary and artistic production, Bourdieu assumes that the field's autonomy rests on the rejection of the capitalism of the bourgeoisie. The field of literature and art militates against the bourgeois logic of profit maximisation by developing its own, independent logic. This specific 'nomos' of the literary and artistic field lies in the independence from economic and political powers.[6] Instead of striving for commercial success, an autonomous literary or artistic production aims at internal recognition within the field. It emancipates itself from the focus on monetary success and honours awarded by the bourgeois society.[7] As a result of this nomos, the consecration mechanisms in the literary and artistic field – the power to set quality standards and dominate the internal discourse – become self-referential: *l'art pour l'art*. The field of literature and art becomes a universe countering the profit logic that impregnates the economic and political discourse. The break with the ruling powers constitutes the basis of an artist's independent, autonomous existence.[8] Autonomous literature and art is a provocation. It challenges the pervasive 'economism' in society.[9]

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3 P Bourdieu, 'Die Logik der Felder' in P Bourdieu and LJD Wacquant (eds), *Reflexive Anthropologie* (Suhrkamp 1996) 124, 134–135; P Bourdieu, *Die Regeln der Kunst. Genese und Struktur des literarischen Feldes*, (Suhrkamp, 1999) (French original: P Bourdieu, *Les règles de l'art. Genèse et structure du champ littéraire*, (Éditions du Seuil, 1992)), 253–255, 368.

4 P Bourdieu, R Chartier and R Darnton, 'Dialog über die Kulturgeschichte' (1985) 26 *Freibeuter – Vierteljahreszeitschrift für Kultur und Politik* 22, 28.

5 Bourdieu, 'Die Logik der Felder', above n 2, 134; J Jurt, *Bourdieu* (Reclam, 2008) 91–92.

6 Bourdieu, *Die Regeln der Kunst*, above n 2, 103–105.

7 Ibid 344.

8 Ibid 105.

9 Ibid 342.

It follows from this configuration of the literary and artistic field that an artist seeking to gain recognition among peers must not align her work with the tastes of the masses and produce mainstream works in the hope of commercial success. This would be perceived as a concession to the predominant profit orientation of society. By contrast, the renunciation of commercial interests and the focus on the internal quality standards within the literary and artistic field testify to an artist's genuinely literary and artistic orientation. In consequence, the field generates a peculiar reverse economy. An artist can only win recognition in the field of literature and art by losing on the territory of monetary rewards: the one who loses (in economic terms), wins (in artistic terms).[10]

This reverse economy also determines the structure of the field of literature and art. As long as the field is autonomous, the highest positions will be held by those artists turning their back on the bourgeois economy and the prospect of commercial gains. The degree of the field's autonomy, in other words, depends on whether independent artists striving for recognition within the field (limited production for other independent artists), or dependent artists striving for recognition outside the field (mainstream production for the masses), hold the highest hierarchical positions.[11]

Accordingly, the fight for predominance and leadership in the literary and artistic field is a fight between autonomous/independent and bourgeois/dependent artists for the power to set quality standards and dictate the internal discourse.[12] The stronger the position of dependent, profit-oriented artists in this fight, the bigger the influence of external economic and political players on the structure of the literary and artistic field, and the lower the field's autonomy.[13]

On the basis of this analysis of the power relations in the literary and artistic field, Bourdieu paints an alarming picture of the field's current degree of autonomy. In the light of reduced state subsidies

10 Ibid 136, 344–345.

11 Ibid 344–345.

12 Ibid 198–203. Within the group of autonomous, independent artists, Bourdieu also describes a further fight between established artists presently holding the consecration and discourse power, and upcoming avant-garde artists challenging this established position: 198, 253–255, 379–380.

13 Ibid 344.

for cultural productions and the rise of culture sponsoring by enterprises, he warns of an increasing mutual penetration of the world of art and the world of money: more and more literary and artistic productions become subject to entrepreneurial marketing strategies and commercial pressures.[14] With the growing influence of external players and profit rationales, the distinction between autonomous, independent productions and commercial, dependent productions is increasingly blurred. To a growing extent, the profit logic of commercial productions also prevails in avant-garde works.[15] Therefore, the autonomy of the field of literature and art is currently at risk.[16]

2. The rationales of copyright revisited

In the light of this analysis, the role of copyright in the field of literary and artistic production seems ambiguous. Utilitarian copyright theory regards copyright as a vehicle to encourage the creation of literary and artistic works by providing an economic stimulus: the promise of monetary rewards is offered to authors as an incentive to create new works.[17] From the perspective of Bourdieu's analysis, this utilitarian incentive rationale is questionable. It may enhance the productivity of dependent artists who share the profit orientation of the bourgeois society. Artists following the specific *l'art pour l'art* nomos of the literary and artistic field, by contrast, are primarily interested in reputational rewards. They aim at recognition among peers. The incentive scheme underlying copyright law thus appears as a risk factor. It may entice autonomous artists away from the independent *l'art pour l'art* logic of the literary and artistic field.

14 Ibid 530.
15 Ibid 531.
16 Ibid 533.
17 FI Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harvard Law Review*, 165, 1211; SP Calandrillo, 'An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System' (1998) 9 *Fordham Intellectual Property Media & Entertainment Law Journal*, 301, 310–312; PE Geller, 'Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?' in B Sherman and A Strowel, *Of Authors and Origins*, (Clarendon Press, 1994) 159, 159, 164–166.

The offer of copyright seems to be not only a bait to spur creativity but also an attempt to persuade autonomous artists to spend time and effort on the production of mainstream works.

A less critical picture can be drawn on the basis of the natural law argument. This copyright theory posits that the author acquires a property right in her work by virtue of the mere act of creation.[18] As the author spends time and effort on the creation of a work, it is deemed right and just to afford her the opportunity to reap the fruit of this creative labour.[19] Copyright law merely recognises formally what has already occurred in the course of the act of creation. This approach is less directly linked with an incentive scheme. Continental European *droit d'auteur* systems following the natural law approach do not only provide strong economic rights but also strong moral rights allowing an author to safeguard the unbreakable bond with her work as a materialisation of her personality.[20] Nonetheless, the concept of recognising copyright as a reward for creative labour leads to a comparable dilemma. It implies that the author derives financial benefits from the exclusive entitlement to exploit a work. This reward mechanism favours commercially exploitable productions. It seems tailored to the interests of profit-oriented, dependent artists. Autonomous authors striving for reputational rewards within their own community are less likely to create works that generate substantial royalty revenue. Accordingly, the exploitation opportunity secured by copyright law offers much less support for their creative efforts.

Finally, even the freedom of expression argument for copyright protection appears doubtful in the light of Bourdieu's analysis. According to this line of reasoning, copyright protection ensures authors' independence from any kind of patronage potentially seeking to restrict their freedom of expression. With the grant of copyright,

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18 H Desbois, *Le droit d'auteur en France* (Dalloz, 2nd ed, 1978) 538; H Hubmann, 'Die Idee vom geistigen Eigentum, die Rechtsprechung des Bundesverfassungsgerichts und die Urheberrechtsnovelle von 1985' (1988) *Zeitschrift für Urheber- und Medienrecht* 4, 5.

19 FW Grosheide, *Auteursrecht op Maat*, (Kluwer, 1986) 128 (argument B).

20 As to continental European moral rights theory, see Geller, above n 16, 169–170; A Strowel, 'Droit d'auteur and Copyright: Between History and Nature' in B Sherman and A Strowel, *Of Authors and Origins* (Clarendon Press, 1994) 235, 236–237; B Edelman, 'The Law's Eye: Nature and Copyright' in B Sherman and A Strowel, *Of Authors and Origins* (Clarendon Press, 1994) 79, 82–87; E Ulmer, *Urheber- und Verlagsrecht* (Springer, 1980) 110–111. See Desbois 1978, above n 17, 538: 'L'auteur est protégé comme tel, en qualité de créateur, parce qu'un lien l'unit à l'objet de sa création.'

authors obtain the opportunity to exploit their works and acquire a source of income that is independent of patronage and other forms of sponsoring.[21] Truly independent authors in the sense of Bourdieu's analysis, however, aim at recognition among other independent authors who also renounce the profit orientation of the bourgeoisie. At the crucial early stage of a career in the area of literary and artistic production, the contribution of copyright to an autonomous artist's individual freedom of expression is thus likely to remain limited. In many cases, autonomous artists will have difficulty to derive substantial financial benefits from copyright protection. Dependent artists with a commercial mainstream orientation, by contrast, will have much less difficulty to generate a solid income. This bourgeois group of artists, however, follows market dictates anyway. Their production is not independent in the sense of the specific *l'art pour l'art* nomos of the literary and artistic field. Strictly speaking, market-oriented artists would not even need copyright to ensure freedom of patronage because they are not striving for independence of commercial influences in the first place. For autonomous artists requiring an extra income to keep their focus on independent productions, however, copyright has little to offer unless their fame within the group of autonomous artists allows them to translate this internal reputation into monetary rewards on the art market.

Hence, it seems difficult to reconcile the standard rationales of copyright protection with the maxim of *l'art pour l'art* in the field of literary and artistic production. By definition, monetary rewards cannot support autonomous artists in their efforts to gain recognition among their peers. Instead of supporting independent creations, the prospect of commercial exploitation is likely to further mainstream productions that may erode the autonomy of the literary and artistic field.[22]

21 NW Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal* 283, 288: 'Copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.' For an in-depth analysis of this argument, see generally NW Netanel, *Copyright's Paradox* (Oxford University Press, 2008).

22 With regard to the impact of continuous expansions of copyright on different kinds of creation strategies, see also Y Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 *New York University Law Review* 354.

The corrosive effect of this configuration of copyright law must not be underestimated. In particular, it would be wrong to assume that the group of autonomous artists and the impact of the problem are only marginal. Bourdieu's analysis – distinguishing between autonomous artists creating art for art's sake and bourgeois artists seeking to make money – is a theoretical model that Bourdieu developed to shed light on the power relations in the field of literary and artistic productions. His strict theoretical distinction between two prototypes of creators, however, need not be applied with the same rigidity when examining real-life implications of the incentives offered in copyright law.

In reality, creators are not unlikely to strive for both monetary and reputational rewards. To varying degrees, creators of flesh and blood are not unlikely to display characteristics of both independent, autonomous artists and market-oriented, bourgeois artists. The central question, then, is whether a creator's profit orientation is so strong that she is prepared to compromise her own aesthetic (scientific, journalistic, etc.) convictions when this is necessary to derive more profit from a work.

Once this more practical standard is applied, a creator can be qualified as autonomous as long as her interest in sufficient monetary rewards does not corrupt her aesthetic (scientific, journalistic, etc.) convictions and does not dilute her genuine, artistic expression. Viewed from this broader, more practical perspective, Bourdieu's analysis brings to light a core problem of copyright law – a problem that does not remain limited to marginal side effects on a specific group of creators and a small fraction of literary and artistic productions. Bourdieu's theory raises the general question of the desired degree of autonomous aesthetic (scientific, journalistic, etc.) expression in literary and artistic works. How truthful are literary and artistic productions that benefit from the incentive scheme of copyright law?

Arguably, copyright law should not only be in favour of profit-oriented mainstream productions. It should also encourage artists to cultivate their own, independent way of expressing themselves – without interference of market dictates. Hence, the examination of copyright law in the light of Bourdieu's analysis must not end here. It would be wrong to jump to the conclusion that copyright has nothing to offer autonomous art and artists. From the perspective of economic theory, it is even indispensable to explore copyright's potential to

contribute to the production of autonomous literature and art. At the core of the incentive rationale in copyright law lies the economic insight that literary and artistic works constitute 'public goods'. Because of non-rivalry in consumption[23] and non-excludability in use,[24] they are unlikely to be created in sufficient quantities in the absence of appropriate incentives.[25] The grant of intellectual property rights, however, is only one strategy for providing the required incentives. A system of public subsidies could solve the problem as well.[26] As pointed out by Bourdieu, this alternative solution of state subsidies is currently unavailable. Therefore, the remaining option of recalibrating the copyright system in a way that strengthens the autonomy of literature and art is of central importance. To safeguard the autonomy of the field, copyright law should become an engine of autonomous *l'art pour l'art* productions.

Before embarking on a survey of potential measures seeking to achieve this goal on the basis of copyright law, however, it is necessary to explain why this recalibration of the copyright system is desirable from the perspective of society as a whole. The proposal of introducing a bias in favour of autonomous literature and art in copyright law lacks power of persuasion in the absence of a clear indication of benefits for society. Therefore, the question arises how a recalibration of copyright law in favour of autonomous literary and artistic productions can be justified. The aesthetic theories of Friedrich Schiller and Theodor Adorno yield important insights in this respect.

3. Need for a bias in favour of autonomous literature and art

While Schiller sees works of art as catalysts paving the way for an ethical and free society (as discussed in section 3.1), Adorno describes the task of art to challenge reality and suggest necessary societal changes (3.2). Against this background, it becomes apparent

23 Use by one actor does not restrict the ability of another actor to benefit as well.

24 Unauthorised parties ('free riders') cannot be prevented from use.

25 WW Fisher, 'Reconstructing the Fair Use Doctrine' (1988) 101 *Harvard Law Review* 1659, 1700; WM Landes and RA Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325, 326; Netanel, *Copyright's Paradox*, above n 20, 84–85.

26 RA Posner, 'Intellectual Property: The Law and Economics Approach' (2005) 19 *Journal of Economic Perspectives* 57, 58–59; Calandrillo, above n 16, 310–312.

that a copyright system focusing on the furtherance of autonomous literature and art is of particular importance. It functions as an engine of alternative visions of society that can serve as a reference point for necessary changes of social and political conditions (3.3).

3.1. Schiller's aesthetic theory

Disillusioned by the French Revolution, which had culminated in chaos and violence instead of leading to a free and equal society, Schiller wrote his letters about mankind's aesthetic education to explore the possibility of a transition from an absolutist, authoritarian state to a purified, ethical state that is founded on human reason.[27] As a precondition for this transition, Schiller emphasises the need to harmonise human desires with the rules of reason. As it is not the destiny of mankind to renounce its natural senses in favour of moral laws,[28] support for an ethical, reasonable state must come from the totality of human dispositions: desire and reason alike. Individuals should not only feel an obligation to follow the rules of reason, they should feel a desire to do so. If human desires are brought in line with the postulates of reason, a revolution will no longer end in chaos and violence. It will lead to the establishment of a moral state instead.[29]

To align human desires with the rules of reason, a catalyst is required that brings moral laws not only to people's heads but also to their hearts. Schiller solves this problem by positing that art can serve as such a catalyst. Even though incapable of changing mankind directly, art can point the way to a change for the better by focusing people's thoughts on the 'necessary and eternal', and make them strive for this ideal.[30] Art is predestined to accomplish this task because it satisfies the desire to play and enjoy. Instead of openly criticising people's actions and attitudes, art can improve society in a subtle way by making visions of ethical behaviour part of people's play and pleasure:

27 F Schiller, *Über die ästhetische Erziehung des Menschen*, edited by KL Berghahn, (Reclam, 2000) 11–14 [Letter 3].
28 Ibid 28 [Letter 6].
29 Ibid 120–121 [Letter 27].
30 Ibid 36 [Letter 9].

> In vain will you combat their maxims, in vain will you condemn their actions; but you can try your moulding hand on their leisure. Drive away caprice, frivolity, and coarseness, from their pleasures, and you will banish them imperceptibly from their acts, and length from their feelings. Everywhere that you meet them, surround them with great, noble, and ingenious forms; multiply around them the symbols of perfection, till appearance triumphs over reality, and art over nature.[31]

Schiller relies on art as a vehicle to let people experience an ideal balance between desire and reason until they finally orient their actions by moral laws instead of following mere physical necessities. A person succumbing to a temptation while knowing that it is against the rules of reason feels overpowered by nature. A person fulfilling a moral obligation in spite of inner resistance feels forced by reason. The aesthetic play, however, reconciles reason with desire, neutralises physical and moral constraints and, in consequence, allows mankind to enjoy full freedom.[32] It enables the individual to experience a state of perfection in which neither the power of nature nor the postulates of reason restrict possible courses of action: in the aesthetic play, mankind experiences humanity in its entirety.[33]

A true work of art is capable of evoking this equilibrium between reason and desire, and this freedom of the mind through appearances of beauty that neither reflect nor require reality.[34] To accomplish this task, the artist must not be a protégé of her time. She must leave the realm of reality behind and employ the techniques of art to depict a vision of the ultimate ideal.[35] In Schiller's view, the experience and enjoyment of this ultimate perfection can pave the way for the establishment of a moral society in which individual freedom no longer follows from the restriction of the freedom of others but from a consensus on ethical norms that corresponds with people's desires – as refined in the aesthetic play.[36] An individual driven by physical necessity must first experience beauty – the aesthetical balance

31 Ibid 37 [Letter 9, English translation taken from: 'Literary and Philosophical essays: French, German and Italian. With Introductions and Notes', *The Harvard Classics*, vol 32, (Collier, 1910) available at the Internet Modern History Sourcebook: <legacy.fordham.edu/halsall/mod/schiller-education.asp>].

32 Schiller, above n 26, 57–58 [Letter 14].

33 Ibid 60–64 [Letter 15] and 105–106 [Letter 25].

34 Ibid 111–112 [Letter 26].

35 Ibid 34–35 [Letter 9].

36 Ibid 120–121 [Letter 27].

between desire and rules of reason – before she can actively and freely opt for moral norms and moral actions.[37] It is thus the task of art to prepare mankind for the transition from the physical state of desire to the moral state of reason.[38]

3.2. Adorno's aesthetic theory

In his aesthetic theory, Theodor Adorno also underlines the societal relevance of art. Against the background of the alienation which the individual faces in a fully rationalised, efficiency-driven world, he warns of the affirmative nature of art. An artwork bringing a conciliatory reflection of enchantment into the disenchanted, empirical reality offers comfort in the rationalised world and supports the unbearable status quo.[39] In the light of the inhumanity of the real world, art would make itself an accomplice of present and coming disasters if it sustained positive visions of society and obscured the defects and poorness of reality.[40] With the prospect of a better world that, as an ultimate truth,[41] shimmers through each genuine artwork,[42] art may falsely pretend that existing societal conditions are acceptable. Therefore, art is constantly at risk of becoming guilty of supporting the inhuman *status quo* and fortifying present ideologies.[43]

On the other hand, art must not be condemned altogether as long as true art is capable of unmasking the negativity of present societal conditions. Showing visions of a better, happier life, art can rouse opposition against the existing reality and contribute to necessary societal changes.[44] True art can play a decisive role in society because it generates utopian views of a better life that may become drivers of a change for the better. This role of authentic art defines its social character: art is the 'social antithesis' of society.[45] Given this delicate position in the social fabric of modern societies, there is a fine line to be walked: the artist must relentlessly expose the inhumanity of reality

37 Ibid 90–91 [Letter 23].
38 Ibid 92 [Letter 23].
39 TW Adorno, *Ästhetische Theorie*, edited by G Adorno and R Tiedemann, (Suhrkamp, 1970) 10, 34.
40 Ibid 28, 503.
41 Ibid 128, 196–197.
42 Ibid 199–200.
43 Ibid 203.
44 Ibid 25–26, 56.
45 Ibid 9–10, 19, 53.

without offering any prospect of reconciliation. In doing so, the artist creates genuine works that, by their very nature, offer shining visions of a better life and a better society in spite of the hopelessness reflected in the artworks themselves.[46] As an antithesis of the total disaster in the real world, art becomes the messenger of an ideal, utopian world.[47]

There is thus an inescapable dualism in contemporary authentic art: the sadness of presenting a happier life as a goal that remains unattainable under present societal conditions.[48] To accomplish this task, art must seek to escape tendencies to undermine and neutralise its critical and irrational impetus, such as the efforts of the cultural industry to commercialise and canonise even the most rebellious and resistant works.[49] Reacting to the growing demand for enchantment in the disenchanted, rationalised reality,[50] the cultural industry offers artworks as consumer goods – abstract objects that function as a *tabula rasa* into which the bourgeois purchaser can project her own feelings and aspirations.[51] As a result, an artwork becomes an echo and confirmation of the viewer's own hopes and attitudes. It becomes an escape from the unbearable real world. This, however, leads to the 'disartification' of art. Once it is consumed as an object of pleasure that offers comfort in an inhuman world, its critical impetus – the exposure of the ugliness of reality as an impulse for societal changes – is negated. The purchaser who only projects her own aspirations into the artwork can no longer experience the underlying truth. Instead of assimilating oneself to the artwork and exploring its genuine meaning,[52] a person consuming a work of art as an object for the projection of her own emotions only seeks to ignore the shameful difference between the utopia shimmering through the artwork and the poorness of her own life.[53] Instead of seeing the artwork as a subject and disappearing in the utopian vision of a radical change of society offered by the artwork,[54] the art consumer simply annexes the artwork to other objects of possession and deprives it of its genuine meaning by replacing the

46 Ibid 127, 199.
47 Ibid 55–56.
48 Ibid 204–205.
49 Ibid 32.
50 Ibid 34.
51 Ibid 33.
52 Ibid 27–28.
53 Ibid 32.
54 Ibid 27.

unpleasant critique of the empirical reality with her own projections. The cultural industry initiates and exploits this process leading to the neutralisation of art.[55]

To escape this threat of disqualification, art must insist on its difference and autonomy by refusing claims for rule obedience and resisting the temptation to fulfil societal expectations. It must preserve its opposition and dissonance by producing works of a non-identical and fragmentary nature that negate the unity of traditional productions, fall outside aesthetical categories and bring chaos in the established order.[56] To mirror the ugliness and futility of present society in an authentic way, artworks must become ugly and futile themselves. The world of art must become a closed counter universe: the last refuge of humanity in an inhuman world that is disfigured by deal and profit maxims.[57] Remaining alien to the world, true art, by definition, is puzzling and gives rise to conflicting interpretations based on internal tension in the work or its connection to conflicts in society.[58] For the final resolution of these tensions and conflicts, society as a whole would have to be transformed. It would have to decipher the contradictions reflected in authentic works of art and extrapolate the underlying ultimate truth that is expressed by simultaneously challenging reality and suggesting improvements.[59]

3.3. Importance of autonomous art

By no means do these two aesthetic theories exhaust the possibilities of describing the role of autonomous literary and artistic productions in society. Nonetheless, the two examples of an assessment of the societal relevance of independent art already show that by presenting alternative visions of society, art can play a crucial role in the improvement of social and political conditions. Providing this additional insight, Schiller's and Adorno's aesthetic theories – despite obvious conceptual differences – offer answers to questions that go beyond Bourdieu's description of the field of literary and artistic production. With the outlined aesthetic theories, Bourdieu's analysis

55 Ibid 33.
56 Ibid 41.
57 Ibid 337–338.
58 Ibid 197–198.
59 Ibid 55, 193–196.

can be supplemented with an assessment of the value and importance of artworks for society as a whole: what would be lost if the field of literary and artistic production was no longer autonomous? If it were dominated by commercial considerations? If literature and art did no longer follow its own, independent logic – its 'nomos' of self-referential *l'art pour l'art*?

Considering Schiller's and Adorno's theories, the answer to these questions lies in the potential of art to mirror shortcomings of present society and raise a desire for changes for the better. As an independent, autonomous observer, the artist is capable of depicting alternatives to an insufficient and unacceptable reality. An artwork can unmask defects of existing societal conditions and prepare society for the transition to a better community. Once the field of literary and artistic production loses its autonomy, this constant challenge of reality and indispensable training for a better world would be lost. Society would remain in a lamentable state of imperfection without the impulses necessary to improve the situation. Hence, there is substantial reason to recalibrate copyright law and make it an engine of autonomous, independent works of true art in the sense of Schiller's and Adorno's theories.

4. Recalibration of copyright law

Given the threat to the autonomy of literature and art that follows from the reduction of state subsidies for independent productions, copyright law must take a position in the fight between autonomous/independent and bourgeois/dependent authors for predominance, leadership and consecration power in the literary and artistic field. It must seek to support autonomous art productions in order to preserve the autonomy of the field and its potential to generate alternative visions of society that can pave the way for necessary social and political changes. This need to recalibrate copyright law leads to the question: which features of the system are of particular importance to autonomous artists following the *l'art pour l'art* nomos of the literary and artistic field? The aforementioned moral rights of authors, including the right of attribution and the right to prevent

derogatory actions,[60] can serve as a first example of rules that may be of particular relevance to autonomous authors seeking to preserve the integrity of their artistic creations. Commercially oriented authors may have less difficulty to accept modifications of their works as long as they increase exploitation revenues.

Other copyright rules that offer support for autonomous productions enter the picture once Bourdieu's description of fights for power and predominance within the community of autonomous artists is taken into consideration. Apart from the competition between autonomous and bourgeois artists that defines the level of autonomy of the literary and artistic field as a whole, Bourdieu also describes internal fights within the group of autonomous artists. This description shows that freedom to transform pre-existing works is essential to the constant evolution of new avant-garde movements (4.1).

In the light of decreasing state subsidies, copyright law must also ensure a redirection of money flows within the field of literary and artistic productions – a redirection in favour of autonomous *l'art pour l'art* productions. Therefore, it is necessary to also reconsider and refine remuneration mechanisms within the copyright system. A first question arising in this context concerns the introduction of a right to fair remuneration that can be invoked in the context of contractual agreements about the exploitation of literary and artistic works (4.2). As autonomous artists may have difficulty to find a publisher, producer or art gallery willing to invest in their works, however, a direct redistribution of copyright revenue in favour of autonomous literature and art must also be considered (4.3).

4.1. Recognition of a right to transformative use

According to Bourdieu's analysis, newcomers in the community of autonomous artists can only establish a new school of thought by rebelling against the rules established by the generation of autonomous artists that is presently in power. The new generation must challenge existing convictions to obtain the power to set its own

60 See the international recognition of moral rights in Berne Convention, article 6*bis*. As to the recognition of these rights in Anglo-American countries, see G Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1995) 19 *Columbia-VLA Journal of Law & the Arts*, 229.

quality standards and dictate the discourse. It must degrade the ruling avant-garde to an arrière-garde.[61] The constant evolution of fresh, autonomous avant-garde productions thus depends on mechanisms that allow new generations of autonomous authors to legitimise their unorthodox, new approach by criticising the dogmata of the predominant school of thought.

For a new generation to challenge the leading avant-garde, it must detect the structural gaps within the texture of already known aesthetic positions. It must formulate an alternative artistic position in the light of the weaknesses and contradictions of the present state of the art.[62] The room between the positions that have already been taken in the literary and artistic field thus constitute potential starting points for an artistic revolution.

Copyright law can support this constant process of renewal within the group of autonomous artists by guaranteeing certain user freedoms.[63] To be capable of challenging established positions, an autonomous artist must be free to dissociate herself from the dogmata set forth by her predecessors. The law can thus enable a new generation of artists to destruct an established order and erect a new one by exempting the use of protected, pre-existing works for the formulation of a new aesthetic position. The idea/expression dichotomy[64] ensures that the ideas and concepts underlying literary and artistic works remain free for this purpose. The freedom to refer to earlier creations, for example in quotations and parodies,[65] allows a new generation to criticise the currently prevailing school of thought. In this way, new autonomous

61 Bourdieu, above n 2, 253–255.

62 Ibid 372.

63 For a discussion of Bourdieu's approach in the context of identifying patterns of permissible fair use in the sense of US legislation, see MJ Madison, 'A Pattern-Oriented Approach to Fair Use' (2004) 45 *William and Mary Law Review* 1525, 1627–1642.

64 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex IC (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) ('TRIPS'), Art 9(2); *World Intellectual Property Organization Copyright Treaty* ('WIPO Copyright Treaty'), opened for signature 20 December 1996, 36 ILM 65, entered into force 6 March 2002, Art 2.

65 See the international recognition of the right of quotation in Berne Convention, article 10(1). As to the inclusion of parody in this broad quotation concept, see AA Quaedvlieg, 'De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat' (1987) *RM Themis*, 279. For an example of the development of the right of quotation in a national copyright system, see MRF Senftleben, 'Quotations, Parody and Fair Use' in PB Hugenholtz, AA Quaedvlieg and DJG Visser (eds), *A Century of Dutch Copyright Law – Auteurswet 1912–2012* (deLex, 2012) 359, online available at <ssrn.com/abstract=2125021>.

artists can demarcate their new position from previous ones. They can lay the foundations for a new avant-garde movement by defining their own position in relation to pre-existing works.

Apart from the freedom to use and criticise pre-existing works in the process of defining and demarcating a new aesthetic position, Bourdieu's analysis highlights a further freedom of use that is crucial to the process of constant renewal in the area of autonomous *l'art pour l'art* productions. To allow a new generation of autonomous authors to formulate a new aesthetic position, these newcomers must first learn of the positions that have already been taken by previous independent artists. Unless they master the history of their particular art and know the heritage of former generations of artists, they are inhibited from detecting structural gaps that allow them to take a legitimate and plausible next step in the evolution of literary and artistic productions.[66] Therefore, the guarantee of freedom to use pre-existing material for the creation of new avant-garde works is only one way in which copyright law can support the process of aesthetic renewal. In addition, copyright law can support the evolution of new avant-garde movements by exempting the use of existing works for educational purposes and private study – exemptions that allow new generations of autonomous artists to explore the cultural landscape and find starting points for the articulation of new positions that challenge and supersede established convictions.

Hence, freedom to learn of pre-existing works and freedom to use and criticise them for the purpose of establishing a new avant-garde movement are of particular importance to authors with an autonomous, independent orientation.[67] This insight necessitates a change in the understanding of the rights to be guaranteed in copyright law. In fact, the term 'copyright' as such becomes doubtful and appears misleading. 'Copyright' must not content itself with safeguarding an author's

66 Bourdieu, above n 2, 385.

67 It must not be overlooked in this context that Bourdieu's analysis – with the two poles of purely bourgeois authors on one side of the spectrum, and purely autonomous authors on the other – is a theoretical model. The conclusion drawn here, accordingly, is based on this strict theoretical distinction between the two groups. In reality, creators of both camps are not unlikely to appreciate the existence of both rights and freedoms to varying degrees. Depending on their individual position between the two poles of purely bourgeois and purely autonomous authors, they will attach more importance to exploitation rights than user freedoms and *vice versa*. For an analysis of copyright law as an engine of cultural diversity that supports this assumption, see Netanel, *Copyright's Paradox*, above n 20, 195–199; Benkler, above n 21, 400–412.

exploitation interests. This traditional concept of exclusive rights focuses on the profit orientation of bourgeois authors and the creative industry. However, it neglects the dependence of autonomous artists on freedom to use pre-existing works for the purpose of developing a new avant-garde. Therefore, the concept of authors' rights must be extended to use privileges: a right to make transformative use.[68] The present copyright system already complies with this broader conception of authors' rights when drawing a boundary line between protected individual expression on the one hand, and unprotected ideas and concepts on the other.[69]

However, the outlined broader concept of authors' rights, including a right of transformative use, challenges the approach to limitations of exclusive exploitation rights in the present copyright system. Insofar as broad, flexible exploitation rights are regarded as the rule, and limitations of these rights are perceived as exceptions that must be construed and applied restrictively,[70] the envisaged broader concept of authors' rights requires substantial changes:[71] use privileges supporting the creative destruction of works, such as the exemption of quotations and parodies, must not be qualified as copyright limitations in the first place. They are an author's right to criticise pre-existing literary and artistic expression to create room for the formulation of a new artistic position. Hence, certain use privileges that are seen as copyright limitations in the present system would have to be redefined as authors' rights[72] to avoid an impediment of the process of creative destruction in the area of autonomous literary and artistic productions.

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68 Transformative use is understood here in the sense of a productive use that aims to employ a protected work in a different manner or for a different purpose, such as the critique of the work or its adaptation to achieve a different artistic effect. It is use transforming the original in new information, new aesthetics, new insights and understandings. For a similar concept developed in the context of the US fair use doctrine, see PN Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105, 1111.

69 Art 9(2) TRIPS; Art 2 WIPO Copyright Treaty.

70 This traditional dogma of the restrictive interpretation of copyright limitations can be found, for instance, in EU copyright systems. For instance, see *Infopaq International v Danske Dagblades Forening* (CJEU, C-5/08, 16 July 2009) [56]–[58].

71 On the basis of similar considerations, C Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) 12 *Vanderbilt Journal of Entertainment and Technology Law* 515, 532–533, argues for introducing a wider limitation for creative uses and converting traditional exploitation rights to prohibit the use of copyrighted works into a right to receive a fair remuneration.

72 Cf C Geiger, 'Die Schranken des Urheberrechts im Lichte der Grundrechte – Zur Rechtsnatur der Beschränkungen des Urheberrechts' in RM Hilty and A Peukert, *Interessenausgleich im*

Interestingly, international copyright law can serve as a point of departure for this redefinition. With regard to quotations, the Berne Convention, in its prevailing French version,[73] states: '[s]ont licites les citations tirées d'une œuvre …'.[74] This formulation can be understood as an obligation of Berne Union members to exempt quotations from the control of the owner of copyright in the underlying work. A mere option to limit copyright in certain respects is expressed differently in the Convention: '[e]st réservée aux législations des pays de l'Union la faculté de permettre …'.[75] The English text confirms this analysis. Stating that '[i]t shall be permissible to make quotations from a work …', the English version leaves little doubt about the nature of the quotation right. The exemption is mandatory and not optional. If parody is qualified as a particular species of quotation,[76] it also falls within the scope of this guarantee of a right to transformative use in the Berne Convention.

In spite of this international framework, the use privilege of making quotations and parodies is still qualified and treated as a regular copyright limitation in national copyright laws. EU legislation, for instance, does not make it clear that the adoption of the right of quotation and the right of parody is mandatory for all member states.[77] Moreover, the EU legislator saw no need to ensure that these rights prevail over the protection of technological protection measures,[78] and escape further scrutiny in the light of the three-step test.[79]

Urheberrecht (Nomos, 2004) 143, 147–150; MRF Senftleben, 'Die Bedeutung der Schranken des Urheberrechts in der Informationsgesellschaft und ihre Begrenzung durch den Dreistufentest' in RM Hilty and A Peukert, *Interessenausgleich im Urheberrecht* (Nomos, 2004) 159, 167–170.

73 According to Berne Convention, Art 37(1)(c), the French text prevails in case of differences of opinion on the interpretation of the various language versions.

74 Berne Convention, Art 10(1).

75 This formulation is used in Berne Convention, Arts 9(2), 10(2) 10*bis*(1) and (2).

76 In this sense Quaedvlieg, above n 64, 285, 288; Senftleben, above n 64, 363.

77 In contrast to the mandatory exemption of transient copying in Art 5(1) of the Information Society Directive 2001/29, the adoption of Art 5(3)(d) and (k) of the Directive is not mandatory.

78 By contrast, Art 6(4) of the Information Society Directive 2001/29 fails to shield the right of quotation and the right of parody from the potential corrosive effect of technological protection measures.

79 Art 5(5) of the Information Society Directive 2001/29. For a discussion of the role of the three-step test in EU copyright law, see MRF Senftleben, 'Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law' in GB Dinwoodie (ed) *Methods and Perspectives in Intellectual Property* (Edward Elgar, 2013) 30; J Griffiths, 'The "Three-Step Test" in European Copyright Law – Problems and Solutions' (2009) *Intellectual Property Quarterly*, 489; C Geiger, 'The Three-Step Test, a Threat to a Balanced Copyright Law?' (2006) *International Review of Intellectual Property and Competition Law*, 683. As to guidelines for the

According to article 13 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and article 10 of the *World Intellectual Property Organization Copyright Treaty* (WIPO Copyright Treaty), the scope of the three-step test is confined to limitations imposed on the exclusive rights of copyright owners:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[80]

The redefinition of the exemption of quotations and parody as an author's right to transformative use would thus have the effect of excluding these use privileges from the ambit of operation of the three-step test altogether. However, existing copyright statutes, such as EU copyright legislation, do not support this more comprehensive conception of authors' rights.

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appropriate application of the test, see C Geiger, J Griffiths and RM Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) *International Review of Intellectual Property and Competition Law*, 707; Senftleben, above n 64.

80 Art 13 TRIPS. The provision was modelled on the first three-step test in international copyright law enshrined in Berne Convention, Art 9(2). After the TRIPS Agreement, the test reappeared in Art 10 WIPO Copyright Treaty. For a discussion of the test's development in international copyright law and its interpretation by WTO Panels, see C Geiger, D Gervais and MRF Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29 *American University International Law Review*, 581; D Gervais, 'Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright' (2009–2010) 57 *Journal of the Copyright Society of the U.S.A*. 499, 510–511; A Kur, 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?' (2009) 8 *Richmond Journal of Global Law and Business* 287, 307–308; MRF Senftleben, 'Towards a Horizontal Standard for Limiting Intellectual Property Rights? – WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law' (2006) 37 *International Review of Intellectual Property and Competition Law* 407; S Ricketson and JC Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond* (Oxford University Press, 2006) 759–763; Senftleben, above n 64, 43–244; M Ficsor, 'How Much of What? The Three-Step Test and Its Application in Two Recent WTO Dispute Settlement Cases' (2002) 192 *Revue Internationale du Droit d'Auteur*, 111; J Oliver, 'Copyright in the WTO: The Panel Decision on the Three-Step Test' (2002) 25 *Columbia Journal of Law and the Arts*, 119; DJ Brennan, 'The Three-Step Test Frenzy: Why the TRIPS Panel Decision might be considered Per Incuriam' (2002) *Intellectual Property Quarterly* 213; J Reinbothe and S von Lewinski, *The WIPO Treaties 1996 – The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – Commentary and Legal Analysis* (Butterworths, 2002); M Ficsor, *The Law of Copyright and the Internet – The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford University Press, 2002); J Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions' (2001) 190 *Revue Internationale du Droit d'Auteur* 13.

Nonetheless, the courts may provide considerable breathing space for certain forms of transformative use, in particular quotations and parody. In the decision *Infopaq/DDF*, the Court of Justice of the European Union (CJEU) adhered to the traditional dogma of a strict interpretation of copyright limitations. Scrutinising the mandatory exemption of transient copies in article 5(1) of the Information Society Directive (ISD),[81] the Court pointed out that for the interpretation of each of the cumulative conditions of the limitation, it should be borne in mind:

> that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly … This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.[82]

According to the Court:

> [t]his is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.[83]

81 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, 10.

82 *Infopaq International v Danske Dagblades Forening* (CJEU, C-5/08, 16 July 2009) [56]–[57].

83 Ibid [58].

The CJEU thus established the rule that copyright limitations had to be construed narrowly. In *Football Association Premier League*, however, this decision did not hinder the Court from emphasising with regard to the same exemption – transient copying in the sense of article 5(1) ISD – the need to guarantee the proper functioning of the limitation and ensure an interpretation that takes due account of the exception's objective and purpose. The Court explained that, in spite of the required strict interpretation, the effectiveness of the limitation had to be safeguarded.[84] On the basis of these considerations, the Court concluded that the transient copying at issue in *Football Association Premier League*, performed within the memory of a satellite decoder and on a television screen, was compatible with the three-step test of article 5(5) ISD.[85]

For the purposes of the present inquiry, it is of particular interest that in *Painer/Der Standard*, the Court confirmed this line of argument with regard to the right of quotation laid down in article 5(3)(d) ISD. The Court underlined the need for an interpretation of the conditions set forth in article 5(3)(d) that enables the effectiveness of the quotation right and safeguards its purpose.[86] More specifically, it clarified that article 5(3)(d) was:

> intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.[87]

In its further decision in *Deckmyn/Vandersteen*, the CJEU followed the same path with regard to the parody exemption in article 5(3)(k) ISD. As in *Painer/Der Standard*, the Court bypassed the dogma of a strict interpretation of copyright limitations by underlining the need to ensure the effectiveness of the parody exemption[88] as a means to balance copyright protection against freedom of expression.[89]

84 *Football Association Premier League v QC Leisure* (CJEU, C-403/08 and C-429/08, 4 October 2011) [162]–[163].
85 Ibid [181].
86 *Eva Maria Painer v Standard VerlagsGmbH* (CJEU, C-145/10, 1 December 2011) [132]–[133].
87 Ibid [134].
88 *Deckmyn and Vrijheidsfonds VZW v Vandersteen* (CJEU, C-201/13, 3 September 2014) [22]–[23].
89 Ibid [25]–[27].

In practice, the courts may thus give copyright limitations that support transformative use a status that comes close to an author's right – even though the underlying copyright statute, such as the Information Society Directive in the EU, does not qualify these limitations as rights but includes them in the catalogue of exceptions to exclusive rights instead. As the examples taken from CJEU jurisprudence demonstrate, the fundamental guarantee of freedom of expression plays a crucial role in this context.[90] Relying on article 11 of the EU Charter of Fundamental Rights and article 10 of the European Convention on Human Rights, the CJEU could interpret the quotation right and the parody exemption less strictly than limitations without a comparably strong freedom of speech underpinning. In both the *Painer* and the *Deckmyn* decision, the Court emphasised the need to achieve a 'fair balance' between, in particular, 'the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other.'[91] The Court thus referred to quotations and parodies as user 'rights' rather than mere user 'interests'.

Does this mean that there is no need for reforms? Does it mean that, in practice, the right of transformative use already exists by virtue of court decisions, even though it is hidden in the catalogue of exceptions in many national copyright statutes? For at least two reasons, the answer to these questions can hardly be in the affirmative. First, a legislative reform that removes use privileges for transformative use from the catalogue of exceptions and openly redefines them as authors' rights – with the same status as traditional exploitation rights – would make the particular importance of these use privileges visible within the copyright statute itself. It would allow an internal balancing of different rights when the courts have to decide on quotations and parodies. This seems more satisfactory

90 As to the influence of freedom of speech guarantees on copyright, cf C Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 *International Review of Intellectual Property and Competition Law*, 371; A Strowel, F Tulkens and D Voorhoof (eds), *Droit d'auteur et liberté d'expression* (Editions Larcier, 2006); PB Hugenholtz, 'Copyright and Freedom of Expression in Europe' in N Elkin-Koren and NW Netanel (eds), *The Commodification of Information* (Kluwer, 2002) 239; S Macciacchini, *Urheberrecht und Meinungsfreiheit* (Stämpfli, 2000); Benkler, above n 21, 355; Netanel, 'Copyright and a Democratic Civil Society', above n 20, 283.

91 *Eva Maria Painer v Standard VerlagsGmbH* (CJEU, C-145/10, 1 December 2011), case C-145/10, Eva Maria Painer/Standard VerlagsGmbH, para. [132]; *Deckmyn and Vrijheidsfonds VZW v Vandersteen* (CJEU, C-201/13, 3 September 2014, case C-201/13, Deckmyn and Vrijheidsfonds VZW/Vandersteen, para.) [26].

than the present practice of balancing copyright against freedom of expression as an external influence factor leading to an exceptionally broad application of a copyright limitation that, in principle, would have to be construed narrowly.[92]

Second, it must not be overlooked that quotations and parodies are longstanding and well-established copyright limitations. The courts may have much more difficulty to arrive at satisfactory solutions when it comes to other cases of transformative use that are not, or at least less clearly, reflected in the catalogue of copyright limitations. With the constant evolution of new artistic practices, it cannot be ruled out that an impediment of autonomous art productions comes to the fore and that copyright law, in the absence of a formal recognition of a right to transformative use, becomes an obstacle to the evolution of new independent art. Sound sampling artists, for instance, face copyright claims as well as neighbouring rights claims of phonogram producers. The more snippets of pre-existing sound recordings they use, the higher will be the risk of infringement. The focus on the protection of exploitation interests in existing sound recordings may thus have a deterrent, corrosive effect on their creativity. In particular, this bias is likely to impede so-called 'collage sampling' using layers of quantitatively or qualitatively insignificant parts of pre-existing recordings to create new musical works.[93] In contrast to traditional quotation and parody cases, the courts seem much more reluctant to make particular efforts to offer room for transformative use in sound sampling cases.[94] In Germany, for example, sampling artists had to argue their case all the way up to the German Federal Constitutional

92 With regard to the question of internal and external balancing exercises, see T Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?', in R Dreyfuss, D Leenheer-Zimmerman and H First (eds), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy* (Oxford University Press, 2001) 295.

93 See DM Morrison, 'Bridgeport Redux: Digital Sampling and Audience Recording' (2008) 19 *Fordham Intellectual Property Media and Entertainment Law Journal* 75, 96, who warns of a corrosive effect on the so-called 'collage paradigm' in sampling.

94 As to the preference given to exploitation interests instead, see, for instance, *Metall auf Metall II*, Bundesgerichtshof [German Federal Court of Justice], I ZR 182/11, 13 December 2012, reported in [2013] *Gewerblicher Rechtsschutz und Urheberrecht*, 614; *Metall auf Metall*, Bundesgerichtshof [German Federal Court of Justice], I ZR 112/06, 20 November 2008, reported in [2009] *Gewerblicher Rechtsschutz und Urheberrecht*, 403. For a translation of the latter case into English, see N Conley and T Braegelmann, 'Metall auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany' (2009) 56 *Journal of the Copyright Society of the U.S.A.*, 1017. For case comments, see BHM Schippers, 'Het chilling effect van Kraftwerk I/II op sound sampling: pleidooi voor zelfregulering ter bevordering van samplegebruik' (2014) *Tijdschrift voor auteurs-, media- en informatierecht*, 105; FJ Dougherty, 'RIP, MIX and

Court to receive the confirmation that, besides the property interests of copyright holders and phonogram producers, their right to freedom of art had to be given sufficient room as well.[95] Other forms of collage art, such as film and photo compositions, are likely to raise similar problems. The formal recognition of a right to transformative use in copyright law could thus make a difference in these cases – not only on paper but also in practice.

A last question concerns the scope of the right to transformative use that should be recognised in copyright law. As pointed out above, Bourdieu's analysis does not only highlight the importance of freedom to use and criticise pre-existing works in the process of defining and demarcating a new aesthetic position. It also sheds light on the need to allow artists of a new generation to learn of the positions that have already been taken by predecessors. Therefore, the question arises whether a right to transformative use should only cover core areas, such as the making of quotations, parodies and collages, or be extended to peripheral areas, such as educational use, library use, and private studying.[96]

The problem with these latter categories is that, unlike the freedom of quotation, parody and collage, they do not lie at the core of the creative process as such. Use privileges for educational and cultural heritage institutions are crucial to the dissemination of information and the guarantee of equal access to information in the information society. However, they are not directly linked with the process of creation. It is unclear whether an art student or a library user will sooner or later embark on the creation of a literary or artistic work. Use privileges for educational and cultural heritage institutions are investments in *potential* acts of creation that may take place in the future. They increase the likelihood of users receiving sufficient inspiration for the creation of a new literary or artistic work. However, they operate in a preliminary, preparatory phase. Moreover, it can hardly ever be ascertained whether the use of services of educational

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BURN: Bemerkungen zu aktuellen Entwicklungen im Bereich des digitalen Sampling nach US-amerikanischem und internationalen Recht' (2007) *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 481.

95 Bundesverfassungsgericht [German Federal Constitutional Court], 1 BvR 1585/13, 31 May 2016 available at <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/05/rs20160531_1bvr158513.html>.

96 For a discussion of this question, see also Senftleben, above n 64, 39–41.

institutions, archives, museums and libraries, is consumptive or transformative. This dilemma clearly comes to the fore in the case of private copying. It is difficult, if not impossible, to conceive of contextual factors that could reliably indicate whether the copying takes place for mere entertainment and enjoyment purposes, or for the studying of aesthetic positions that will finally lead to a new literary or artistic production.

Given these conceptual and practical difficulties, it seems advisable to confine the recognition of a right to transformative use to use privileges that directly support the process of creation, such as a quotation right that permits the taking of parts of a pre-existing work to make a comment, a parody right that permits the evocation of a pre-existing work to express humour or mockery, a collage right that permits the composition of a new work on the basis of fragments of pre-existing works.

4.2. Refinement of remuneration mechanisms

As explained above, Bourdieu's analysis casts doubt upon standard justifications of copyright protection. In particular, the focus on the motivating power of monetary rewards in current copyright law is questionable. As autonomous authors attach more importance to reputational rewards, the prospect of copyright protection does not necessarily spur their creativity. Taking Bourdieu's assumptions to the extremes, it could be said that autonomous authors, by definition, have no interest in monetary rewards. As winning in economic terms implies losing in artistic terms, commercial success may even be seen as undesirable. Hence, one might be tempted to assume that autonomous authors need not be remunerated for their work.

This cynical line of reasoning, however, follows from a misunderstanding of the above critique of the standard rationales of copyright protection in the light of Bourdieu's analysis. It is correct to say that the reliance of traditional copyright theories on the power of monetary incentives is questionable. Authors with an independent *l'art pour l'art* orientation are unlikely to be more creative and more productive when copyright protection is offered as a bait. However, it would be incorrect to infer from these doubts about a standard argument for copyright protection that autonomous authors should not receive any remuneration for their work. The reason for securing

this remuneration, however, is not the utilitarian incentive rationale. By contrast, an appropriate remuneration must be guaranteed because of social considerations and the need for equal treatment.

As market-oriented authors, autonomous authors have to earn a living. Therefore, it is a matter of fairness and equality to remunerate not only bourgeois authors but also autonomous authors for their creative work. From a social perspective, it may be added that the need to take measures to ensure an appropriate remuneration is even more pressing in the case of autonomous authors because this group may fail to attach sufficient importance to revenue streams when it comes to negotiations with producers and disseminators seeking to exploit their works (exploiters). As long as a certain mode of exploitation is likely to yield attractive reputational rewards, autonomous authors may be tempted to give their works away at a price that does not appropriately reflect their market value. Hence, the question arises how copyright law can ensure that autonomous creators receive a fair remuneration for their creative labour. The answer to this question can hardly be found in the very nature of copyright itself. Copyright law ensures that authors' exploitation rights are marketable. However, autonomous artists in the sense of Bourdieu's sociological analysis may never attain a bargaining position that allows them to ensure a decent income on the basis of copyright because their works are not made for the tastes of the masses in the first place. While these consequences may be seen as a normal result in a market economy driven by supply and demand, they become problematic when it is considered that copyright, as pointed out above, is often presented as a right that serves the individual interests of creators. If the whole group of creators with a *l'art pour l'art* orientation does not have the bargaining power to derive substantial economic benefit from copyright,[97] this problem may discredit the protection system as

97 In this regard, see the analyses of the bargaining position and income situation of individual creators by M Kretschmer et al, *2011 Copyright Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers* (Centre for Intellectual Property Policy & Management (CIPPM), 2011) available at <ssrn.com/abstract=1780206>; J Weda et al, *Wat er speelt – De positie van makers en uitvoerend kunstenaars in de digitale omgeving*, (SEO Economisch Onderzoek, 2011), available at <www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/04/11/rapport-wat-er-speelt.html>; PB Hugenholtz and L Guibault, *Auteurscontractenrecht: naar een wettelijke regeling?,* (Institute for Information Law (IViR), 2004) available at <www.ivir.nl/publicaties/overig/auteurscontractenrecht.pdf> (unavailable from original source but accessible via archive.org; copy on file with editors).

a whole.[98] If copyright only serves as a vehicle to vest the creative industries with strong rights in information products while these rights are defended as a means to remunerate authors, the creators of literary and artistic works – including the group of autonomous artists that is often depicted as the prototype of the 'romantic author' – only function as a dummy to conceal the industry's insatiable appetite for continuously expanding exclusive rights. As a result, the arguments advanced in favour of copyright can be unmasked as false rhetoric[99] and the protection system is in danger of losing its support in society. The system's social legitimacy is put at risk.

To avoid this erosion of copyright's acceptance in society, the lawmaker can seek to reduce the exposure to market forces and adopt measures that strengthen the position of creators vis-à-vis exploiters. In 2002, an example of legislation in this area – an *Act on Copyright Contract Law* – entered into force in Germany. This legislation confers upon authors a right to fair remuneration besides the traditional exploitation rights. By virtue of § 32(1) of the German *Copyright Act* (UrhG), as amended by the *2002 Copyright Contract Act*, authors have the right to demand the modification of a contract about a work's exploitation that fails to provide for a fair remuneration. § 32(2) UrhG complements this right to fair remuneration by making it clear that so-called 'common remuneration rules' established in negotiations between a representative association of authors on the one hand, and an individual exploiter or an association of exploiters on the other hand (§ 36 UrhG), are to be deemed 'fair' in this sense by virtue of the law.

98 For empirical evidence of the precarious income situation of creators (not limited to the group of autonomous artists), see, for example, Kretschmer et al, above n 96. As to the need for a strengthening of the bargaining position of authors, see Weda et al, above n 96.

99 Cf SE Sterk, 'Rhetoric and Reality in Copyright Law' (1996) 94 *Michigan Law Review* 1197, 1197–1198, pointing out that 'although some copyright protection indeed may be necessary to induce creative activity, copyright doctrine now extends well beyond the contours of the instrumental justification. The 1976 statute and more recent amendments protect authors even when no plausible argument can be made that protection will enhance the incentive for authors to create'.

Although the German *Copyright Contract Act* has now been in effect for more than 10 years, it has not led to the envisaged general improvement of the income situation of authors.[100] Authors seem hesitant to assert their remuneration right in court. As an exception to this rule, translators started court procedures that finally led to first decisions of the German Federal Court of Justice on the fair remuneration question.[101] On balance, however, the determinants of what constitutes a fair remuneration in an individual case still seem too vague to allow the effective use and enforcement of the new right. As the party invoking the right to fair remuneration, the burden of proving that a contractually agreed remuneration falls short of the legally guaranteed fair remuneration rests on the author. Hence, she also carries the risk and costs of showing that a certain remuneration is to be deemed fair in the relevant sector of the creative industry, and that the concluded contract does not provide for this fair remuneration.[102]

For cases in which no common remuneration rules are available, § 32(2) UrhG indicates that a remuneration can be considered fair when it complies with the remuneration that, according to the customary practices in the sector concerned, an author could reasonably expect in light of the scope and reach of the granted right, the duration and time of the use, and other circumstances relevant to the individual case.[103] These flexible factors, however, can hardly clarify the conceptual contours of the fair remuneration right. In the absence of model contracts or other customary remuneration schemes that come close to common remuneration rules in the sense of § 36 UrhG, an author will still have difficulty to prove that a contractually agreed

100 See the recent analyses by H Maas, 'Kulturelle Werke – mehr als nur ein Wirtschaftsgut' (2016) *Zeitschrift für Urheber- und Medienrecht*, 207, 209, and K-N Peifer, 'Urhebervertragsrecht in der Reform: Der „Kölner Entwurf"' (2015) *Gewerblicher Rechtsschutz und Urheberrecht – Praxis im Immaterialgüter- und Wettbewerbsrecht*, 1, 1–2; as well as earlier comments by G Schulze, 'Vergütungssystem und Schrankenregelungen' (2005) *Gewerblicher Rechtsschutz und Urheberrecht*, 828, which in principle were shared by A Dietz, 'Das Urhebervertragsrecht in Deutschland' in RM Hilty and C Geiger (eds), *Impulse für eine europäische Harmonisierung des Urheberrechts* (Springer, 2007) 465. However, Dietz qualified the first common remuneration rule that had been established under the new German legislation as a success of the system as a whole. See Dietz at 473–474.

101 See Bundesgerichtshof [Federal Court of Justice], I ZR 38/07 and I ZR 230/06, 7 October 2009, reported in (in German) <www.bundesgerichtshof.de>. This case law will be discussed in more detail below.

102 Schulze, above n 99, 829–830; Dietz, above n 99, 469.

103 Schulze, above n 99, p. 595.

remuneration is not fair on the basis of this vague definition of fairness based on the custom in a given sector.[104] Similarly, the author will have difficulty in assessing the risk of litigation about the remuneration question as long as there is no reliable information on the customary remuneration.

Against this background, the additional option to invoke § 36 UrhG and formally establish common remuneration rules in collective negotiations between an association of authors and industry representatives is of particular practical importance. By virtue of § 32(2) UrhG, a standard remuneration scheme of this type constitutes a legally binding definition of the fair remuneration in the industry sector concerned. A standard remuneration scheme in the sense of § 32(2) thus provides the legal certainty necessary to assess the chances of court procedures. It can also serve as a yardstick for proving the unfairness of a remuneration that does not comply with the standard described in the remuneration scheme.

In Germany, the Common Remuneration Rules for Writers of German Fiction[105] constitute a prominent example of remuneration rules that were concluded on the basis of the German *Copyright Contract Act* in negotiations between the Association of German Writers in the United Services Trade Union Ver.di and several publishers.[106] As no representative association of publishers entered the negotiations,[107] it was difficult to foresee the impact of this standard remuneration rule on the sector as a whole. The fact that the German Ministry of Justice itself finally decided to mediate informally between the parties to ensure the adoption of the remuneration rules mirrors the difficulty of the negotiations.[108]

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104 Schulze, above n 99, 829–830; AA Wandtke, 'Der Anspruch auf angemessene Vergütung für Filmurheber nach § 32 UrhG' (2010) *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 704, 707.

105 These common remuneration rules are available (in German) at <www.bmj.de/media/archive/962.pdf>.

106 The rules were signed, for instance, by Rowohlt, S Fischer and Random House. See A Dietz in G Schricker, *Urheberrecht – Kommentar* (CH Beck, 3rd ed, 2006) 797.

107 See Deutscher Bundestag, 3 May 2004, Kurzprotokoll der 14. Sitzung (öffentlich) der Enquete-Kommission 'Kultur in Deutschland', Protokoll Nr 15/14, 13/4–13/5.

108 The mediation was informal in the sense that it was no formal mediation procedure with a dispute commission under § 36a UrhG. See Dietz, above n 99, 797; Schulze, above n 99, 830.

Given the scarcity of common remuneration rules in the sense of § 36 UrhG,[109] it is tempting for the courts to make extensive use of existing rules. As already indicated above, the German Federal Court of Justice had the opportunity to clarify the scope of common remuneration rules in two cases that had been initiated by translators. A collectively agreed remuneration rule for translators in the sense of § 36 UrhG was not available for a decision in these cases. Moreover, the Federal Court of Justice had serious doubts about the customary remuneration in the translation sector. Referring to the aforementioned general definition of 'fair remuneration' in § 32(2) UrhG, the Court pointed out that compliance with customary remuneration practices in a particular sector may nonetheless be insufficient in the light of the general fairness criteria formulated by the legislator:

> Even if a particular honorarium – as in this case – is customary in the sector, this does not necessarily mean that it is fair. By contrast, a given remuneration is only fair when it equally takes account of the interests of the author besides those of the exploiter.[110]

Having neither a common remuneration rule in the sense of § 36 UrhG nor an appropriate customary remuneration scheme in the sense of § 32(2) UrhG at its disposal, the Federal Court of Justice finally turned to the Common Remuneration Rules for Writers of German Fiction as a point of departure for determining the fair remuneration of translators.[111] By analogy, the Court used these Common Remuneration Rules as a guideline for its decision on a fair level of remuneration for translators. This widening of the field of application of common remuneration rules is remarkable because the Common

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109 In Germany, the number of common remuneration rules in the sense of § 36 UrhG is growing. Cf A Dietz, 'Schutz der Kreativen (der Urheber und ausübenden Künstler) durch das Urheberrecht oder Die fünf Säulen des modernen kontinentaleuropäischen Urheberrechts' (2015) *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 309, 315–316. The scope of these rules, however, is often limited to specific groups of authors and exploiters. For example, see the initiatives in the area of public broadcasting described by P Weber, 'Rahmenverträge und gemeinsame Vergütungsregeln nach Urhebervertragsrecht – aus der Praxis des ZDF' (2013) *Zeitschrift für Urheber- und Medienrecht* 740, 742–745. On balance, the result can thus still be seen as unsatisfactory. See G Spindler, 'Reformen der Vergütungsregeln im Urhebervertragsrecht' (2012) *Zeitschrift für Urheber- und Medienrecht* 921, 921.

110 German Federal Court of Justice, 7 October 2009, I ZR 38/07, 11, with case comment by R Jacobs at (2009) *Gewerblicher Rechtsschutz und Urheberrecht* 1148, 1150; German Federal Court of Justice I ZR 230/06, 12, available (in German) at <www.bundesgerichtshof.de>.

111 German Federal Court of Justice, 7 October 2009, I ZR 38/07, 16; German Federal Court of Justice, 7 October 2009, I ZR 230/06, 15–16; both reported in (in German) <www.bundesgerichtshof.de>.

Remuneration Rules for Writers of German Fiction explicitly exclude applicability to translated works.[112] In addition, the Federal Court of Justice was unimpressed by the fact that only one of the two cases brought by translators concerned fiction works. The second case was about translations of non-fiction books. The Court, however, also surmounted this hurdle of 'double' analogy. It did not matter that the case concerned translators instead of writers, and it did not matter that it concerned non-fiction instead of fiction books:

> Even though the remuneration rules … are not directly applicable to publication contracts for non-fiction books, there are no prevailing concerns against their use for the purpose of determining a fair remuneration for the translation of a non-fiction book. According to the findings of the Court of Appeals, none of the parties argued and no other circumstances suggest that the conditions of publication contracts for non-fiction books differ from those of contracts over fiction works to such an extent that the remuneration rules for writers could not be taken into account.[113]

Using the Common Remuneration Rules for Writers of German Fiction as a guideline for the development of a fair remuneration standard for translators, the Court finally ruled that translators are entitled to 2 per cent of the net retail price of hardcover editions and 1 per cent in the case of paperback editions. This amounts to one-fifth of the remuneration which, according to the Common Remuneration Rules for Writers of German Fiction, is due to writers. If the publisher guarantees an honorarium that can be deemed reasonable in light of the custom in the sector, this right to fair remuneration is reduced to 0.8 per cent for hardcover sales and 0.4 per cent for paperback sales. Moreover, this reduced royalty only needs to be paid as of the 5,000th copy sold. In addition, translators are entitled to 50 per cent of the net profits from the commercialisation of ancillary rights.[114]

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112 See Gemeinsame Vergütungsregeln für Autoren belletristischer Werke in deutscher Sprache, available at <www.bmj.de/media/archive/962.pdf>, 1 n 1, on the one hand, and German Federal Court of Justice, 7 October 2009, I ZR 38/07, 17, and German Federal Court of Justice, 7 October 2009, I ZR 230/06, 16, <www.bundesgerichtshof.de>, on the other hand.

113 See German Federal Court of Justice, 7 October 2009, I ZR 230/06, [34], <www.bundesgerichtshof.de>.

114 See German Federal Court of Justice, 7 October 2009, I ZR 38/07, 18–23, and German Federal Court of Justice, 7 October 2009, I ZR 230/06, 18–23, both <www.bundesgerichtshof.de>. Nonetheless, this level of fair remuneration did not meet the expectations of translators. Cf Dietz, above n 99, 469.

This jurisprudence of the Federal Court of Justice shows that common remuneration rules established under § 36 UrhG can have a broad field of application. In particular, the courts may extend the scope of these rules to parties who have not been involved in the underlying negotiations. A common remuneration rule may become a general yardstick for the establishment of fair remuneration standards in a given sector even though it was only concluded between specific parties and for a specific group of creators. On its merits, this jurisprudence transforms common remuneration rules into generally binding legal instruments with a considerable impact on remuneration standards in the respective segment of the creative industry.

On the one hand, this approach can have positive effects for authors in a sector where no agreement on a common remuneration rule can be reached. By invoking remuneration rules of a related sector or a related group, German courts can still arrive at a fair remuneration standard in these cases and improve the income situation of authors by reference to remuneration standards in a comparable field. On the other hand, the jurisprudence of the Federal Court of Justice can easily become an additional obstacle to negotiations on common remuneration rules in the sense of § 36 UrhG. If it is at all possible to find individual exploiters or business associations that are willing to speak about common remuneration rules in a particular branch, these exploiters and associations may be reluctant to enter into formal negotiations because of the risk of resulting fair remuneration standards being declared applicable to the whole sector afterwards by the courts. Given this risk of generalisation, interested enterprises and associations may also face pressure from other players in the relevant sector who fear that the establishment of common remuneration rules in one particular branch may finally affect remuneration standards in the entire sector.

In spite of these problems, the underlying recipe – the combination of a right to fair remuneration with the possibility of establishing common remuneration standards in negotiations between authors and the creative industry – served as a model for other countries also seeking to enhance the credibility of the copyright system by strengthening the position of individual authors vis-à-vis commercial exploiters of their works. In the Netherlands, for instance, legislation that copies the core elements of the German system was adopted

in 2015.[115] Regardless of this export success, however, the question remains how fair remuneration legislation could be rendered more effective in practice. A clearer definition of the underlying concept of fairness, a reversal of the burden of proof with regard to evidence of remuneration standards in a given sector, extra incentives for the creative industry to enter into collective negotiations with associations of authors and, as a last resort, the imposition of a legal obligation to establish common remuneration rules could be considered in this context.

In the drafting process underlying the present German legislation, a far-reaching obligation to accept common remuneration standards was contemplated with regard to situations where the parties involved in negotiations, finally, could not reach agreement. A common remuneration rule could then also have been established in compulsory settlement procedures or through a court decision.[116] This proposal, however, was rejected because of fears that it would encroach upon fundamental freedoms of enterprises and business associations, in particular the general freedom of action and the negative freedom of not being obliged to enter into coalitions guaranteed in the German constitution.[117] Legislation that imposes a de facto obligation

115 See the Law of 30 June 2015 changing the *Dutch Copyright Act* and the *Neighbouring Rights Act* in connection with the strengthening of the position of authors and performing artists in contracts concerning copyright and neighbouring rights (*Copyright Contract Act*), *Staatsblad* 2015, 257, which led to a new section in the *Dutch Copyright Act* (Arts 25b–25h) dealing specifically with authors' contract rights. As to the preparatory work for this new legislation, see Ministerie van Veiligheid en Justitie, 12 June 2012, 'Wetsvoorstel auteurscontractenrecht', *Kamerstukken II* 2011/12, 33 308, (2013) *Tijdschrift voor auteurs-, media en informatierecht*, 23; B J Lenselink, 'Auteurscontractenrecht 2.0 – Het wetsvoorstel inzake het auteurscontractenrecht' (2013) *Tijdschrift voor auteurs-, media- en informatierecht*, 7; E Wybenga, 'Ongebonden werk – Is de literaire sector gebaat bij het voorontwerp auteurscontractenrecht?' (2011) *Tijdschrift voor auteurs-, media- en informatierecht*, 41; D Peeperkorn, 'De lange geschiedenis van het auteurscontractenrecht' (2010) *Tijdschrift voor auteurs-, media- en informatierecht*, 167; JP Poort and JJM Theeuwes, 'Prova d'Orchestra – Een economische analyse van het voorontwerp auteurscontractenrecht' (2010) *Tijdschrift voor auteurs-, media- en informatierecht*, 137; MRF Senftleben, 'Exportschlager deutsches Urhebervertragsrecht? Het voorontwerp auteurscontractenrecht in Duits perspectief' (2010) *Tijdschrift voor auteurs-, media- en informatierecht*, 146; H Cohen Jehoram, 'Komend auteurscontractenrecht' (2008) *Intellectuele eigendom en reclamerecht*, 303; PB Hugenholtz and L Guibault, above n 96.

116 See Deutscher Bundestag, 26 June 2001, 'Entwurf eines Gesetzes zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern', *Drucksache* 14/6433, 4 [§ 36(3), (5)–(8)], 17.

117 See *Grundgesetz* [German Basic Law], Arts 2(1), 9, available online at <www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg_01/245122>; Cf H Schack, 'Neuregelung des Urhebervertragsrechts' (2001) *Zeitschrift für Urheber- und Medienrecht* 453, 462. See also NP Flechsig

to establish common remuneration rules thus seems excessive.[118] The current discussion about an amendment of the German system, however, includes the proposal to make the concept of fairness more concrete by pointing out that a fair remuneration, in principle, requires more than a one-time 'buy out' payment. Instead, the author should continuously receive a share of the revenue accruing from the exploitation of her work.[119]

Given the various problems identified in the ongoing debate, copyright legislation seeking to improve the income situation of creators should not exclusively rely on the recognition of a right to fair remuneration and the vague hope that agreements on appropriate remuneration standards will evolve from negotiations between authors and the creative industry. By contrast, additional instruments are necessary to ensure that authors receive a fair monetary reward for their creative work.

Again, Bourdieu's analysis can offer important impulses in this regard. While a general right to fair remuneration *ex ante* may be of particular importance to bourgeois authors whose works are likely to be commercially successful in the marketplace, the difficulty of providing evidence for a certain level of standard remuneration in a specific field of art is likely to constitute an almost insurmountable hurdle for autonomous authors. As their works do not follow market dictates and may be avant-garde productions not following known patterns, a remuneration concept presupposing the existence of a customary level of fair remuneration seems inapt from the outset. Autonomous artists may also fear negative reactions in the art sector concerned when they insist on the right to fair remuneration. Facing a relatively small circle of investors and producers, an autonomous artist may be concerned about seeing her name being added to a 'black list' of creators with whom exploiters do not want to work because of past disputes about an adequate level of remuneration.

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and K Hendricks, 'Zivilprozessuales Schiedsverfahren zur Schließung urheberrechtlicher Gesamtverträge – Zweckmäßige Alternative oder Sackgasse?' (2000) *Zeitschrift für Urheber- und Medienrecht*, 721, for an assessment of the pros and cons of a formal settlement procedure.

118 For a detailed discussion of this point, see Spindler, above n 108, 925–928.

119 Cf K-N Peifer, 'Der Referentenentwurf zum Urhebervertragsrecht' (2016) *Gewerblicher Rechtsschutz und Urheberrecht* 6, 8, and J Kreile and E Schley, 'Reform der Reform – Wie viel vom Kölner und Münchner Entwurf steckt im Referentenentwurf zum Urhebervertragsrecht?' (2015) *Zeitschrift für Urheber- und Medienrecht* 837, 837, for a discussion of a proposed new sentence in § 32(2) UrhG.

However, once the work of an autonomous creator has attained the status of an important avant-garde production within the circle of independent artists and generates considerable monetary revenue on the art market because of this status, the author may have a particular interest in a remuneration rule that ensures a fair profit sharing *ex post*. If the work becomes successful on the art market to such an extent that the remuneration originally received appears disproportionally low, an *ex post* remuneration rule would ensure that the author can demand an adjustment of the contract in the light of changed circumstances.

Again, experiences with copyright legislation in Germany can serve as an example in this context. Prior to the introduction of the above-described 2002 *Act on Copyright Contract Law*, the German *Copyright Act* already contained a safeguard against remuneration schemes that turn out to be disproportionate in the course of a work's exploitation: the so-called 'bestseller clause' was regarded as an important addition to the general rule on *imprévision* in the German Civil Code. It softened the requirement that new circumstances justifying an adjustment of the remuneration had to be unforeseeable for contracting parties at the time of concluding the exploitation contract. The strict application of this requirement had rendered the general *imprévision* rule in the German Civil Code ineffective in many copyright cases.[120] Against this background, the traditional bestseller clause in the German copyright system was based on an alternative threshold for requesting an adjustment of the remuneration: a showing of 'gross' disproportionality. This condition was deemed to be fulfilled when the honorarium received by the author amounted to only one-third of what would have constituted a usual royalty revenue when taking into account the work's success.[121]

In the 2002 *Act on Copyright Contract Law*, the German legislator replaced this bestseller clause with an even more elastic 'fairness clause'. In § 32a(1) UrhG, it was stated explicitly that this new clause could be invoked regardless of whether the parties could have foreseen the disproportionality between remuneration and revenue when entering into the exploitation contract. The condition of

120 For instance, see German Federal Court of Justice, 'Horoskop-Kalender' (1991), *Gewerblicher Rechtsschutz und Urheberrecht* 901, 902; German Federal Court of Justice, 'Comic-Übersetzungen' (1998) *Zeitschrift für Urheber- und Medienrecht* 497, 502.

121 See German Federal Court of Justice, 'Horoskop-Kalender' (1991), *Gewerblicher Rechtsschutz und Urheberrecht*, 903.

'gross' disproportionality was attenuated by setting forth a threshold of 'striking' disproportionality instead. In the official materials accompanying the 2002 Act, the German legislator explained that this new requirement could be deemed to be met when the author had received an honorarium amounting to less than half of the income that could have been expected considering the work's success.[122] In literature, it is argued that even one-fifth should already be sufficient to assume a striking disproportionality.[123] German courts, however, have not had sufficient opportunities to fix this new threshold requirement yet.[124]

As with the traditional bestseller clause, the new fairness clause covers all kinds of contracts awarding exploitation entitlements. Its scope of application ranges from transfers and exclusive licenses to non-exclusive licenses and specific permissions of use, such as a permission to translate or adapt a work.[125] Moreover, the new provision makes it clear that in the case of a license chain, the author can assert the right to *ex post* adjustment of the contractually agreed remuneration against every license holder (§ 32a(2) UrhG). It is thus irrelevant whether a licensee was involved in the original honorarium negotiations and received the exploitation entitlement directly from the author.

122 See Deutscher Bundestag, 23 January 2002, 'Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern – Beschlussempfehlung und Bericht des Rechtsausschusses', *Drucksache* 14/8058, 19.

123 Cf the overview provided by Schulze in Th Dreier and G Schulze, *UrhG – Kommentar* (CH Beck, 3rd ed, 2008) 616.

124 Court decisions based on the new fairness clause are still scarce. See Schulze, above n 122, 617. As to the practical difficulties of court procedures seeking to clarify the fairness of the remuneration received by the authors under the new fairness clause, see N Reber, 'Der "Fairnessparagraph", § 32a UrhG' (2010) *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 708, 709.

125 See Schulze, above n 122, 613.

Arguably, *ex post* adjustment measures of this type are more effective than attempts to secure a fair remuneration *ex ante* – at a stage where a work's exploitation has not yet started. Support for *ex post* remuneration mechanisms can also be found in international copyright law. The optional *droit de suite* recognised in article 14ter(1) of the Berne Convention grants the author and her heirs an interest in any sale of original works of art and original manuscripts subsequent to the work's first transfer. As bestseller and fairness legislation seeking to ensure an additional income in case of disproportionality between initial remuneration and later revenues, this international provision aims to ensure that the author receives a share of profits accruing from a work's successful exploitation at a later stage.

For lawmakers aiming at appropriate remuneration mechanisms for individual creators, the debate on fair remuneration also yields more general guidelines. In particular, exploitation contracts offering authors a revenue share seem more desirable than fixed one-time honoraria in 'buy out' contracts. With a remuneration scheme ensuring a continuous royalty stream, the risk of disproportionality between remuneration and revenue can be reduced from the outset. As a legislative measure, it may thus be advisable to encourage remuneration in the form of royalty percentages and discourage agreements based on lump sum honoraria as the only form of remuneration.

A final aspect of the debate on a fair remuneration for the work of creators concerns the cross-financing of productions. When *ex post* measures are taken to adjust the remuneration in the case of works having huge market success, exploiters may warn of shrinking budgets for the financing of less successful works. The income from bestsellers, so runs the argument, is needed to compensate for the losses stemming from unsuccessful productions. If the creative industry must share profits accruing from bestsellers with the authors, the potential of bestseller productions for levelling out losses resulting from investment in commercially insecure productions is reduced. This may limit the willingness of the creative industry to invest in unorthodox works of unknown artists from the outset.

Revisiting Bourdieu's analysis, a line can be drawn between this cross-financing argument and the ongoing fight between bourgeois and autonomous authors for predominance in the field of literary and artistic production. If it was true that the creative industry used

the income from successful mainstream productions to finance less promising autonomous productions, *ex post* adjustments of revenue streams leading to a higher income for bourgeois bestseller authors may have the effect of reducing the budget available for less secure art productions of autonomous authors. In other words: the potential of mainstream productions of bourgeois authors serving as a subsidy for *l'art pour l'art* productions of autonomous authors would be reduced.

In the absence of an economic analysis confirming this alleged interdependence of investment decisions in bourgeois and autonomous productions in the creative industry, however, it cannot readily be assumed that the alleged cross-financing of art productions is taking place, and that it would be frustrated by *ex post* adjustments of remuneration schemes for bestsellers. These *ex post* adjustments would only occur when a work's market success has not already been factored into the equation at the time of concluding the exploitation contract. Once a creator is known as a bestseller author, however, she will have the bargaining power to negotiate an adequate remuneration in the initial exploitation contract. Hence, *ex post* adjustments only impact the calculations of the creative industry in case a work was not expected to have outstanding commercial success so that the creator had limited bargaining power. Even if the alleged practice of cross-financing exists, it is thus unclear whether these cases would minimise industry profits to such an extent that the alleged subsidising of art productions becomes unfeasible.

4.3. Redistribution of copyright revenue

Copyright legislation that aims to strengthen the position of creators vis-à-vis exploiters by awarding a right to fair remuneration presupposes that the creative industry is willing to invest in a creator's work. Otherwise, the creator will have no opportunity to assert remuneration rights in the first place. The central problem of autonomous art, then, is its limited potential to generate profit. As independent artists do not strive for market success, refuse to align their works with the tastes of the masses and are unlikely to create bestsellers, the grant of a right to fair remuneration – *ex ante* or *ex post* – may fail to yield tangible results. If no exploiter can be found for a true work of art, the autonomous artist will simply have no chance

of invoking her right to fair remuneration. Hence, the grant of a right to fair remuneration does not change the position of an autonomous artist for the better in these circumstances.

Therefore, it is necessary, as a last resort, to also consider the room in copyright law for a direct redistribution of copyright revenue in favour of autonomous artists. Is it possible to subsidise independent literature and art with income accruing from dependent, profit-oriented productions? At the level of individual, commercially successful authors or industries, the introduction of a direct subsidy of autonomous art is hardly conceivable. Out of solidarity, financially successful creators or exploiters may be prepared to sponsor autonomous art projects on a case-by-case basis. However, a statutory obligation to systematically deposit a share of the revenues accruing from successful productions in a fund for less successful autonomous productions would most likely be seen as an act of expropriation.

The situation is different, however, at the level of collective copyright management. In the EU, the *Amazon* case about the payment and repartitioning of private copying levies in Austria showed that far-reaching mechanisms for the use of collected funds for social and cultural purposes may already be in place. One of the prejudicial questions asked by the Austrian Supreme Court was whether a collecting society lost its right to the payment of fair compensation if, in relation to half of the funds received, the collecting society was required by law not to pay the levy income to the persons entitled to compensation but to distribute it to social and cultural institutions.[126]

Answering this question, the CJEU held the view that EU law did not contain an obligation to pay all the fair compensation collected on the basis of private copying legislation directly to rights owners in cash. By contrast, a member state was free to provide that part of the compensation for the damage caused by private copying be distributed in the form of indirect compensation through social and cultural institutions set up for the benefit of authors and performing artists.[127] The fact that the fair compensation had to be regarded as recompense for the harm suffered by holders of the exclusive right of reproduction by reason of the introduction of the private copying exception did

126 *Amazon v Austro-Mechana* (CJEU, C-521/11, 11 July 2013) [15].
127 Ibid [49].

not constitute an obstacle to the establishment of such an indirect payment mechanism through the intermediary of social and cultural institutions.[128] In the light of the objectives underlying the Information Society Directive, the Court even stated that such a system of indirect distribution of collected funds was conducive to ensuring that European cultural creativity and production received the necessary resources. It also safeguarded the independence and dignity of artistic creators and performers.[129] The Court made it a condition, however, that the social and cultural establishments involved actually benefit those entitled to fair compensation for private copying. Moreover, it was necessary that the detailed arrangements for the operation of social and cultural institutions were not discriminatory. Benefits had to be granted to those persons entitled to fair compensation and the system had to be open to nationals and foreigners alike.[130]

At the level of collecting societies, there might thus be room to adopt measures to offer extra support for autonomous artists and independent art productions. If it is legitimate to use half of the funds of collecting societies for social and cultural purposes, it also seems possible to devote particular attention to the furtherance of independent literature and art when taking decisions on the distribution of this substantial share of the collected money. However, the decision of the CJEU in *Amazon* sheds light on two hurdles to be surmounted in this context.

Firstly, the Court made it clear that the use of funds by social and cultural institutions must constitute an indirect form of payment for those entitled to the collected remuneration. In the *Amazon* case, the remuneration was the result of private copying legislation providing for the payment of fair compensation for the damage caused by acts of private copying.[131] Hence, the question arises to which extent the partitioning of collected funds must directly relate to the losses of

128 Ibid [50].
129 Ibid [52].
130 Ibid [53]–[54].
131 Art 5(2)(b) ISD. As to the criterion of harm which the CJEU established in this context, see *Padawan v SGAE*, (CJEU, C-467/08, 21 October 2010) [40], [42]. As to the underlying debate on private copying in the EU, see DJG Visser, 'Private Copying' in PB Hugenholtz, AA Quaedvlieg and DJG Visser (eds), *A Century of Dutch Copyright Law – Auteurswet 1912–2012* (deLex, 2012) 413; JN Ullrich, 'Clash of Copyrights – Optionale Schranke und zwingender finanzieller Ausgleich im Fall der Privatkopie nach Art 5 Abs. 2 lit. B) Richtlinie 2001/29/EG und Dreistufentest' (2009) *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil*, 283; C Geiger, 'The Answer to the Machine Should not be the Machine: Safeguarding the Private Copy Exception in the

individual groups of authors. If a strict alignment with individual damage is necessary, the requirement of an indirect compensation via social and cultural institutions would replicate the general problem of a focus on monetary incentives in copyright law. As profit-oriented mainstream productions are likely to be copied more often than independent avant-garde productions, it seems difficult to spend a higher share of the collected remuneration on programs supporting *l'art pour l'art* productions and artists. By contrast, the lion's share of the collected remuneration would have to benefit those authors presumably suffering most from private copying: profit-oriented mainstream artists.

In *Amazon*, however, the CJEU referred to the fact that it was very difficult, if not impossible, to calculate the damage caused by private copying. Against this background, the Court underlined that member states enjoyed wide discretion in determining the form, the detailed arrangements and the possible level of fair compensation.[132] In the exercise of this wide discretion, member states were free to establish a system of indirect compensation via social and cultural institutions.[133] Hence, the Court itself does not seem to insist on a system that distributes collected money meticulously on the basis of the individual harm suffered by individual authors because such a detailed calculation of individual damage is hardly possible. The Austrian provision underlying the *Amazon* decision read as follows:

1. Collecting societies may create institutions for social and cultural purposes for the beneficiaries which they represent and for their family members.
2. Collecting societies that exercise the right to remuneration for blank cassettes shall create institutions for social or cultural purposes and pay to them 50 per cent of the funds generated by that remuneration, minus the relevant administration costs …
3. Collecting societies must establish strict rules concerning the sums paid by their institutions for social and cultural purposes.

Digital Environment' (2008) *European Intellectual Property Review*, 121; C Geiger, 'Right to Copy v. Three-Step Test, The Future of the Private Copy Exception in the Digital Environment' (2005) *Computer Law Review International*, 12.

132 *Amazon v Austro-Mechana*, (CJEU, C-521/11, 11 July 2013) [20], [40].

133 Ibid [49].

4. As regards the funds paid to social and cultural institutions deriving from remuneration in respect of blank cassettes, the federal Chancellor may determine, by regulation, the circumstances to be taken into account by the rules to be established under subparagraph 3. That regulation must ensure, inter alia, that:
    1. there is a fair balance between the sums allocated to social institutions and those allocated to cultural institutions;
    2. in the case of social establishments, it is possible, primarily, to provide support for rightholders suffering hardship;
    3. the sums allocated to cultural establishments are used to promote the interests of rightholders.[134]

In subsection 4(2), this provision explicitly leaves room to focus on 'rightholders suffering hardship'. Therefore, it seems that the indirect compensation mechanism following from the Austrian system is not strictly based on individual harm suffered by individual right holders. By contrast, particular support for creators in a precarious financial situation is possible. The criterion of harm underlying the remuneration system for private copying in the EU, therefore, does not constitute an insurmountable hurdle when seeking to set up social and cultural institutions with a particular focus on support for independent art and artists.

Secondly, the CJEU made it clear in *Amazon* that a system of indirect compensation via social and cultural institutions must not be discriminatory. This further requirement could also be seen as an obstacle to the establishment of a system favouring autonomous creators. Particular support for *l'art pour l'art* productions could be regarded as an unfair discrimination against bourgeois mainstream authors. This conclusion, however, need not be the last word on the matter. Cultural institutions can support autonomous art while basing their sponsoring decisions on objective criteria, such as a need to provide financial support because of missing opportunities to find a commercial investor. As autonomous art has lower chances of attracting the interest of commercial exploiters, the application of such a general criterion could de facto have the effect of offering

134 § 13 of the Austrian Law on Collecting Societies (Verwertungsgesellschaftengesetz) of 13 January 2006, *Bundesgesetzblatt* I, 9/2006, as in force at the time of the *Amazon* case. The translation is taken from *Amazon v Austro-Mechana*, (CJEU, C-521/11, 11 July 2013), [8].

stronger support for independent *l'art pour l'art* productions than for profit-oriented mainstream productions. Moreover, it must be considered that even if discrimination in favour of autonomous art was found, this discrimination could be justified. Given the above-described fundamental importance of autonomous art as an engine of alternative visions of society that may pave the way for necessary social and political changes, there is a sound justification for lending stronger support to independent productions and autonomous artists.

Hence, the discussion of redistribution mechanisms in the field of collective management of copyright revenue, such as the Austrian system of indirect compensation for private copying via social and cultural institutions, shows that mechanisms for the partitioning of collected funds in line with specific social and cultural objectives are possible. To offer stronger support for autonomous art and artists, it would be necessary to employ these redistribution mechanisms systematically to support autonomous artists and finance the production of independent art capable of offering alternative visions of society.

5. Towards a copyright system supporting autonomous art

Bourdieu's sociological analysis provides an important theoretical model that sheds light on the motivations and expectations of different groups of creators. It explains how the ongoing fight between bourgeois and autonomous creators for predominance in the field of literary and artistic production impacts the quality standards and the internal discourse in the art community, and how it influences the degree of autonomy of the social space in which works of literature and art are created. Bourdieu highlights the plurality of factors influencing the decision to create a work. With a spectrum of driving forces ranging from monetary to reputational rewards, the analysis confirms previous research pointing out that the focus on the motivating power of pecuniary incentives in copyright law is incomplete and doubtful. In the area of autonomous *l'art pour l'art* productions, Bourdieu identifies a peculiar reverse economy contradicting the reliance on the grant of exploitation rights as a reward and incentive scheme: a creator winning in economic terms loses in artistic terms. Artists

striving for monetary success are unlikely to acquire a reputation as an autonomous, independent artist in the art community. From this perspective, copyright law may even be accused of enticing authors away from an autonomous *l'art pour l'art* orientation. Considering Bourdieu's description of the ongoing fight of bourgeois and autonomous creators for predominance in the field of literary and artistic production, it may also be said that copyright is not impartial in the power struggle. Focusing on monetary incentives, it offers more support for bourgeois authors than for autonomous authors.

As state subsidies for autonomous art and artists are continuously reduced, it is indispensable to remove this bias of copyright law in favour of profit-oriented mainstream productions. In the absence of public funds for the creation of independent literature and art, it would be disastrous not to take measures supporting autonomous productions in copyright law. Works of true art fulfil a function of particular importance in society. They offer alternative visions of life and society that can pave the way for necessary changes of social and political conditions. Without these impulses provided by independent, autonomous art, society has less chances to evolve and overcome imperfections. Hence, it is of particular importance to identify those features of copyright law that are capable of compensating for the loss of state subsidies and functioning as a driver of autonomous art.

The analysis of copyright law from this perspective leads to a broader understanding of authors' rights. Apart from traditional exploitation rights that allow an author to prohibit the unauthorised use of literary and artistic works (right to control consumptive use), copyright law should also recognise an author's right to use pre-existing material for the purpose of creating new works (right of transformative use of protected material). Limitations that are central to this transformative process, such as the idea/expression dichotomy and the freedom to make quotations, parodies and remixes, would have to obtain the same status as traditional exploitation rights. This would exclude a strict, narrow interpretation. It would also require the development of appropriate enforcement mechanisms, for instance with regard to works protected through technological measures.

The analysis of copyright law in the light of Bourdieu's theory also leads to the question how copyright law can ensure a fair remuneration for bourgeois and autonomous authors alike. It is contradictory when

the law justifies the grant of broad exploitation rights in the light of the difficult income situation of creators, while at the same time condoning the practice of imposing 'buy out' contracts upon authors with insufficient bargaining power. Again, Bourdieu's analysis can offer guidelines in this regard. While a general right to fair remuneration *ex ante* may be of particular importance to bourgeois authors whose works are likely to be commercially successful in the marketplace, independent artists may have a particular interest in a remuneration rule that ensures a fair profit sharing *ex post*.

Accordingly, legislative measures seeking to ensure that creators receive a fair remuneration for their creative work should not be confined to mechanisms focusing on an appropriate reward *ex ante* – at the time the exploitation contract is concluded. By contrast, fair remuneration legislation must necessarily include an *ex post* remuneration rule giving authors the right to demand an adjustment of the exploitation contract if a work has outstanding success. If the paid honorarium appears disproportionately low in the light of a work's later success, such an *ex post* rule ensures an appropriate remuneration against the background of verifiable sales and income figures. The introduction of an *ex post* remuneration mechanism may also encourage the conclusion of exploitation contracts which, instead of merely providing for a one-time 'buy out' honorarium, offer continuous royalty payments based on a predefined revenue share.

Finally, the present analysis yields the insight that a direct redistribution of money in the creative sector is advisable to support autonomous art and artists. Such a redistribution of financial resources is possible in the area of collective copyright management. The schemes of collecting societies for the partitioning of collected funds can systematically be aligned with the need to support the production of independent art. For this purpose, the distribution of copyright revenue that is available for autonomous art should be left to designated bodies of collecting societies with a particular focus on furthering the production of autonomous literature and art.

As a critical comment on this latter point, it is to be added that the recommendation of a direct redistribution of copyright revenue via designated bodies of collecting societies is inspired by Bourdieu's conclusion that, as a result of reduced state subsidies for independent art, the autonomy of the field of literary and artistic productions is

currently at risk. Against this background, the direct redistribution of remuneration in favour of autonomous art and artists must be seen as an extraordinary measure. It culminates in the cross-financing of independent art through income accruing from dependent mainstream productions. On its merits, this concept imposes an obligation on the cultural sector to finance its own autonomy. Given the crucial importance of autonomous art for society as a whole, however, this may be deemed an unfairly heavy burden. On the one hand, measures based on partitioning schemes of collecting societies that favour autonomous art must not become a cheap escape strategy for state authorities seeking to rid themselves of the responsibility to ensure an intact system of autonomous art and provide financial support for underlying societal goals. On the other hand, the implementation of support strategies for autonomous art by the cultural sector itself has the advantage of avoiding the shortcomings of direct state patronage.[135] Funding via repartitioning schemes of collecting societies allows creators to establish criteria for the distribution of available funds themselves. The discussion about an appropriate framework for supporting autonomous art may be a particularly challenging task for the different groups of artists who are members of a given collecting society. Once it is clear that a certain percentage of collected revenue must be available for autonomous art, however, the necessity to find workable solutions for the distribution of resulting funds is not unlikely to lead to the establishment of a procedure for appropriate decision-making. The funding decisions taken by the designated bodies of collecting societies, in turn, can be qualified as acts of self-regulation. Once this self-regulation is in place, the state can contribute to the funding of autonomous art without interfering with the decision-making process. For this purpose, the state can simply make additional funds available to the designated bodies of collecting societies (which have been established by the artists in the collecting society themselves).

135 For a detailed discussion of potential shortcomings, see SA Pager, 'Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade' (2011) 31 *Northwestern Journal of International Law & Business* 63, 75–97. However, the shortcomings listed by Pager are not fully applicable in the present context because he focuses on market-based incentives and commercial productions.

Finally, the limitations of the present analysis must not be concealed. Bourdieu focuses on professional authors devoting time and effort to the creation of literary and artistic works. Hence, the rights and remuneration infrastructure that would be needed to support the creativity of amateur creators falls outside the scope of the present inquiry from the outset. Guidelines for the application of copyright rules to amateur producers of user-generated content can hardly be inferred from Bourdieu's theoretical model. Therefore, the various questions[136] raised by the increased participation of users in the creation of literary and artistic works remain open.

136 For an exceptional case of a specific use privilege for user-generated content, see Art 29.21 of the *Copyright Act* of Canada, as introduced by Bill C-11, *Copyright Modernization Act*, adopted 18 June 2012. As to the debate on user-generated content and its impact on copyright law, see SD Jamar, 'Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context' (2010) 19 *Widener Law Journal* 843; N Helberger et al, *Legal Aspects of User Created Content* (Institute for Information Law, 2009) available at <ssrn.com/abstract=1499333>; MWS Wong, 'Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?' (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1075; E Lee, 'Warming Up to User-Generated Content' (2008) *University of Illinois Law Review* 1459; B Buckley, 'SueTube: Web 2.0 and Copyright Infringement' (2008) 31 *Columbia Journal of Law and the Arts* 235; TW Bell, 'The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 841; S Hechter, 'User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 863; G Lastowka, 'User-Generated Content and Virtual Worlds' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 893.

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