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There Is Always More than Law! From Low IP Regimes to a Governance Perspective in Copyright Research

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**THERE IS ALWAYS MORE THAN LAW!
FROM LOW IP REGIMES TO A GOVERNANCE
PERSPECTIVE IN COPYRIGHT RESEARCH**

*Christian Katzenbach**

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I. INTRODUCTION

When creatives talk about their work, they rarely talk about copyright or trademarks. Routines of production, sources of inspiration, and collaborations with colleagues and coworkers figure prominently among their narratives of their own work—but not the legal framing.¹ Yet, the copyright regulation discourse routinely assumes that legal measures are constitutive for creative production. If there is no legal protection for

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1. See, among others, JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 5 (1st ed. 2014); LAURA J. MURRAY ET AL., *PUTTING INTELLECTUAL PROPERTY IN ITS PLACE* 1 (2014).

creative works, it is assumed creatives will not be able to reap the benefits. In this situation, creatives would lack incentives to create new works in the first place, with the result that they would not innovate at all.

This great discrepancy between the dominant copyright discourse and creators' own accounts presents a challenge for copyright research. The normative and highly politicized policy debate of the last two decades has paid rather little attention to the concrete practices of cultural production and their commercial exploitation.² However, in recent years, empirical research from multiple perspectives has increasingly investigated copyright's actual effects in the domains of culture and economy: which creative practices it enables or precludes, and how informal norms and discourses complement legal regulation.

In addition to prevailing quantitative approaches and emerging experimental settings, this empirical turn in copyright research has also been driven by qualitative studies that shed light on the practices, routines, and norms of creatives and how these relate to legal provisions such as copyright and patents.³ The literature on low IP regimes especially provides instructive insights into the different modalities of organizing and regulating the production and circulation of creative goods. In many case studies, scholars have learned that the absence of formal IP protection does not mean the absence of IP control: communities such as French chefs, comedians, and magicians have developed their own set of rules delineating legitimate and illegitimate practices.⁴

In sum, there is ample empirical evidence supporting the position that when seeking to understand the circulation of creative goods there is always more than law involved: these are informal norms, discourses, economic rationales, and the technologies underlying creative practices. These frames may align with copyright provisions, but in many cases they

2. See Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1330 (2015); Dan Burk, *On the Sociology of Patenting*, 101 MINN. L. REV. 421, 421–52 (2016) (discussing discrepancy). See also Ruth Towse, *Creativity, Copyright and the Creative Industries Paradigm*, 63 KYKLOS 461, 461 (2010); CHRISTIAN HANDKE, *ECONOMIC EFFECTS OF COPYRIGHT* (2011); Jeanette Hofmann et al., *Kulturgütermärkte im Schatten des Urheberrechts*, 62 AUS POLITIK UND ZEITGESCHICHTE 39, 39–45 (2012); Ruth Towse, *The Quest for Evidence on the Economic Effects of Copyright Law*, 37 CAMBRIDGE J. ECON. 1187, 1187 (2013).

3. SILBEY, *supra* note 1, at 5; MURRAY ET AL., *supra* note 1, at 1.

4. See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORGAN. SCI., 187, 187–201 (2008) (on French chefs); Dotan Oliar & Christopher J. Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1771–73 (2008); JACOB LOSHIN, *SECRETS REVEALED: PROTECTING MAGICIANS' INTELLECTUAL PROPERTY WITHOUT LAW*, in *LAW AND MAGIC* 123 (Christine A. Corcos ed., 2008). See also *CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY* (Kate Darling & Aaron Perzanowski eds., 2017) (discussing a recent paradigmatic case study).

do not.⁵ What is still lacking, though, is a theoretical approach to understand and investigate these phenomena within a systematic and comparative framework.

This Essay contributes to empirical copyright research by presenting an integrated governance perspective. This conceptual framework seeks to enable the identification and comparison of different modes of ordering and control in creative production and distribution. Based on sociological institutionalism, this governance perspective does not privilege law *ex ante*, but positions norms, discourses, and technology as (analytically) equally relevant dimensions of copyright governance.

The reasoning of this Essay is presented in three parts. Firstly, I draw from Murray to argue against a low IP exceptionalism.⁶ The norms and routines ordering creative production in sectors of low IP protection are not unique to these sectors. Instead, they are constitutive of all processes of creative production. Norms and routines are not mere replacements for legal measures in a “negative space of IP.”⁷ Instead, it is argued that they are always already present in every form of cultural production and circulation. Thus, the ordering of creative production and circulation is a multimodal process that is realized in many dimensions. Secondly, this perspective is developed into a conceptual framework based on sociological institutionalism (SI) with four modalities of copyright governance: (1) a regulative dimension, addressing the provision and enforcement of formal rules, such as laws, court decisions, terms of services; (2) a normative dimension, investigating the prevalent assumptions about legitimate and illegitimate behavior in a specific community or sector; (3) a discursive dimension, addressing the framings and debates on creativity, authorship, and originality; and (4) a technological dimension that investigates the embodiment of affordances and rules in infrastructures, devices, and algorithms relevant to creative work. This will allow the empirical study of the impact and mutual relations of the different modalities across creative sectors. Finally, to illustrate this concept, the paper discusses the implications of this model for existing case studies on low IP regimes and other sectors.

5. See SILBEY, *supra* note 1, at 81–148.

6. MURRAY ET AL., *supra* note 1, at 1.

7. Elizabeth Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 317–65 (2011).

II. BEYOND LOW IP REGIMES: THERE'S ALWAYS MORE THAN LAW

A. Low IP Regimes: IP Without Law?

This investigation into heterogeneous modes of ordering creative production and circulation takes as its starting point the literature on low IP regimes. In empirical studies, scholars are exploring creative practices and products that are hardly amenable to formal IP regulation. Studies on magicians,⁸ French chefs,⁹ comedians,¹⁰ and roller derby players¹¹ have demonstrated that there is more than law in controlling and circulating creative work. In the absence of clear-cut legal protection, these communities have developed norms and routines that delineate acceptable from objectionable practices, thus bringing about “Intellectual Property without law.”¹² The focus on informal regulation in research addressing these seemingly disconnected fields stems from their legal peculiarity: comedy, magic, and cooking are hardly regulated by formal legal measures. Given this context, stakeholders need to mobilize different modes of regulation other than law in order to coordinate their creative practices and products. In these studies, it is community norms that regulate creative practices and sanction deviant behavior by measures such as exclusion.

By looking at the fashion industry, Raustiala and Sprigman have given this perspective a slightly different spin:¹³ while this sector is highly monetized and subject to a considerable number of formal regulations (*e.g.*, trademark, design patents), they are able to show that the sector lacks consistent legal rules for its key creative work, fashion design. Intellectual property rights are not able to effectively delineate between legitimate inspiration on the one hand and illegitimate plagiarism on the other hand.¹⁴ However, against all assumptions of conventional IP theory, “piracy” does not lead to market failure here but to a flourishing, innovative industry.¹⁵

8. LOSHIN, *supra* note 4, at 123.

9. Fauchart & von Hippel, *supra* note 4, at 187–201.

10. Oliar & Sprigman, *supra* note 4, at 1771–73.

11. David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1095–97 (2011).

12. LOSHIN, *supra* note 4, at 123.

13. Kal Raustiala & Christopher J. Sprigman, *The Privacy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1699–1705 (2006); *see also* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 44–45 (1994); *see* Susan Scafidi, *Intellectual Property and Fashion Design*, 24 INTELL. PROP. & INFO. WEALTH 115 (Peter K. Yu ed., 2006); *see* Christopher Buccafusco & Jeanne C. Fromer, *Fashion's Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51 (2017).

14. Raustiala & Sprigman, *supra* note 13, at 1717–61.

15. *Id.*

Scholars have addressed a similar puzzle regarding the trade in TV formats.¹⁶ The legal protection of formats is arguably very weak, yet there is a highly profitable global licensing market for formats. Why do organizations pay to license a format that is not consistently protected? Why develop new formats if you can free ride on existing ones? Standard IP theory “would predict that innovators would have no incentive to innovate in such a market. [. . .] [T]he TV format industry would suffer from a significant undersupply of TV formats, as constant free riding on TV format innovation would eliminate incentives to innovate.”¹⁷

But producers do invest in new formats. There is not much research on this topic, but empirical studies and economic theory suggest that a mix of business strategies, professional practices and community norms drive the necessary level of innovation in this sector.¹⁸ Similarly to the fashion industry, imitation as a form of “herding behavior” generates innovation rather than hindering it.¹⁹ In a multi-method study on imitation and innovation in game production, we identified similar strategies and professional norms.²⁰ Kate Darling has investigated the strategies of the online adult entertainment industry to cope with a low level of copyright enforcement.²¹ Based on qualitative interviews, she has learned that producers shift towards the production of experience goods rather than replicable works.²² Consumer privacy preferences, consumption habits, low production costs, and a continuing high demand also help this business to thrive sustainably.²³

In sum, the literature on low IP regimes supports the position that strong community norms can make up for the lack of formal IP regulation. This perspective has been extended to more commercial, and arguably less community-driven sectors, such as fashion, TV formats, game production, and online adult entertainment. While not constituting clear-cut low IP regimes, creative production in these sectors is not easily protected by formal IP regulation, either because it lacks suitable

16. Stefan Bechtold, *The Fashion of TV Show Formats*, 2013 MICH. ST. L. REV. 451, 451–62 (2013); see MARTIN KRETSCHMER & SUKHPREET SINGH, *EXPLOITING IDOLS: A CASE STUDY OF INTERNATIONAL TV FORMATS TRADING IN THE ABSENCE OF INTELLECTUAL PROPERTY PROTECTION* (2010).

17. Bechtold, *supra* note 15, at 493.

18. *Id.*; see also Kretschmer & Singh, *supra* note 15.

19. Bechtold, *supra* note 15, at 489.

20. Christian Katzenbach et al., *Copies, Clones and Genre Building*, 10 INT’L J. COMM. 838 (2016); Lies van Roessel & Christian Katzenbach, Address at the 67th Annual Conference on the International Communication Association: Navigating the Grey Zone: Developers’ Views on Imitation and Inspiration in the Game Sector (May 25, 2017).

21. Kate Darling, *IP Without IP? A Study of the Online Adult Entertainment Industry*, 17 STAN. TECH. L. REV. 709, 709–71 (2014).

22. *Id.* at 765–69.

23. *Id.* at 738–58.

measures to protect the key creative output (fashion, TV formats, games) or effective enforcement (online adult entertainment). Professionals and companies in these sectors complement this, not by strong community norms, but rather by a mix of business strategies, professional norms, and work routines.

B. Against the Exceptionalism of Low IP Regimes: There's Always More than Law

This strand of research routinely presents low IP regimes as the exceptional case; that is, the “negative space of IP” that represents a puzzle in light of standard theory.²⁴ Similarly, the strategies in the more complex examples of fashion, TV formats, games, and online adult entertainment are regarded as countermeasures to compensate for a lack of copyright protection and enforcement. Taken together, the literature tends to consider these sectors as instructive, yet exceptional cases. In contrast, most creative sectors are well covered by copyright and other IP regulation, so they do not *need* informal norms or other complementary strategies one might argue.

But this position overlooks some constitutive aspects of ordering creative production and circulation—that there is always more than law. Low IP regimes are only exceptional cases with regard to their legal situation. Beyond a “legal centralism,” a broad set of empirical studies and different humanities theories show us that informal norms, discourses, economic rationales, and technologies of production and circulation always contribute to framing and ordering creative practices whether law provides adequate control or not.²⁵ As Laura Murray and her co-authors rightly assert, “all creative practices – not merely extraordinary niches like magic and stand-up comedy – features some sort of embodied ideas about attribution, custodianship, and fair practice.”²⁶

Studies on game design and a wide range of other creative practices indicate that creators always hold strong concepts of their creative practice and their creative works, sometimes aligning with IP provisions and sometimes not.²⁷ In fact, many professionals do not know the applicable copyright regulations, and many rarely encounter or explicitly

24. Rosenblatt, *supra* note 7, at 317.

25. Fagundes, *supra* note 11, at 1098.

26. MURRAY ET AL., *supra* note 1, at 10.

27. For game design, see Tom Phillips, “Don’t Clone My Indie Game, Bro”: Informal Cultures of Videogame Regulation in the Independent Sector, 24 *CULTURAL TRENDS* 143 (2015). For other creative practices, see MURRAY ET AL., *supra* note 1. For the mismatch between IP provisions and Creatives’ perspectives, see SILBEY, *supra* note 1, at 81–148.

reflect on legal issues in their working routines.²⁸ David Fagundes' study on names and branding in roller derby found that informal norms emerge regardless of existing formal IP measures.²⁹ In her extensive study on creative practices in sectors with mostly strong IP coverage, Jessica Silbey finds strong opinions and informal norms among the interviewees regarding the creative process and the circulation of the creative output.³⁰ For different aspects and sectors, Silbey identifies mismatches between the creatives' own positions and formal IP regulation. Especially regarding the creative process, the interviews indicate that copyright and patent law is of very little practical importance. Additionally, experimental studies indicate that creative practices are motivated by a wide array of factors, law being one among many.³¹

So, there is ample empirical evidence for the position that there is always already more than law in ordering creative practices and circulation of creative works. Informal norms and routines do not only complement law in the absence of formal regulation, but they are always involved. Yet, how do these different mechanisms and dimensions interact? How do they mutually reinforce or undermine each other? How can they be included in a systematic and comparative framework for investigating the ordering of creative practices and the circulation of creative works without privileging law ex-ante? This Essay sets out to contribute to the theoretical advancement of empirical copyright research. In the following, I suggest building blocks for a holistic understanding of the governance of creative practices and the circulation of creative works.

III. A GOVERNANCE PERSPECTIVE FOR EMPIRICAL COPYRIGHT RESEARCH

The development of a comprehensive framework for analyzing the ordering of creative practices and the circulation of creative outputs can take different approaches with different theoretical underpinnings. One prevalent and instructive approach is transaction cost economics and its variations in economic and institutional theory. Another one addresses motives and incentives on the individual level of creatives and users of creative products. Psychologically informed research has provided

28. See van Roessel & Katzenbach, *supra* note 20.

29. Fagundes, *supra* note 11.

30. SILBEY, *supra* note 1, at 25–54.

31. Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010); Christopher Buccafusco et al., *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 93 TEX. L. REV. 1921 (2014).

insight into the reasoning of individuals creating, using and sharing potentially copyrighted works.

This Essay, in turn, is grounded in sociological institutionalism. The focus in this perspective is neither on individual motives nor on the calculation of transaction costs, but on the processes of developing and contesting shared norms. Put simply, sociological institutionalism is interested in the ways communities or societies negotiate and establish shared expectations about legitimate and illegitimate practices. For copyright research, and specifically for empirical copyright research this promises to provide a useful theoretical avenue. Building on these concepts will allow scholars to integrate the different mechanisms of ordering at play in creative sectors in a systematic and comparative framework. In contrast to psychological and transaction cost frameworks, this perspective focuses on the meso- and macro-levels of negotiating and contesting norms and understanding. It is thus well positioned to integrate formal regulation on the same level.

Institutions, in this line of theory, are not understood as or restricted to formal organizations or rules. Instead they are, in a broader sense, “building-blocks of social order.”³² They manifest themselves in different forms such as informal norms, daily routines, organizational procedures, common sayings, but also formal regulations. In essence, institutions “represent socially sanctioned, that is, collectively enforced expectations with respect to the behavior of specific categories of actors or the performance of certain activities. Typically, they involve mutually related rights and obligations for actors, distinguishing between appropriate and inappropriate, ‘right’ and ‘wrong,’ ‘possible’ and ‘impossible’ actions and thereby organizing behavior into predictable and reliable patterns.”³³

This understanding of institutions focuses on the mutual expectations of social actors and suggests different ways and processes that inform these expectations. The classification of practices as right or wrong, appropriate or inappropriate already anticipates the potential of this sort of institutional theory for the endeavor at hand here. Considering norms, discourses and technology as potentially functional equivalents to copyright regulation, this perspective is agnostic to the different possible modalities of substantiating an institution (*i.e.*, of delineating right or wrong, appropriate or inappropriate law is but one factor).

An important element in this line of institutional theory is its sensitivity to less obvious factors of institutionalization. Prominently, sociologists have stressed the cognitive and discursive dimension of

32. Wolfgang Streeck & Kathleen Thelen, *Introduction* to BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 1, 9 (Wolfgang Streeck & Kathleen Thelen eds., 2005).

33. *Id.*

institutions. These dimensions influence behavior not only by normative guidance and by specifying what one *should* do, but more fundamentally, and maybe even more effectively, by specifying what we imagine that we *could* do in a given context.³⁴ In this perspective, institutions do not primarily consist of “norms and values but [of] taken-for-granted scripts, rules, and classifications.”³⁵

In a recent paper, Dan Burk has analyzed the development and application of patent law from a similar perspective.³⁶ Based on sociological institutionalism, he insightfully uncovers the myths and mythology of patent law. His analysis is based on the cognitive dimensions of institutions and thus highlights the prevalent social understandings that bind communities together. Burk argues convincingly that, as narratives that are “true but not factual,”³⁷ myths contribute to explaining the “puzzle” of the patent law system that has often been proved ineffective but remains remarkably stable.³⁸

Starting from the same basis, this Essay takes a different route in explaining and investigating matters of intellectual property in context. Burk exclusively focuses on the cognitive dimension of institutions. In contrast, this Essay follows his call to integrate the other “pillars of institutions.”³⁹ If successful, this should facilitate a comparative approach focused on the intersection of and interplay between the different dimensions. In turn, the object of explanation here is more restricted than in Burk’s paper. Whereas he delivers a meta-analysis of the consolidation of the patent law system, the framework developed here aims to investigate the classification of actual practices as either legitimate or illegitimate with regard to creative works. In other words, this Essay addresses the governance of creative practices and products. Yet, both are interested in understanding the role of law in social practices,⁴⁰ thus contributing to an instructive shift in perspective. As Silbey pointed out, instead of imposing *ex-ante* “the view that intellectual property ‘incentivizes’ innovation and creativity, and then showing how IP is not working as it should, a social science investigation asks the empirical question that Burk urges we begin to ask with more determination: ‘[J]ust what roles [are] patents . . . playing?’”⁴¹

34. Lynne G. Zucker, *Organizations as Institutions*, in 2 RES. SOC. ORGAN. 1 (Sam Bacharach ed., 1983).

35. Paul J. DiMaggio & Walter W. Powell, *Introduction to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 15 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

36. Burk, *supra* note 2.

37. *Id.* at 429.

38. *Id.* at 423.

39. *Id.* at 451.

40. Jessica Silbey, *Heuristic Interventions in the Study of Intellectual Property*, 101 MINN. L. REV. 333, 334 (2016).

41. *Id.* at 347.

The model for the empirical study of social practices and the role of copyright presented here rests on Richard Scott's typology of institutions, which contains regulative, normative and cultural-cognitive pillars.⁴² In his synthesis of institutional theories, he summarizes that institutions are "set in motion by regulative, normative, and cultural-cognitive elements."⁴³ From this perspective of shared expectations, mutually related rights and obligations, and common assumptions about right and wrong, possible and impossible practices are not only constituted by law but also by normative orientations and cognitive framings. As these elements interact, complement, and sometimes conflict with each other rather than constitute separate entities, I prefer to call them dimensions instead of pillars. The enduring and coercive impact of institutions then strongly relies on the coherence of these dimensions, as Marie-Laure Djelic and Sigrid Quack explain: "the stability, robustness and self-reproducing characters of institutions will be all the more pronounced that regulative pressures and systems of control combine with normative and cognitive frames and reinforce each other."⁴⁴ Conflicts typically arise when informal norms and formal law or any other dimension diverge with regard to evaluating right or wrong, and appropriate or inappropriate practices.

Turning to copyright, this concept of institutions allows us to develop a multimodal framework to analyze the governance of creative practices and products. This framework posits that there is (1) a *regulative dimension*, addressing the provision and enforcement of formal rules, such as laws, court decisions, contracts, and corporate policies. In short, copyright as usual. But this is only one of many dimensions and not necessarily a privileged one. There is (2) the *normative dimension*, describing the prevalent assumptions about legitimate and illegitimate behavior in a specific community or sector (*i.e.*, the community norms in the low IP literature). In addition, institutional theory suggests (3) a *cognitive and discursive dimension*, addressing the shared (or contested) understandings and framings of issues in certain contexts. An example of the context of copyright relates to the understandings and debates on what constitutes creativity in the first place, the role of originality, or the identification of authorship. While not explicitly present in Scott's model of institutions, it seems reasonable to add (4) a *material or technological dimension* that takes into account the affordances and rules embodied in

42. RICHARD W. SCOTT, INSTITUTIONS AND ORGANIZATIONS: IDEAS AND INTERESTS 51 (3d ed. 2008).

43. *Id.* at 49.

44. MARIE-LAURE DJELIC & SIGRID QUACK, THEORETICAL BUILDING BLOCKS FOR A RESEARCH AGENDA LINKING GLOBALIZATION AND INSTITUTIONS, *in* GLOBALIZATION AND INSTITUTIONS: REDEFINING THE RULES OF THE ECONOMIC GAME 15, 20 (Marie-Laure Djelic & Sigrid Quack eds., 2003).

infrastructures, devices, and algorithms relevant to creative work. Scott already concedes that artifacts are important “carriers” for sustaining institutions,⁴⁵ but research in Science and Technology Studies (STS) has shown that technologies and artifacts are more active elements in building and constituting social order.⁴⁶ They do more than just “embody and represent particular constellations of ideas.”⁴⁷ Road bumps, bridges,⁴⁸ automatic door closers, or heavy tags on hotel keys are the classic examples in this “sociology of things” that illustrate how artifacts have a strong impact on the way we move, talk, and interact.⁴⁹ In this sense, technology is an institutionalized form of social interactions or structures that, once institutionalized, have an effect on the social.

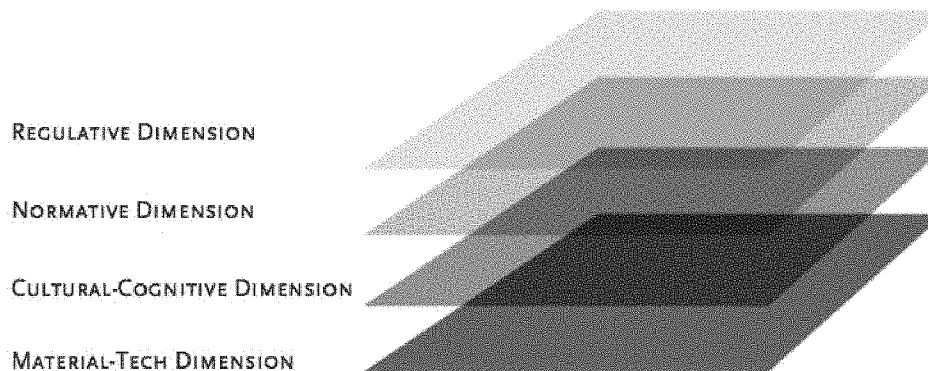


FIGURE 1: LAYERS OF INSTITUTIONS

This model diverges from prevalent thinking about copyright regulation in two ways. First, it integrates different modes of ordering into a coherent framework for empirical research. Thus, it reflects the findings and arguments stemming from the low IP literature that informal norms and shared beliefs are always involved in creative practices—not only in niche sectors. The relation between these dimensions is not set ex-ante by stating a putative absence of formal regulation and having norms act as a surrogate. Instead, they operate on equal footing. The relation between laws, norms, and discourses then is an empirical

45. SCOTT, *supra* note 42, at 52.

46. BRUNO LATOUR, *REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK-THEORY* (2007).

47. SCOTT, *supra* note 42, at 85.

48. Langdon Winner, *Do Artifacts Have Politics?*, 109 *DAEDALUS* 121, 123 (1980).

49. Bruno Latour, *Technology is Society Made Durable*, in *A SOCIOLOGY OF MONSTERS* 103, 104 (John Law ed., 1991).

question that is amenable to research.⁵⁰ Does copyright law prohibit creative practices that are deemed legitimate within a specific context or across an entire society? Are the understandings and routines of creative production in all creative sectors compatible with the categories of copyright (*e.g.*, authorship, work)? Which creative practices do current or past technologies enable and promote and which ones are constrained, or no longer possible? Does this realm of possibilities align well with informal norms and copyright provisions? In this sense, the legitimacy and robustness of institutions is dependent on the coherence of these dimensions. In sum, this model provides an integrative framework for empirical copyright research that allows us to investigate and compare formal regulations, norms, discourses, and material-technological elements as distinct, yet interdependent modes of copyright governance.

The second feature of this model is that it rests on the notion of governance rather than regulation. While governance as a concept is “notoriously slippery,” it provides analytical value in broadening the concept of regulation.⁵¹ At its core, governance refers to all patterns of rule, and exploring governance means exploring the construction of social order and social coordination.⁵² Patterns of rule and ordering mechanisms can take different forms and different trajectories, and thus the notion of governance resonates well with the institutional framework presented here. In contrast, the notion of regulation is characterized by intentional and goal-directed interventions into a policy domain. Julia Black defines regulation as “a process involving the sustained and focused attempt to alter the behavior of others according to identified purposes with the intention of producing a broadly identified outcome or outcomes.”⁵³ Regulation may take the form of legislation, private self-regulation or multi-actor arrangements; in all cases, however, it links ordering processes with explicit objectives and measures. Regulatory actors, private or public, assess their options to intervene in a specific field and use the means they deem effective to achieve a desired outcome.⁵⁴ Copyright is routinely discussed from a regulatory perspective. What effects do specific provisions have on creative practices or consumption behavior? How can copyright be changed in order to reach desired outcomes? In contrast, the governance perspective

50. With that, it resonates with Burk’s call for agnostically trying to understand what IP really does in practice, not assuming an incentive function (or any other) ex-ante. Burk, *supra* note 2, at 452; Silbey, *supra* note 40, at 347.

51. JON PIERRE & GUY B. PETERS, *GOVERNANCE, POLITICS AND THE STATE* 7 (2000).

52. MARK BEVIR, *KEY CONCEPTS IN GOVERNANCE* 3 (2009).

53. Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World*, 54 *CURR. LEG. PROBL.* 103, 142 (2001).

54. Jeanette Hofmann et al., *Between Coordination and Regulation: Finding the Governance in Internet Governance*, *NEW MEDIA & SOC.* 1, 13 (2016).

put forward here focuses on how certain frames and norms constitute, inform, and question the practices of creative people, as well as users of creative products. This complements the prevalent regulatory perspective in important ways, not only because controlling IP involves more than law but also because the reference points of our actions are not solely there to guide our creative practices. Shared beliefs, motives, and legitimizations are not here to regulate our practices; they have emerged in long-term processes and only sometimes they, implicitly or explicitly, inform and guide what we do. In sum, this copyright governance model attributes the ordering and regulation of creative practices to the mutual reinforcement (or weakening) between regulative, normative, discursive, and material elements. Some of which are designed to regulate, but many of which are not.

IV. MODES OF COPYRIGHT GOVERNANCE: REGULATION, NORMS, DISCOURSE, TECHNOLOGY

This Part illustrates the analytical and empirical value of the proposed model by spelling out the kind of questions and answers it enables, and by providing a short application of the model to the governance of imitation and innovation in game development. This illustrative case study is based on a multi-method case investigation: a document analysis of industry handbooks, a discourse analysis of contested cases, and extensive interviews with different professionals and stakeholders from the games sector in Germany. We conducted semi-structured interviews with twenty German game practitioners and four legal consultants and in-house lawyers, taking about ninety minutes each.

TABLE 1: MODES AND LEAD QUESTIONS OF COPYRIGHT GOVERNANCE

	Research Questions	Empirical Account	Examples
Regulative Dimension	<p>Which actors establish which rules (scope!)?</p> <p>How is compliance monitored and deviation sanctioned?</p> <p>How are Rules interpreted and adapted?</p>	<p>Legal Analysis, Policy Documents, Legislation Process</p>	<p>Copyright for Games, Non-Disclosure Agreements, Internal Corporate Policies, Terms of Service of Development Environments</p>
Normative Dimension	<p>With which normative expectations are actors confronted?</p> <p>Which expectations are internalized?</p> <p>How are these norms established and negotiated?</p>	<p>Interviews, Ethnographies, Participatory Observations</p>	<p>Norms within Communities, Comedy, French Chefs</p>
Discursive Dimension	<p>What is “taken for granted”?</p> <p>Construction and deconstruction of shared frames and perspectives</p>	<p>Discourse Analyses, Politicization, Issue Formation, Frames</p>	<p>Debates around “Piracy” and “Stealing” IP, Understandings of Authorship and Creativity</p>
Technological Dimension	<p>Which rules and assumptions are inscribed into technology?</p> <p>How do services and algorithms structure and regulate our creative practices and our media usage?</p>	<p>Analyses of Technologies, Ethnographies of Tinkering, Digital Methods, User Interactions</p>	<p>Digital Rights Management, YouTube’s Upload-Filtering (Content ID), Development Environment</p>

A. *Regulative Dimension*

The regulative dimension is the one that is most familiar to scholars of copyright. In addressing the manifest rules and regulations, it is mainly concerned with laws, contracts, court decisions and other legal documents. As an institutional element, the regulative dimension operates essentially in three steps: rule-setting, monitoring, and enforcement. In this view, institutions are accomplished through “the capacity to establish rules, inspect others’ conformity to them and, as necessary, manipulate sanctions—rewards or punishments—in an attempt to influence future behavior.”⁵⁵ Researching this aspect of governance might be considered business-as-usual for copyright scholarship, hence this Essay will not go into much detail here. Investigating this dimension can include both the substance of rules (*e.g.*, legal analysis) as well as its emergence and implementation (*e.g.*, policy analysis).

In the case study, we were interested in understanding how different modes of governance frame and regulate imitation and innovation in game production. The production of games is characterized by the fact that imitation is a common and necessary industry practice that even spurs innovation. Entire game genres (one can think of platform side scroller games or first-person shooters) have emerged by remaking and extending on great games.⁵⁶ While the view that imitation is a constituent part of innovation seems to be shared throughout the industry. Recent tussles over alleged clones have sparked lively discussions about legitimate and illegitimate imitation practices in game development.

Interestingly, the legal and regulative dimension is far from providing a clear-cut answer for “navigating this grey zone.”⁵⁷ Games are composed of several elements (rules, graphics, source code, audio), some of which can be separately protected by intellectual property law. For instance, the source code and audiovisual elements are protected by copyright, while game hardware manufacturers often have their technology patented.⁵⁸ However, a unique part of games compared to other audiovisual media is the rule-based system. For example, in the case of chess, it is not the exact colors and shapes of the pieces that define the

55. SCOTT, *supra* note 42, at 52.

56. JESPER JUUL, *A CASUAL REVOLUTION: REINVENTING VIDEO GAMES AND THEIR PLAYERS* 84 (MIT Press 2012).

57. van Roessel & Katzenbach, *supra* note 20.

58. CASEY O’DONNELL, *DEVELOPER’S DILEMMA: THE SECRET WORLD OF VIDEOGAME CREATORS* (MIT Press 2014); Arya Tayebi, *Interactivity, Immersion and Innovation: Can Videogames Be Adequately Protected by Copyright Law?*, ARYATAYEBI (Feb. 10, 2012), <https://aryatayebi.wordpress.com/2012/02/10/interactivity-immersion-and-ideas-can-videogame-s-be-adequately-protected-by-copyright-law/>.

game, it is the possible moves and affordances of the pieces, the actions that emerge from these affordances and the interplay between the actions. Such rule-based systems could arguably be understood as abstract ideas rather than concrete or fixed expressions.⁵⁹ As such, games have an “uncopyrightable core: the actual play of the game.”⁶⁰ Thus, the long-lasting tension between imitation and inspiration in the games sector and the conflicts around the alleged copying of games is not easily resolved in the regulative dimension.⁶¹

In the interviews we conducted, we were confronted with a striking neglect of the regulative dimension both with regard to the tension between imitation and innovation as well as to legal aspects of game production in general. To put it plainly, the designers, graphic artists and programmers that produce the games we play every day, and that generate enormous revenue, neither reflect legal issues in their daily work routines nor are there regular interactions with legal staff. They seem to operate with vague, lay concepts of copyright in the back of their minds. When asked directly, most developers could not assess correctly if a certain game element was protected by copyright or not, or if a certain practice crosses the line to infringement. Only in big studios are professional legal assessments included in the process, but at very late stages when production is mostly done and marketing kicks in. In sum, the regulative dimension is not totally absent from creative processes of game production, but it is certainly in the background.

B. Normative Dimension

The normative dimension addresses values and norms that classify practices as legitimate or illegitimate and appropriate or inappropriate. In contrast to the regulative dimension, rules here are neither manifest nor are they sanctioned by defined punishments. Instead, they are grounded in shared values and operate as normative expectations: “The expectations are held by other salient actors in the situation, and so are experienced by the focal actor as external pressures. Additionally, to varying degrees, they become internalized by the actor.”⁶² Typically, norms are strongly contextual and differ between communities, societies, and world regions. This dimension of governance operates according to

59. GREG LASTOWKA, COPYRIGHT LAW AND VIDEO GAMES: A BRIEF HISTORY OF AN INTERACTIVE MEDIUM (2013), <https://ssrn.com/abstract=2321424>; Tayebi, *supra* note 58.

60. Bruce E. Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439, 479 (2011).

61. The assessment of games as objects of copyright and related IP provisions is not key to the argument of this Essay, so I keep it short. Cf. LASTOWKA, *supra* note 59, at 10; Tayebi, *supra* note 58; and Boyden, *supra* note 60 (analyzing the copyright’s application to digital games and long lists of court cases).

62. SCOTT, *supra* note 42, at 55.

a “logic of appropriateness.”⁶³ In this perspective, people do not behave according to an economic calculus nor to a legal assessment, but they adjust their actions to what they perceive as appropriate in a certain situation and context.

To act appropriately is to proceed according to the institutionalized practices of a collectivity and mutual understandings of what is true, reasonable, natural, right, and good. Actors seek to fulfill the obligations and duties encapsulated in a role, an identity, and a membership in a political community. Rules are followed because they are perceived to be adequate for the task at hand and to have normative validity.⁶⁴

The literature on low IP regimes is strongly based on this perspective although sometimes the connection is not always drawn. The community of French chef investigated by Emmanuelle Fauchart and Eric von Hippel displays typical aspects of normative ordering.⁶⁵ Implicit rules and shared expectations about legitimate and illegitimate practices are established, such as a prohibition of 1:1 copies, confidentiality, and referencing the original creator.⁶⁶ Noncompliance to these expectations is not sanctioned by monetary or legal punishments but by exclusion from the community and from further sharing of expertise.⁶⁷ With recipes and original ideas for the combination of ingredients not being protected by formal IP provisions but by these informal norms, the normative dimension and the regulative dimension are not congruent in the case of French haute cuisine.

Our interview study on game production, similarly revealed divergence between these dimensions but with a weaker normative stance and less cohesion within the community. There is consensus between professionals across the industry that “re-skinning” a game, that is plainly copying a game and only changing the art style, is an objectionable practice. Especially if the rule-based system strongly shapes the gameplay experience, copying the system and merely coating it with another visual layer is even more illegitimate.

I think it’s okay if you just copy the idea [. . .] and do your own game, your own balancing, your own pricing. What is harder or,

63. JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 23 (1989).

64. Johan P. Olsen, *Understanding Institutions and Logics of Appropriateness: Introductory Essay*, ARENA 3 (2007), http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2007/wp07_13.pdf.

65. Fauchart & von Hippel, *supra* note 4.

66. *Id.* at 193.

67. *Id.* at 195.

what I think you should not do, or what I don't wanna do myself, is to take a game and copy it exactly, only change the art stuff.⁶⁸

This informal norm runs counter to the regulative dimension, because copying the game idea and game play does not constitute copyright infringement as long as you re-program and re-skin the product.

On the other hand, the copyright infringing practice of taking art assets of classic games such as *Super Mario* is in many cases considered legitimate practice, as long as the game developers add interesting twists to their own game and not merely copy the whole original game.

In sum, the normative dimension rests on cohesive communities and societies to establish shared norms and expectations. The evocative cases of the low IP literature are examples of that (French chefs, U.S. comedians, magicians). In the case of the games industry, we found community norms to be less strong. This might be no surprise since the market is vast, global, and highly profitable—which rather hinders the development of shared norms. Only in the subset of so-called Indie Developers were strong community norms and beliefs recognizable.

C. Discursive Dimension

The third dimension addressed the ways we understand and talk about creative practices and products. This does not necessarily imply direct normative assessment but nonetheless shapes our thinking and doing. In Scott's institutional theory, this dimension is denoted as the "cultural-cognitive pillar" of institutions.⁶⁹ In that view, "compliance occurs in many circumstances because other types of behavior are inconceivable; routines are followed because they are taken for granted as "the way we do these things."⁷⁰ In contrast to the regulative and the normative dimension, practices here are not explicitly classified as legitimate or illegitimate. We just take certain things for granted, and routinely follow these assumptions.

Dan Burk's paper on the sociology of patenting addresses this dimension.⁷¹ When he refers to Mircea Eliade's definition of myths as narratives that are "true but not factual," he exactly refers to the enduring quality and impact of widely shared beliefs that are deeply embedded in social routines and structures, so that questioning them is a hard job, even with good reasons.⁷²

68. Material from interview study, INT17-S-M (Interviewee No. 17, S=large studio employee, M-manager).

69. SCOTT, *supra* note 42, at 56.

70. *Id.* at 58.

71. Burk, *supra* note 2.

72. *Id.* at 429; MIRCEA ELIADE, MYTH AND REALITY (1963).

In this Essay, I rename this dimension as *discursive dimension*, because communication and discourses are the medium in which these beliefs and frames can be identified. With “piracy” and “stealing” on the one hand, and “sharing” on the other, the copyright debates are replete with examples for discursive struggles over the ways we should understand and frame the changing practices of media and culture. While most scholarship addresses these debates only as prelude or as independent variable for the real thing, copyright reform and legislation,⁷³ an institutional understanding of governance, suggests taking the discursive dimension seriously in its own right: words matter!

The brilliant works by Martha Woodmansee⁷⁴ and Mark Rose⁷⁵ on the emergence of the author-concept and its important impact on the consolidation of copyright as a legal instrument point to another aspect of this dimension. The regulative as well as the normative dimension are strongly dependent on the discursive dimension. Here, subjects and categories are constructed, and only on these grounds normative and regulatory provisions can operate. How do we come to privilege the author over the paper factory with regard to a book? Why do we take the idea of a self-contained work for granted, although we know that we all stand on the shoulders of giants?⁷⁶

With regard to our interview study, I highlight three strong currents in this dimension. The first concerns creators’ understanding of game design. All game professionals interviewed hold that game production is a highly collaborative process, full of mutual imitation and references. Devising new games always and necessarily includes great portions of existing ideas. Indeed, for a new game to become a good game, professionals argue that you should not innovate on all levels of game design; otherwise players would be confused and unable to play the game. Instead, remixing existing elements and giving the game an original twist is considered a good game design: “A lot of time it’s more about picking the right ingredients that are already there. I mean, 95% of what we do always [already] exists somewhere.”⁷⁷

73. Cf. SEBASTIAN HAUNSS, *CONFLICTS IN THE KNOWLEDGE SOCIETY: THE CONTENTIOUS POLITICS OF INTELLECTUAL PROPERTY* (2013).

74. Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 *EIGHTEENTH-CENTURY STUD.* 425 (1984).

75. Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 *REPRESENTATIONS* 51 (1988).

76. ROBERT BALDWIN ET AL., *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* 52 (2012) (Regulatory theory has somehow included this into its concepts by acknowledging that “the underlying ideas [...] and the broader intellectual climate that regulat[es] instruments” — but again, are only a prelude to “serious” regulation).

77. Material from interview study, INT12-I-O (Interviewee No. 12, I-independent studio, O-owner).

The second aspect concerns game professionals' self-concept as creatives. Almost all interviewees, whether working as independent game developers or as employees in a big studio, considered themselves as creative professionals, thus aiming for producing something new and original in their daily job. This self-concept has ramifications for the tension between imitation and innovation discussed here. Even if the management demands replicas of successful games by competitors, the developers are guided by strong intrinsic motivations to include original elements in the new game. As one interviewee put it: "I always try to smuggle something in."⁷⁸

A third element in this dimension stemming from the interviews is a strong understanding of authorship in a subset of the interviewees. Indie developers articulate a strong identification with their work. They consider the developed games as "theirs," as personal expressions. They understand the games they produce not foremost as commercial products, but as "heart projects." Some of the indie developers who were interviewed classified their games as "Autorenspiele," a German notion used to highlight the strong link between author and game.

D. Technological Dimension

The fourth dimension in this copyright governance model is the material-technological layer. The services and devices we use in our private and professional lives enable and at the same time, constrain the range of actions we pursue. From an institutional perspective, they contribute to ordering the social jointly with regulative, normative and discursive elements. As John Law writes, "[m]achines, architectures, clothes, texts – all contribute to the patterning of the social."⁷⁹ In this dimension, to put it plainly, the distinction between right or wrong, and appropriate or inappropriate, is translated into possible or impossible.

In the broader field of Internet Governance, Joel Reidenberg and Lawrence Lessig made a similar argument in the late 1990s:

Law and government regulation are [. . .] not the only source of rule-making. Technological capabilities and system design choices impose rules on participants [. . .]; the set of rules for information flows imposed by technology and communication networks form a "lex informatica."⁸⁰

78. Material from interview study, INT22-S-GA (Interviewee No. 22, S=large studio employee, GA-graphic artist).

79. John Law, *Notes on the Theory of the Actor-Network: Ordering, Strategy, and Heterogeneity*, 5 *SYS. PRAC.* 379, 382 (1992).

80. Joel R. Reidenberg, *Lex Informatica: The Formation of Information Policy Rules*

For this perspective, Lawrence Lessig has coined the catch phrase “Code is Law.”⁸¹ That line of argument always runs the risk of falling into the trap of technological determinism; but if integrated into an institutional perspective, it provides an instructive impulse into our thinking about how creatives work and how products are regulated and framed.

This dimension is of particular importance for copyright research. Digital Rights Management is an obvious example for the direct delegation of regulatory functions to the technological dimension. These systems try to translate strictly the legal or illegal distinction into possible or impossible actions on our devices and services, with sometimes frustrating and bewildering results. While DRM in the pay-per-download market for music has been too inconvenient to succeed, it is today so tightly integrated into many services we use daily that we barely recognize them (*e.g.*, streaming). Upload filtering technologies combined with IP rights databases such as YouTube’s ContentID, similarly constitute ordering processes on the technological layer. Algorithms sift through every uploaded video and identify audio snippets that match items in their IP database. As a default, every match is a potential copyright infringement, notwithstanding possible fair use practices and other restrictions of copyright claims. In effect, these systems tend to over-block content by removing works that are not infringing at all.

Turning to the case of imitation and innovation in game production, this dimension addresses the technological infrastructure of game development. Programmers and graphic artists routinely use software and programming environments that provide huge libraries and modules to help them build the game. No new game is technically built from scratch. In effect, the specific degree of imitation and innovation is strongly dependent on the technologies and their affordances. Level design, game engine, as well as control of the game character are regularly adopted from existing games—not only the concepts but also the implementation.

In sum, the technological layer is one dimension where the governance of creative production and consumption is situated. Like other institutional elements, it does not determine practices, but enables, constrains, and nudges people into one direction, and it hides alternatives.

through Technology, 76 TEX. L. REV. 553, 554–55 (1998).

81. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

V. A MODEL FOR COMPARATIVE COPYRIGHT RESEARCH

A. Comparing Modes of Governance Within a Sector

In analytically distinguishing different modes, discussion of their interplay sometimes gets neglected. The key analytical and empirical value of the proposed governance model is to investigate the relation between these dimensions and their respective effects. The actual relation between laws, norms, discourses, and possibly technological affordances in a specific context is an empirical question that is amenable to research.

Turning to our case study on game production, I have already highlighted several differences in the evaluation of game design practices in Part IV of this Essay. In Table 2, I summarize and compare the evaluations across the four dimensions and two practices: re-skinning and retro or homage games.

**TABLE 2: COMPARATIVE EVALUATION OF
GAME DESIGN PRACTICES
(LEGITIMATE PRACTICE AND ILLEGITIMATE PRACTICE)**

	Regulative	Normative	Discursive	Technology
Re-Skinning	No infringement	Objectionable Practice	Not considered creative work	Re-engineer the product with new code and elements
Homage/Retro	Infringing use of graphics and sounds	If creative remake, then legitimate	Creative work	Re-use of elements

White box: legitimate practice; Dark box: illegitimate practice

Re-skinning refers to re-producing a (often successful) game by copying the logic and mechanics of a game and only changing the art style. From a legal perspective, this is in most cases a non-infringing practice. As long as graphics and sounds are substantially altered, and the software code is re-written, this does not violate copyright or other legal provisions. In contrast, the normative evaluation within the game design community strongly rejects this practice. Looking at re-skinning from the discursive perspective, this is not only considered a normatively objectionable practice, game designers more fundamentally refrain from categorizing this a creative practice in the first place. From a technological perspective, re-skinning is not effortless—all material

elements (graphics, sounds, software code) need to be redone so not to infringe upon the original.

A contrasting case is the production of *homage* or *retro games*. Popular especially in the context of independent developers is the production of games that allude to iconic games, often from the 1980s or 1990s, such as *Super Mario Brothers*. Typically, game designers take the characters and maybe soundbites from these old games and produce new games with a different game-play and narrative. From a legal perspective, this regularly constitutes copyright infringement, since developers include the original, thus protected characters or very close adaption, and integrate iconic graphic elements or soundbites.⁸² Yet, from the developer community's normative point of view, this does not violate community norms as long as the game constitutes a creative remake of the original (*e.g.*, by performing a gender-swap of the main characters or giving the game a different twist in game play).⁸³

These short examples illustrate the analytical and empirical value of this model. Depending on the object of study, the four governance dimensions afford and support different creative and economic practices—and in many cases, they are not congruent. Regulative provisions diverge with normative assumptions in a community, and public discourse is at struggle with practices enabled—and maybe even nudged—by new technologies. This is not only true with game designers. The same is true for the mismatches identified by Jessica Silbey,⁸⁴ and also for the community norms in low IP regimes. Similar to the game designers, both French chefs and comedians seem to value greatly the underlying idea of their creative works. Thus, the informal ownership claim put forward by creatives in these sectors encompasses game play and mechanics (game designers), the combination and preparation of ingredients (French chefs) and the core structure of a routine and joke (comedians)—elements that are typically not protected by copyright as they are considered ideas rather than works. The analytical framework presented here thus allows us to identify these mismatches and to discuss possible reactions, if necessary.

82. See Maria B. Garda, *Nostalgia in Retro Game Design*, DiGRA (2013) http://www.digra.org/wp-content/uploads/digital-library/paper_310.pdf (for the common practice of remixing popular video games); see LASTOWKA, *supra* note 59; and Boyden, *supra* note 60 (for a general copyright assessment of video games and their elements).

83. *Id.*

84. SILBEY, *supra* note 1, at 81.

B. Comparing Modes of Governance Across Sectors

This model also allows copyright and IP scholars to compare models of governance across sectors. In the discussion of low IP regimes and other sectors, we have seen that the impact and salience of different modes of governance varies: in the case of French chef and comedians, for example, informal norms appear as the main governance mode.⁸⁵ In game design, norms have emerged as a relevant mode as well, but regulative, discursive, and technological aspects also contribute to the ordering of creative practices. In other sectors, copyright legislation and licensing contracts might well provide for creative practices and outputs.

TABLE 3: COMPARATIVE ASSESSMENT OF GOVERNANCE MODES ACROSS SECTORS (STRONG IMPACT, AVERAGE IMPACT, AND WEAK IMPACT)

	Regulative	Normative	Discursive	Technology
Sector A				
Sector B				
Sector C				

Black box: strong impact; Grey box: average impact;
White box: weak impact

The schematized comparison of sectors in Table 3 illustrates the analytical value of the proposed governance model. Prevalent copyright research presumes a strong impact of law, ideally incentivizing innovation—and then concludes, allegedly with surprise, that “IP is not working as it should”⁸⁶ or that some sectors represent a “negative space of IP.”⁸⁷ This is because copyright researchers tend to focus on law and other legal instruments, but in the context of the presented model, this is but one dimension. In consequence, the model allows us to comparatively address the respective impact of different governance modes: regulation, norms, discourses, and technology. It turns the assumption of copyright and IP scholarship and policy (that IP (a) has impact on creative practices

85. Fauchart & von Hippel, *supra* note 4, at 187–201.

86. SILBEY, *supra* note 1, at 347.

87. See Rosenblatt, *supra* note 7.

and (b) incentivizes innovation) into an empirical question⁸⁸: What is the impact of IP on creative practices in relation to norms, discourses and technology? Does it hinder or promote innovation? What is considered innovation in the first place? Only by bringing different modes of governance into relation, instead of isolating regulative means, we start to fully understand the interaction between creative practices.

VI. DISCUSSION

This Essay has set out to develop a multimodal concept of copyright governance. In a nutshell, it emphasizes the point that there is always more than law in controlling IP, not only in low IP regimes. Building on institutional theories, I suggest four modes of copyright governance: (1) A regulative dimension, addressing the provision and enforcement of formal rules such as laws, court decisions, and terms of services; (2) a normative dimension, investigating the prevalent assumptions about legitimate and illegitimate behavior in a specific community or sector; (3) a discursive dimension, addressing the framings and debates on creativity, authorship, and originality; and (4) a technological dimension that investigates the embodiment of affordances and rules in infrastructures, devices, and algorithms relevant to creative work.

In analytically distinguishing different modes, discussing their interplay sometimes gets neglected. But that is exactly the core idea of this governance model—ordering takes place when these dimensions reinforce each other, but also when they contest each other. Especially in the context of copyright, divergence between these dimensions has been obvious in recent years. Technologies strongly nudge users towards infringing behaviors; norms prevalent in many communities do not fit well within the formal IP regulations.

The illustrative case study on imitation and innovation in games production similarly has shown incongruences between the dimensions. While legal regulation allows for re-skinning of games, the developers consider that a bad and objectionable practice.

The empirical value of this model is that it allows for comparative approaches. It allows comparison of the empirical impact and specific effects of the respective dimensions not only within one sector, but also across sectors. From this perspective, the prominent low IP sectors can be characterized by a low level of formal IP regulation but a high level of informal normative expectations. The governance of content on online platforms, such as YouTube or Facebook, constitutes a promising example for future case studies. On the regulative dimension, we might

88. Cf. Burk, *supra* note 2, at 452; Silbey, *supra* note 40, at 347.

expect a shift from public law to contractual elements such as Terms of Service, and Community Guidelines. Similarly, we seem to experience a shift towards regulation on the technological dimension, given the massive amount of content that these platforms host and the increasing political pressure for taking accountability for this content. As a consequence, the platforms have implemented filtering mechanisms.

I hope to stimulate the discussion on theoretical aspects of interdisciplinary copyright research with this Essay. The literature on low IP regimes has given many impulses for extending our understanding of how creative work is ordered and framed. This Essay tries to develop that line of thinking into a coherent framework that integrates diverse modes of ordering without privileging one over the other. The specific impact of the respective modes is an empirical question. I hope the copyright governance model put forward here can contribute to answering this question.