RETHINKING FORMALITIES IN A DIGITAL ECOSYSTEM

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THE DIGITAL ECOSYSTEM

- Who creates?
  - The rise of UGC and collaborative production

- How we distribute?
  - Low transaction cost
  - The rise of online intermediaries
USER-GENERATED CONTENT

- A shift from industrial production to a mixture of commercial/non-commercial
- Consumer/producer (author/user)
  - Professional v. Amateur
  - Exploiters v. Creators
  - Individual Authors v. Collaborative
  - Financial v. Non-profit
- No firm business model
- No organizational structure for registration and licensing
WHY INTRODUCE FORMALITIES?

- Filtering, to expand the public domain
- Signaling, to enhance legal certainty
- Generating information, to facilitate licensing
FILTERING OUT

- Copyright
  - Applies automatically
  - Protects too many works
- Formalities: an opt-in regime
  - A costly affirmative step
  - Protection only when expected benefits exceed the cost of registration
 Fewer works will be protected
  – Only when expected benefits exceed the cost of registration

 The “right” works will be protected
  – Only those commercially valuable

 Shorter duration
  – Owners will be able to opt out of copyright when works are no longer commercially valuable.
COMMERCIALLY BIASED

- Expected benefits > Registration cost
- Owners’ self-assessment of the commercial value
  - Commercial value increases with a portfolio
  - UGC motivation is non-financial
  - Users create first, may exploit later
  - © might be useful for non-commercial goals
- Registration costs are lower for repeat players
FILTERING BY FORMALITIES

- Marginalizing UGC
- Pressure to commercialize content
- How to maintain the benefits of UGC?
  - For a vibrant civil society?
  - For political noncommercial speech?
  - For collaborative production?
  - For efficient crowdsourcing?
FORMALITIES FOR SIGNALING

- No need for central registry
  - Shared standards (i.e., GPL)
  - Voluntary distributed solutions (CC)

- Self-help signaling
  - A Notice: © is asserted
  - A licensed inside (CC)

- Efficiency
  - Lowers uncertainty & chilling effects
  - Lowers transaction cost
NEW RISKS

- User friendly self-help notice increase the risk of overuse
  - Generating a false signal

- Over licensing - Clearance Culture
  - Licensing use, which is *fair use*, may narrow the scope of the public domain (circular effect)
  - Perfect licensing may threaten copyright goals
NEW RISKS II

- Signaling by online platforms
  - Generating ID files for original content
  - Manage the content
    - Block, license, generate reports

- Online platforms not only signal but also enforce

- No procedures to verify title and scope of ownership in ID files
FORMALITIES BY PLATFORMS

- Online Platforms
  - Control over access
  - Control over content
  - Control over users
    - Partnership with rightholders

- A shift from *copies to services* (eBooks, iTunes, *Capitol v. ReDigi*)

- Consequently, a growing need to secure users’ rights and A2K
WHAT TYPE OF LEGAL INTERVENTION?

- No mandatory formalities
  - Filtering may marginalize UGC

- Voluntary self-help signaling
  - Incentives through remedies
  - No damages unless a notice (*good faith*)
  - Sanctions for false notices

- Platforms subject to legal oversight
  - E.g., *due process, transparency, equal treatment*