Introduction

More and more third parties jump on board to help the artists, or labels, navigate and collect feedback or money, but it just adds to the noise and confusion, further widening the gap between fan and artist and the journey of their music. I feel digitally torn apart; and in the data-driven era, the movement of music, money and feedback should be frictionless. A total rethink is in order.¹

This is how Imogen Heap, the British singer-songwriter, creator among other successful projects of the 2009 album *Ellipse*, described the woes of music copyright. It is not just music. The entire copyright-based system of production of entertainment and informational works is in disarray. She is right that a ‘rethink’ is called for. Instead of trying to change what is in the box of copyright, however, this book argues that the box itself needs to be restructured.

The book’s main premise—and the explanation of its title—is that copyright is either poorly structured (one can always try to impose a structure ex post) or, as I see it, unstructured. The inadequacy or absence of the structure of the current copyright system is due to two main factors, both of which are linked to the transition of almost everything to the digital realm.

First, copyright evolved from a system mostly meant to control certain uses of physical products to a major regulatory vector for the online environment. It was created for and traded by and between professionals (authors, publishers, producers, various distributors, etc.), who could typically afford greater transaction costs, including understanding sometimes arcane copyright rules. This also afforded policy makers the ‘luxury of expediency’ in defining copyright rights not in terms of actual market or other impacts but by focusing on the technical nature of the use made of a protected work (reproduction, adaptation, performance in public, communication to a public at a distance, etc.). In the ‘bricks and mortar’ environment, the poor structure of copyright could often be remedied in contracts among copyright ‘professionals’. Private ordering stepped in where the

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statute created unnecessary complexity or did not map well into actual uses of protected material. This is no longer the case. The shift from a professional or ‘one-to-many’ distribution infrastructure in which copyright was managed mostly by professionals to a ‘many-to-many’ infrastructure means that individuals users are at once authors, users and reusers of material and hence in the crosshairs of copyright. Contractual patches no longer work well or make matters worse, such as lengthy End User Licensing Agreements (EULAs), those contracts of adhesion in which users are often asked to give up the right to use statutory flexibilities.

Second, the size and might of online intermediaries (right holders and/or users) pulling policy decisions in their direction without any obvious desire to compromise has eclipsed many options for discussions focusing on actual authors and users of copyright material. The result is an increasing distance between authors, individual users and copyright policy—that is the gap described by Imogen Heap in her quote at the beginning of this chapter. This is making it much harder to see—and for many users to accept—a justification for copyright. Yet, justifications, properly recast, do exist and should inform appropriately structured policy choices.

I do not believe that there is a perfect copyright law somewhere in a platonic policy cave. Policy is imperfect and contingent. Changes in technological tools and the social norms that develop around them make optimal policy design a moving target. Indeed that ‘movement’ (of the target) is best viewed as part of the equation, thus favouring a (more) dynamic copyright system. That said, dynamism and discombobulation are not synonyms. Copyright should always strive to achieve normative equilibrium. In this sense, one can agree with Plato’s direction to the legislator to bring about a result that is the closest possible to the ‘most noble and most true’. As discussed in the Preface, I can hardly think of anything nobler and truer than humans fostering human creativity.

Against this backdrop, this book has two specific objectives. First, it aims to identify structural and other deficiencies within the current system. Part I of the book is thus diagnostic in nature. Part II offers detailed and concrete pathways to improve the current system and articulates a structured approach to international copyright reform. A comprehensive reform is not only necessary to ensure that copyright meets its needs in the future. It is also a far better alternative than the current path to a patch-

2 I am perhaps more Aristotelian because I do not start from that premise, I get there primarily from observation of human history. Art and creativity have played and continue to play a key role in human evolution and development.

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work of regional and bilateral trade agreements, sometimes not compatible with one another, evolving in parallel with myriad new multilateral copyright treaties often ratified only by a fairly small number of countries, and then only years after the treaty’s adoption.

The key point I wish to demonstrate in Part I is that there is a lack of, or deficiency in, structure and that remedying it will increase the relevance, usability and user-friendliness of copyright. Copyright should not be structured around two ‘sides’ as most debates are now framed, namely authors and users. Yet that is the way most laws and national treaties read: a series of exclusive rights on the one hand, and a series of exceptions and limitations, on the other.

My proposal, in very quick summary, is to rebalance the expression of the right itself to align it with its purpose, therefore reducing the perceived need to fight the right, including by introducing more and more exceptions and limitations. The economic component of copyright should be a right to prohibit uses that demonstrably interfere with actual or predictable commercial exploitation. This would of course be subject to limitations and exceptions, but the objective is to build intrinsic limits in the scope of the right itself and make it independent of the technical nature of the use made (copy, performance, etc.) although in order to comply with international norms, which this book considers an essential part of the solution, the right should be interpreted by defining ‘use’ to encompass current technical uses (reproduction, performance, communication). A restructured right allows cumbersome interfaces between the various E&Ls (say, between fair use and a library exception) because the right itself would be more focused. The proposal includes, in the Epilogue, a partial new draft of the Berne Convention, still today the most important copyright treaty—at least in terms of global membership, with 172 member states as of December 2016 that remains compatible with the obligations undertaken by Members of the World Trade Organization (WTO).

The book uses a creator-user dialogic approach to facilitate analysis, but restructures the paradigm used to structure rights themselves because a systemic view of policy structures is required. In other words, rights, exceptions and remedies must be viewed in this ‘systemic’ light. Building a key limitation in the formulation of economic rights is not entirely new of course. For example, the right of public performance is inherently limited by the notion of ‘public’.

The task at hand is to balance the protection of authors of ‘works’, on the one hand, and ‘access’ to such works by users and reusers of

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4 Internationally, the most important treaty in the fields of copyright (in
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copyrighted material, on the other hand. While efforts to seek a balanced level of protection are not new,\(^5\) translating this high-level balancing act into a structured approach and deriving actual policy objectives, levers and decisions has proven elusive. Reform, and the restructuring suggested in this book, is based on the public interest. But, unlike a number of commentators, I do not believe that the public interest is always best served by eliminating or attempting to reduce copyright.\(^6\) The public interest is best served neither by over-production nor by under-protection. In short, the level, mode and type of enforceability of copyright must all be balanced to achieve something as close to systemic protection at equilibrium.

That does not mean that the opposite is true of course, namely that more copyright leads to better outcomes. The problem is structural. Current copyright law is ‘one-size-fits-all’, yet at the same time highly fragmented, regime. This means that every copyright holder gets more or less the same package of ‘right fragments’ (reproduction, performance, adaptation, etc.), which can then be split by country, language, etc. But then copyright protects one thing, and one thing only, namely ‘works’,\(^7\) provides a single terms of membership at least), is Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, as last revised at Paris on July 24, 1971) 1161 UNTS 30 (Berne Convention). The importance and contents of the Convention are explained in Chapter 2. Article 2 of the Convention defines (by enumeration), the object of protection under the Convention, namely ‘literary and artistic works.’ In the United States, the statute refers to ‘works of authorship’. See the US Copyright Act 1976 (Copyright Act) ss 101 and 102(a), 17 USC s 102 (2010) (‘Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression. . .’).

\(^5\) As will be shown in Chapter 2, they can be traced back at least as far as the (original) text of the Berne Convention (1886).


\(^7\) In the US, sound recordings are works but they have a special regime, not having the public performance right and instead having a limited right in digital transmissions (Copyright Act 1976, s. 106(6)). That is due in large part to the fact that sound recordings have ‘copyright’ and not, as in other countries, a related or neighbouring right. See Tyler T. Ochoa, ‘Is The Copyright Public Domain Irrevocable? An Introduction to Golan v. Holder’ (2011) 64 Vanderbilt Law Review En Banc 123, 141. This in turn begs the question of the originality of sound recordings, since originality is a constitutional requirement to obtain federal copyright protection. See Melville B. Nimmer and David Nimmer, Nimmer on Copyright, vol. 1 (Matthew Bender 1963) s. 2.10[A][2][b] (discussing record producers’ originality requirement for copyright in the sound recording); and William F. Patry,
set of rights and exceptions and the term of protection is typically the same for all works. Copyright, simply put, is both highly fragmented and unstructured. The current system rests on the assumption that a single set of rights, limitations and exceptions works optimally to serve the interests of authors and those of the people who use and reuse their works. That is simply not so.

The book gives authors and users at least as much normative space as the intermediaries that dominate the discourse. After all, we need authors to create and users to enjoy their creations. Intermediaries, in contrast, are contingent. Yet they capture the policy debates, often to gain market advantage. In doing so, they distance copyright from its normative foundations.

The most common legal metaphor to describe a balancing process is probably that of a scale with two pans. In copyright policy terms, the scale used to construct this book weighs the interests of authors, in one pan, and those of users, in the other, without tipping the normative scale unfairly in one direction. It is worth noting that this approach reflects human rights norms: Article 27 of the Universal Declaration on Human Rights (UDHR) protects both the rights of authors (to the protection of the moral and material interests resulting from and scientific, literary or artistic production) and the rights of users (freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits).

The book begins by exploring basic structural deficiencies in the current copyright system. It then considers the Berne Convention and its successive revisions until 1971. This will demonstrate that: (a) the protection of authors was instituted in the public interest; (b) there is no contradiction between adequate protection of authors and the public interest; and (c) the public interest requires appropriate limitations and exceptions for the benefit of (other) authors and users. It should indeed be self-evident that not all ‘authors’ are in the same situation. The harder and more interesting inquiry is whether one can push the analysis beyond merely acknowledging the existence of this diversity. Structuring copyright implies abandoning the fiction of homogeneity of authorship that pervades current policy and derives a taxonomy of authorship, with direct policy effects.


8 The Berne Convention does limit certain rights to specific categories of works. For example, art. 11ter provides a right of public recitation only to literary works, which seems logical enough.

9 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art. 27.
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To structure the proposed taxonomy, the book explores changes in the notion of authorship. It has evolved throughout the twentieth century and has now been replaced with that of a ‘twenty-first century author’. This author, who could be referred to as ‘post post-modern’, is often happy to reuse pre-existing material and to cooperate with others, but also insists on attribution (that is, recognition of her authorship). Of those authors who seek protection of their interests, some, not all, also expect financial returns when their works are used in commerce. For those who do not, it is often because they are otherwise compensated (academics and scientists for example).

Unlike distributors and commercial entities that aggregate rights and content, most authors (whether or not they seek financial gain) have a limited interest in trying to control the dissemination of their works. Simply put, most authors want attribution and wide dissemination, at least once a work has been made publicly available. Some want payment, but very few want (or think they can or should exert) control over what individual non-professional users do. This matters in policy analysis because, while the major commercial intermediaries who often own copyright and who do want (some) control over dissemination networks are only a part of the copyright picture, copyright policy often seems entirely articulated around their interests. The current system provides protection without intentionality. A vast amount of material is protected by copyright by default due to the absence of formalities. This issue is ripe for a fresh debate.

The other pan of the scale weighs the interests of users. Users can make mere consumptive uses of commercial copyrighted material, such as watching a movie or reading a book. They can do more, however. They can add comments (and social media ‘likes’). They may want to re-disseminate the material with these ‘additions’. Some users will go beyond this. They will copy or derive from pre-existing works and sometimes genuinely transform and re-contextualize them, and become authors in their own

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11 In a WIPO study undertaken by Sam Ricketson, it is suggested that the term ‘exceptions’ be used for rules which ‘grant immunity from infringement proceedings for particular kinds of use’ (i.e., the ‘quotation-type’ of rules), whereas ‘provisions that exclude, or allow for the exclusion of, particular categories of works’ should be called ‘limitations.’ Sam Ricketson, ‘WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment’ (5 April 2003) SCCR/9/7 <www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805> accessed 11 May 2015.
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right. Others may only be looking for ideas or information contained in copyrighted material, for example as part of a research project (here defined very broadly). For them, searching, accessing and being able to quote and reuse is essential to their ability to engage with existing material.

The book proceeds as follows. Part I begins by exploring major structural problems with copyright and explores applicable constraints contained in relevant international instruments, including the Berne Convention, the TRIPS Agreement, and the ‘three-step test’, the most significant limit to a state’s ability to create limitations and exceptions to copyright in international law. While as a theoretical matter one could suggest that reform proposals ignore existing treaties, the book takes the view that countries are unlikely to pull out of WIPO and the WTO. The book does not take all existing constraints as a permanent feature of the system, however, and suggests, in the last chapters of Part II, a more realistic way to improve international copyright. It suggests a structured reform of the rights, exceptions and limitations, and, as noted above, the indispensable look at the regulation of their application, specifically via formalities and collective management. The book then turns to developing nations and the specific challenges they face in calibrating their copyright regime. The Epilogue proposes a concrete set of reforms, and suggests that they be enshrined in a revised Berne Convention, without leaving the WTO entirely out of the reform picture. A first Appendix explaining fair use and fair dealing follows for readers who may have an interest in learning more about open-ended statutory formulations of permitted uses. Another Appendix unpacks another important international set of limitations, namely those contained in the Berne Convention Appendix.

A comprehensive reform is not only necessary to ensure that copyright meets its needs in the future. It is also a far better alternative than the current path to a patchwork of regional and bilateral trade agreements, sometimes not compatible with one another, evolving in parallel with myriad new multilateral copyright treaties often ratified only by a fairly small number of countries, and then only years after the treaty’s adoption.