Introduction

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Much has been written on the theoretical aspects of copyright and also on the cultural industries. Much less has been written about the applied side – how copyright law works in practice. How do lawyers, copyright collectives, authors and performers, and firms in the cultural industries manage and administer copyrights? What are the economic, legal and managerial problems? What are the implications of these problems for copyright policy?

We live in an era in which technical changes due to digitalization are significantly affecting markets in the cultural sector, with implications for artists and other cultural workers, for the organization of the cultural industries and for consumers. These changes are raising questions about the whole purpose of copyright, as well as its ability to adapt to and cope with technical and economic developments. Napster has pushed these issues to the front page of every newspaper. As may be seen from the chapters in this book, some contributors question the efficacy of copyright, which is increasingly seen as protecting multinational corporations rather than individual creators. Others are less critical of copyright per se but question its ability to meet current challenges. More specific problems are analysed: Landes discusses copyright in relation to the development in contemporary art of appropriation art, in which artists purposely use other artists’ images (the same issues arise in music sampling); Torremans considers the problem of what law should govern international transactions of copyrighted material; Rushton provides an economic analysis of freedom of expression; Hakfoort asks whether there is an economic case for extending copyright; Gallagher shows that compulsory licensing is an inevitable aspect of copyright administration; Macmillan is critical of the role of copyright in its influence on the economic power of cultural industries and on cultural development; Smiers shares the same concerns, particularly for the Third World, advocating the abolition of copyright; Kretschmer analyses the role of music collecting societies in Europe and Einhorn gives a detailed explanation of musical licensing in the digital age; Farchy and Rochlandet evaluate economic and legal solutions to Internet distribution of copyright material; Matsumoto provides data on the copyright earnings of Japanese performers and identifies problems in the administration of performers’ rights with digitalization; Tschmuck gives an...
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All these authors, whose biographies are to be found on pages viii to xii, participated in the international conference ‘Copyright in the Cultural Industries: Economics, Law and Management’ at Erasmus University Rotterdam in September 2000. The conference was opened by Rick van der Ploeg, the Dutch Secretary of State for Education, Culture and Science, who is a well-known academic economist; the text of his speech is the opening chapter in this volume and presents the policy-maker’s view of copyright issues in the cultural industries. The purpose of the conference was to bring together academics from the relevant disciplines with those who administer copyrights, and a particular feature of the conference was a panel session of practitioners. A list of panel members is to be found in the Preface. Having learned in my own research how much academics in this field have to gain from this type of exchange, I wanted as conference organizer to encourage this interaction. The panel discussion’s main theme was the difficulty of royalty collection with Internet use; two aspects of this were the perceived resistance on the part of consumers to pay for online copyrighted material and the collecting societies’ data problems with digital delivery. This dialogue between practitioners and academics is clearly an important one, not only for understanding the changes taking place around us but also because it provides a basis for assessing the important policy changes that are now being mooted to adapt copyright law, nationally and internationally, to the Internet. I hope this book, with its international flavour, can inform these discussions.

In order to make the contents of the chapters in this book accessible to those who are new to copyright issues, a brief introductory summary of the main topics of copyright law is provided before proceeding to a short summary of each chapter. Those familiar with copyright law can safely skip over the next section.

INTRODUCTION TO COPYRIGHT

The acknowledged purpose of copyright law is to protect the work of authors from unauthorized use. It does so through creating statutory property rights, consisting of economic rights, which enable authors to earn royalties for their intellectual effort, and moral rights, which protect their integrity. Copyright law gives the right to copyright owners to exclude others from copying their work without permission, thus creating property rights that overcome some of
the public good aspects of information goods by preventing ‘free-riding’, that is, unpaid use. It therefore provides an incentive to creative work. As techniques for reproducing and copying creative work have developed and the hardware for applying them has become cheaper, making it possible for the average household to own several copying devices (aural and video tape recorders, photocopiers, computers), the scope and degree of protection of copyright law has increased. Copyright law does not protect ideas, only their expression in fixed form (the fixation); copyright belongs initially to the author, the creator of the first fixation and is automatic in some countries. Copyright applies to a wide range of literary, dramatic, musical and artistic works in various media, such as broadcasts, films, recordings, computer software and the like. Copyright law confers rights on the basis of creative effort; thus arrangements, compilations, listings, databases and so on are protected by copyright separately from the original material embodied in them. Neighbouring rights (rights ‘neighbouring on’ copyright) are property rights of performers for their fixed performances and of firms in the cultural industries that create works, such as literary publications, sound and image recordings and the like. Copyright lasts for the life of the author plus 70 years and neighbouring rights 50 years from the date of fixation. It should be noted that in countries with an Anglo-Saxon legal tradition (such as the UK and USA), there is not such a strong distinction between copyright for authors and neighbouring rights as there is in European countries, where authors’ rights are limited to individuals and moral rights have a stronger role. These differences, however, are being gradually eroded due to international conventions.

The basic right conferred on the copyright holder is that of controlling or restricting acts of copying – reproducing the work, issuing copies to the public, performing the work in public, broadcasting it by wire or satellite and including the work in a cable programme, playing and showing the work in public and renting or lending it to the public. The author may license, assign or sell economic rights outright or in part, or transfer them to an agent; moral rights, however, are unwaivable. Typically, royalties on sales and other kinds of so-called primary use are administered by the publisher; secondary use, such as photocopying and public performance of recorded works, is licensed by cooperative collecting societies.

Copyright law provides an economic incentive to creative production by enabling authors and publishers to recoup their outlays on the resources used in creating the work; that is, on the fixed costs of the expression and its first fixation. Avoiding the fixed cost is not the only benefit on which a copier could free-ride were she not prevented from doing so by being required to obtain authorization; the copier can also avoid the risk of testing the market for this original work because she will obviously only copy works that are successful and profitable. However, in providing this incentive, copyright also
enables firms in the cultural industries to bar entry to potential competitors for the life of the copyright; to counteract the effect of the temporary monopoly, legislators limit copyright law and allow unauthorized and unpaid use of copyrighted material for private purposes. This is known as fair use1 and it provides an exception to the copyright holder’s exclusive right of authorization. With the advent of cheap office- or home-based copying machinery, such as photocopiers, home video recorders and copying music via the Internet, unauthorized use has increased considerably, some of which is fair use but much of which is illegal. Fair use, therefore, is an important issue in relation to the cultural industries. A too strong copyright regime that tolerated little fair use would raise transaction costs and copyright-based earnings, transferring rents to rights holders from users; it would, however, raise the costs of creating the work in the first place. A too weak regime, on the other hand, would increase fair use of copyright material and reduce transaction costs but would not provide sufficient economic incentives.

The impact of digitalization on fair use and piracy now dominate discussions of copyright as technical developments gather pace. There are two opposing versions of discussion about the future of the cultural industries: one is that cheap downloading from the Internet of music, words and images in private homes will wipe out authors’ and publishers’ ability to collect royalties, and the other is that it will so facilitate their collection that fair use is threatened.

Finally, in this brief overview of copyright, we come to the role of copyright collection organizations. Collecting societies have developed over the last hundred years to administer rights on behalf of copyright owners. They are mostly non-profit-making collective organizations controlled by their members, on whose behalf they typically issue collective or blanket licences. In some countries (for example, the Netherlands), the monopoly to administer copyrights is granted by the State. Collecting societies have three main functions: they license the works in which they hold the copyright for specific uses, they monitor use and collect revenues, and they distribute the revenue as royalties to members of the society. The problems that these copyright collecting arrangements overcome are the cost and bother to individual authors, publishers and users of clearing and paying for the use of copyright material and that of enforcing copyright. Digitalization may or may not exacerbate these problems.

COPYRIGHT IN THE CULTURAL INDUSTRIES

The cultural industries consist of publishing, broadcasting (television and radio), film and video, multimedia and the music business. There is an
increasing tendency towards defining the cultural (or creative) industries in terms of their reliance on copyright; thus, besides the visual arts and crafts, computer games, toys and other entertainment goods, advertising and scientific research are lumped together with these industries into the ‘cultural sector’. This reflects, on the one hand, a more open approach to perceptions of culture and, on the other, the recognition that it is very difficult to draw a line on the production side between ‘creative’ and ‘mundane’ work – is the sound engineer not creative? Similarly, what about advertising, with its search for novelty and employment of highly trained film-makers, artists and performers?

The cultural sector is seen as increasingly important for employment and economic growth, an aspect that is mentioned by Rick van der Ploeg in Chapter 1. In the Netherlands in 1995, industries reliant upon copyright accounted for around 5 per cent of Gross Domestic Product, were growing at an annual rate above that of the economy as a whole and employed 3 per cent of workers; similar figures are to be found in other developed countries. He outlines the policy of the Netherlands on extending copyright protection to works in digital form and on the Internet, and exposed the balancing act that governments face when dealing with new technologies, the cultural, social, economic and political effects of which are so widespread.

William Landes’ Keynote talk to the conference (Chapter 2) offers an economic approach to the post-modern art form known as appropriation art: the use of borrowed images from the work of others for the creation of new images. The subject essentially hinges on two issues in copyright: what constitutes an original or a derivative work of art, and whether appropriation is fair use. Landes brings to this topic the economic analysis of the doctrines of copyright law that he developed with Posner, applying it here to lawsuits involving appropriation artists. His conclusion is that the economic interpretation of fair use in terms of productive and reproductive use, which adopts the criterion of financial damage to the owner of the rights to the original work, may also be applied to borrowed images. Where only a few copies are made by the appropriation artist, this should be treated as fair use but when the appropriation artist makes many copies, he or she should be treated as any other large-scale producer of derivative works and required to obtain a license from the artists(s) whose works are used. Therefore, existing copyright law is capable of adapting to this art form.

In Chapter 3, Torremans gives a legal analysis of the problem of the choice of law for international transactions of copyrighted material, which, as he points out, are involved almost by definition in any successful digital online exploitation in a society that is increasingly creative. Using the example of UK copyright law in relation to the Berne Convention, as well as looking at various international cases, Torremans analyses the difficulties and concludes
that a combination of rules is called for, with national law playing a major protective role in combination with a single worldwide law governing such key issues as authorship and ownership.

The contribution by Rushton (Chapter 4) draws together economic analysis of copyright and freedom of expression. He puts forward the view that, in some aspects, copyright protection over the past century has become overbroad, and that the costs in terms of lost freedom of expression and in transaction costs from expanding copyright’s domain have not been matched by offsetting benefits. He bases his argument on two examples from Canadian cases: copyright’s expansion to corporate symbols (usually covered by trademark law) and parodies, to which fair-use exceptions apply. In Chapter 5, Hakfoort investigates the claim that copyright protection should be extended and more resources spent (by governments) on copyright enforcement. He applies the standard economic model of copyright, based on the apparent increased attractiveness of copies and the decrease in their marginal cost with new technologies. However, Hakfoort argues that by taking a more detailed look at the characteristics of the markets for information goods, competition between originals and copies is becoming less important and, furthermore, publishers can often internalize part of the revenue created by copies.

Gallagher (Chapter 6) takes as his topic the economic analysis of compulsory licensing – when unauthorized use of copyrighted material over and above fair use is sanctioned. As with fair use, the rationale for compulsory licensing is to maintain a balance between incentives and access so that the law does not confer too strong a monopoly to the copyright holder. Gallagher’s focus is on the incentive justification for this limitation to the rights of owners rather than the more usual access justifications based on other public policy concerns.

Macmillan (Chapter 7) and Smiers (Chapter 8) share a scepticism concerning copyright law based on the disproportionate power both believe it has conferred on publishers (firms in the cultural industries) rather than authors (individuals who are the primary creators). Each argues that the excessive commodification of works protected by copyright has been one of the foundations of the power of the media and entertainment sector, which has led to a homogenized culture. They reach the same conclusion from very different standpoints: Macmillan is an academic lawyer and Smiers a cultural analyst. Macmillan contrasts the rhetoric of copyright law as being associated with concepts of genius, creativity and culture with the many cases in which it was used to bolster the position of powerful multinational entertainment corporations. Smiers argues the point from the perspective of artists (creators/authors), who are in a weak bargaining position in relation to the oligopolies with which they have to deal to get their work published; he advocates the abolition of copyright to be replaced by alternative means of
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remuneration. Both refer to the problem of applying copyright in Third World countries.

With the contributions of Kretschmer (Chapter 9) and Einhorn (Chapter 10), we move to the problems associated with copyright in practice, which is the theme of all the remaining chapters. Kretschmer considers the development of collecting societies for musical performance in several European countries with reference to the concept of property that underlies their transactions. He concludes that tensions between author and publisher members make collective administration unstable and that the system therefore requires reform. In Chapter 10, Einhorn provides a detailed discussion of the problems of charging for music on the Internet. He argues that the present administrative arrangements devised in the USA for analogue distribution of music copyrights are not suitable for digital distribution. Farchy and Rochelandet (Chapter 11) follow with the theme of copyright protection and appropriability issues raised by Internet distribution. They consider private copying of different types of cultural content and using different copying devices, providing some much-needed empirical data (from France). Having considered various economic and legal solutions, they conclude there is no one efficient institutional arrangement for the appropriation of rewards or of fair use that applies across the board.

Evidence of another kind is provided by Matsumoto in Chapter 12; as Director of GEIDANKYO, the Japanese Council of performers’ organizations, which is concerned with the economic welfare and social status of performers as well as administering their rights, he is in a unique position to assemble data on both earnings of performers in general and on earnings from neighbouring rights in particular. The question of performers’ earnings is set in the context of the finance of the performing arts in Japan, where private rather than state funding is the norm, causing performers to rely heavily on the market for their incomes. He presents the evidence and discusses the problems of a collecting society now faced with digital distribution. As he told the conference in the panel discussion, there is a serious problem in obtaining sufficient information on each performer’s contribution sound recordings and on all uses of them, which prevents a fair distribution. By contrast, the paper by Tschmuck (Chapter 13) looks at the position of composers before the advent of copyright law; as he points out, this did not mean that there was no protection from unauthorized publishing, as the right to publish or perform was a privilege granted by the ruler. He describes the system of protection for musical composition in Vienna in the late eighteenth century – the fruitful period of artistic production just before the introduction of copyright laws – and examines how far the de facto absence of copyright laws affected both the potential for artistic creativity and the possibility for the artist to profit from his or her creations.
In the next two chapters, Aalberts and Beunen (Chapter 14) and Reale (Chapter 15) shift the scene to other areas in which copyright plays a role. Beunen and Aalberts take up a new problem, the exploitation of Internet distribution of images of objects in museums. Many museums, public and private, have seen the Internet as providing an opportunity for publicizing their collections and facilities but, as the authors show, there are copyright problems to be solved and difficult decisions to be made to avoid museums being exploited by specialist companies. Reale analyses an old problem that has a new dimension to it with digital technology - the limitations and exceptions to copyright as they apply to scientific research in the context of the European Directive On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. She contrasts the opportunities and drawbacks of copyright in the digital age and discusses the consequences for Italian copyright law. Finally, Levshina and Pakhomova in Chapter 16 describe the problems of transition in the administration of copyrights for dramatic performance in Russia. Under the Soviet government, copyright was intimately tied up with censorship, and the administration of authors’ rights was undertaken by a state agency; now, the data needed for royalty distributions must be assembled and international standards applied. Levshina and Pakhomova also describe the problems of introducing a new type of collective copyright for dramatic productions of stage works, where directors and performers together create a work for performance.

The scope and breadth of copyright coverage is well illustrated by the range of topics included in the chapters of the book, which together show the complexities of the legal, economic and management problems to be solved in the cultural industries. The difficulties and doubts about the present administration of copyright law, as well as uncertainties about its future possibilities in the face of fast technical change, are described and analysed by international experts in law, economics and administration of copyright in the cultural industries. Their thoughts about copyright’s ultimate purpose in stimulating cultural development deserve serious consideration by those responsible for copyright policy in every country and by the supranational policy-making bodies. Copyright policy is not only an issue for law-makers but also for social scientists and cultural analysts.

The informed analysis by the contributors to the conference and to this book of the problems of administering copyright in the cultural industries fully justify the combination of theory and practice. Much has been learned from their exchanges. We have gone some way in exposing the problems and possible solutions, though there is still much more to learn. These are issues that will recur again and again as information technologies develop and change our culture.
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NOTE

1. The doctrine is known as fair dealing in the UK; in the USA and the UK exceptions and limitations are judged in the context of the case; in other countries they are specified by statute.