

# RETHINKING FORMALITIES IN A DIGITAL ECOSYSTEM

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AP photographer Mannie Garcia    The HOPE poster by Fairey

# 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*

# FORMALITIES ADVOCATES: EFFICIENT OUTCOME

- ◎ 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 license 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*