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Open Culture – rethinking the legal framework

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Culture, information and Economics 101

- Information is *non-rivalrous*
  - Thus inherently open
- Openness hinders monetisation
  - For this, information must be made *excludable*
  - Achievable for digital information only through laws which enable “owner” to prevent free uses
    - Primarily found at present in copyright and neighbouring rights
- Laws also grant rights to control information *about* a person
- Right to freedom of expression is also important
  - But this presentation concentrates on rights which can be used to resist Open Culture

"Natural" scope of legal rights

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- Classification of rights as
  - "Natural property" (copyright)
  - "Fundamental human" (privacy, freedom of expression, etc)
- These are rhetorical arguments, not statements of fact
- Thus states are free to review these rights, balancing
  - Benefits from free use
  - Benefits from private rights to control use

Information rights protecting the personality

- Shape of these rights is approximately correct
  - Based on controlling *use*
- Scope clearly needs further reconsideration for Open Culture
  - Dealing with national differences and global communication
  - Review of intermediary immunity

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Rights protecting information creations

- Shape here is entirely wrong
  - Based on embedded business model
    - Return to creator is from sales of physical copies
  - Control of copying is a mere proxy for control of use
    - Online copying can occur without use
    - Use can occur without copying
- Fundamental rethink is required
  - Copyright *should no longer be about copying*

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Restructuring copyright

- Three basic principles
  - Creator has right to control commercial exploitation
  - Non-commercial uses are free
  - Protection of creator's personality
    - Prevention of initial use
    - Right to attribution
    - Right to control uses which damage the personality
      - Not equivalent to right to prevent derogatory treatment of *work*

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Control of commercial exploitation

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- Meets law's aim of securing return to the creator
- Wider than mere control of charging for access to work
  - Includes use in marketing and advertising
  - Uncertainties at the penumbra are inevitable
- Policy discussion around hosts who make a commercial return
  - Do the benefits for Open Culture of YouTube's existence outweigh a creator's claim to a revenue share?

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Non-commercial uses

- No revenue to share
- But some uses can damage commercial exploitation by creator
  - WIPO copyright treaty three-step test
    - “conflict with a normal exploitation of the work”
    - Current interpretations assume business model of charging for copies
  - Adoption of principles from EU competition law
    - Substitutability in the market

“Under the Boardwalk”

- Amateur recording (on ukulele?) posted to YouTube
  - Faithful copy of the Rolling Stones version
- The Stones (performance)
  - Does not substitute for their version
    - Does not satisfy viewers and thus deter sales
    - Cf ripping track to MP3 and file sharing
- Resnick/Young (music and lyrics)
  - No revenue accrues to the recorder, either from making or posting to YouTube
  - YouTube does generate revenue via advertising
    - Again, the policy question
  - If video recorded to promote paid performances this is a commercial exploitation
    - But Resnick/Young receive their revenue from venue performance licences – is this sufficient reward?

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Is restructuring copyright possible?

- Of course not, in the short term
  - Inertia of international conventions
  - Entrenched position of rightholders
- In longer term
  - Copyright seems unfitted to adapt
  - Following the death of copyright ...
  - ... some form of use right

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