Preface

This book aims to inform the debate about the future of copyright and its influence on human creativity. It is possible that, in a few years, all books will be the product of artificial intelligence and a version of Bob Dylan’s songs will be written by the son or daughter of IBM’s Watson. We are not quite there. Copyright has been, and is still, linked to many forms of (human) literary and artistic creation. Literature and art are perhaps the most vivid mirror of a society, its deepest aspirations and fears, its horrors and its magnificence. How policy affects that creation is, therefore, crucial to future human progress.

In common parlance, ‘artists’ create Art. In copyright, we call artists ‘authors’. We could call them ‘creators’. Art is used and often owned by those who distribute, disseminate, package, and sell it, to be enjoyed or used in one form or another by all of us. Art then enters a cycle of appropriation, reuse and transformation, sometimes leading to more creation. Creation has a very broad meaning in the copyright realm. It includes ‘art’ proper but also non-fiction writing and many more utilitarian forms of creation such as maps and (certain) computer programs. Some quality contributions to human progress are created by amateurs, from deeply influential essays to child prodigy music composers. Talent—however that term is defined—seems not to have been distributed evenly; yet even abundant talent needs to be honed, nurtured and developed. Mozart started composing as a child but few of the works he wrote before the age of 21 are among the ones people listen to on a regular basis two and half centuries later. That nurturing is a key function that copyright, properly structured, can accomplish. This book proposes a way to structure copyright internationally to achieve this aim. There are no doubt many other ways to get there, but I can think of no higher policy objective. There is a fundamental ‘anthropological’ aspect to the quest for human development and policies that support it, although there is a sheer economic argument to be made as well: in the ‘knowledge economy’, creativity replaces material goods. Immaterial capital displaces physical capital. Knowledge is a commodity in itself; it is increasingly produced not to support the production of material goods (e.g., an improvement on a physical device) but for its own exchange value. As a matter of human and economic development,
policy must ensure that those who can, and will, push their creative limits, including in developing new knowledge, can do so.

True, technological changes make the policy work ahead harder. Those changes will alter in unforeseeable ways the interaction between humans and machine. Whether humans adapt to the machine (think of all the people walking with their heads down looking at a small glass screen) or whether the machine helps human creativity and potential flourish is the next great question. Law and policy can only influence the course of events up to a certain point, in part because regulatory interventions are so often educated guessing at best. Yet the inversion that André Gorz and others have described—the economy serving humans rather than the other way around—is the best possible outcome.

Good policy can maximize our chances of getting there. Copyright is not the only tool in the policy toolbox of course. It forms part of a broader set of policies known as intellectual property (IP) and IP itself is part of an array of cultural and economic levers available to policy makers, from tax credits and subsidies (ex ante tools) to awards and prizes (ex post tools). The copyright system remains front and centre in this discussion, however. Yet it is a broken system. Not surprisingly, many voices have called for copyright (and sometimes all of IP) to be jettisoned as an obsolete industrial revolution era policy dinosaur. The early days of the Internet led the Grateful Dead’s John Perry Barlow to declare copyright dead. It is not. Others have made it their task to reduce copyright to its simplest expression, reflecting an underlying assumption that copyright is a negative—as little copyright as possible is necessarily a better outcome. Perhaps calls for reduction are merely a reluctant acknowledgment that it is unrealistic in this era of trade rules to think that copyright can be scrapped entirely.

There are two other ways to see such recent developments. One is a cynical view. Many major commercial ‘intermediaries’ whose business is to sell advertisements need ‘content’ in myriad forms to draw users to their apps, sites and services. Whether it be a cat video or a Fellini movie, a recording of a high school band or a Puccini opera, a blog-post or a Jane Austen book matters not to them. I submit that it should matter to us all. Indeed, this concern must inform proper copyright policy. The other way to see recent developments is to embrace them, because they do lead to progress in a number of areas. The idea that entire libraries of paper books can be word-searched online is clearly a positive development, leaving aside for now the idea that those who write those books need not be remunerated for the uses of their works. The power of the Internet to disseminate new creations worldwide at little or no cost is a powerful tool to level the distribution playing field (for example by allowing anyone to publish
(Re)structuring copyright

an ebook) and potentially bringing all cultures, not just major players, to ‘users’ worldwide. Digital tools that allow amateurs and professionals to create, modify and add their own creativity to existing works can allow new creations to emerge and flourish, although it can also lead to ‘lazy’ creation by copying. Imitation has always been of the human creative process and this has now been raised to immeasurably higher levels, for both good and bad.

More ‘content’ is a good thing. More good ‘content’ is a far better thing. By ‘good’ I mean the type of work that alters our perceptual filters, forces us to think and rethink our world, moves us, and hopefully can make us better humans. Sometimes it is hard to know which is which. The initial failure of many new forms of art, including the famous rejection of the Impressionists by the bourgeois Parisian elites, come to mind. It is clear, however, that to achieve those aims new ‘content’ must not only be created, it must be made available. Current policy efforts aimed at providing new and stronger ways to take down unauthorized content are thus often misguided, although not in cases of straight piracy that add no value. We should aim not to take content down but to put more good content up. And all of that cannot and should not happen at the expense of those who have spent their lives honing their craft and/or by preventing new creators to do so. An equilibrium must be established—it can be done.

The current lack of equilibrium and the deficient structure of copyright results, in part, from a process of historical changes and accretions to the list of copyright ‘rights’ and in part from a lack of clarity as to its purpose. Indeed, very few national laws state one or more purposes of copyright. European Union Directives often mention several aims in their recitals. The definition of a purpose is often seen as a binary exercise. I have been asked so many times what ‘side’ of copyright I was on. Must one side win? This book takes the view that we can all ‘win’.

The United States Constitution is a helpful guide. It is unique in that it states the purpose (Progress of Science and Useful Arts), beneficiaries (Authors) and mode of implementation (Exclusive Rights in ‘Writings’, for Limited Times) of copyright. Copyright should promote ‘progress’. Words matter. This means that copyright is not needed to promote mere ‘change’. Change happens no matter what. Progress, not necessarily so. In his 1974 Invitation to Jurisprudence Professor Harry Jones noted that not all forms of change are progress. Change that is not progress means moving sideways or going backwards. Change is merely a difference between two points (A and B) on a timeline. Progress is an improvement at point B.

Progress does not mean that there is an end-state that we must identify, such as Fukuyama’s initial description of an End of History. But human
progress, its emancipation, through science and the arts, is surely progress. That said, governments, courts and policy makers cannot and should not dictate the direction of societal and technological change. Cultural memes and economic forces are too powerful to resist, and often they lead change that does constitute progress. But I submit that it is the role of all branches of government to promote progress by ensuring that a larger proportion of change is progress. It is the role of academics (among others) to illuminate the economic, sociological, philosophical, and historical underpinnings that can then inform the thinking about how policies can affect the degree to which change will lead to progress.