1. Copyright as property

I THE LEGAL CONCEPT OF DEMATERIALISED PROPERTY

The statutory definition of copyright in the UK Copyright, Patents and Designs Act 1988, s. 1, states in slightly deceptive simplicity: ‘Copyright is a property right …’. However, the Act does not explain what ‘property right’ means, especially in connection with copyright, and one can glean from the Act in part only what a copyright-property right can entail. It will be necessary to apply property theory (within legal, normative, systems) to the concept of copyright for the understanding of copyright as property. This aspect poses difficulties. Traditional property theorists want to apply their property conceptions to conventional private property, rather than intellectual property, sometimes not even to any kind of intangible property, and they tend to use copyright as the most significant example for their argument. Some intellectual property theorists prefer to see intellectual property rights not as property rights at all. This diffuse scepticism is ultimately toothless. In fact, copyright is a particularly good case in point within the development of a more general property theory that enables a discussion of proprietary powers and their potential dangers in the concrete context of copyright protection. It is arguably even accurate to say that one understands the legal concept of dematerialised property and of...

---

1 This property-based definition is followed up in CDPA 1988, s. 90: ‘Copyright is transmissible … as personal or moveable property’, and s. 96: ‘In an action for infringement of copyright all such relief … is available to the plaintiff as is available in respect of the infringement of any other property right.’

2 The same approach by Penner (2000: 2). The discussion is with regard to property in law, thus the moral and political aspects of property are disregarded in the present context. For a recent discussion on the moral right to own intellectual property, see e.g. Wilson (2009: 393, 395) who rejects such a moral right.

3 Penner (2000: 109, 118–20). Some reservation also in Harris (1996: 42–46). As will be shown, some of the difficulties these authors face when dealing with intellectual property arise from unsatisfactory conceptual assumptions.


property rights in general more easily if one looks at intellectual property rights first. Historically it was obviously the other way round; intellectual property arrived comparatively late on the property scene.

As there are several helpful overviews of classical and modern theories of property, there is no need to give another exposition of the relevant treatises, although the present discussion is certainly indebted in one way or another to authors like Hohfeld, Honoré, Harris, Waldron, Penner, Drahos and others. But these authors will often appear in the context of a critique: some of their views are not shared by the present author or their concepts have to be adapted to intellectual property and copyright, and the terminology they use is not always precise, practical or consistent. Property theory treatises also sometimes begin with a lengthy, but rather uninformative introduction that seeks to illustrate the elusiveness, complexities and incongruities of the legal concept of property and contrasts it with an ostentatiously simplistic ‘layman’s view’, for example in Waldron:

Consider the relation between a person (call her Susan) and an object (say, a motor car) generally taken to be her private property. The layman thinks of this as a two-place relation of ownership between a person and a thing: Susan owns that Porsche. But the lawyer tells us that … [t]he legal relation involved must be a relation between persons …

This approach (including its possible gender-bias: the ignorant one is obviously a woman, while the competent expert lawyer seems to be a man) will not be adopted here: one can safely assume that the male or female reader who picks up this book is not a layperson and therefore is familiar with principal property concepts. Hence it is better to start with a discussion of the present author’s property theory as far as relevant to copyright and to mention other property theories in more detail where...

---

6 These classical theories tend to fall into the area of political philosophy, rather than law. See Ryan (1984), on Locke, Rousseau, Kant, Bentham, Hegel, Marx and Mill. See also on Locke, Waldron (1988: 137), Becker (1977: 32), on Hegel, Penner (2000: 169). See also below, Chapter 2.

7 On classical and modern theories regarding the foundation of property rights, see Carter (1989). On Hohfeld with regard to property rights, see e.g. Munzer (1990: 17), Penner (2000: 23), on Honoré, see e.g. Penner (1996: 754). Overviews of classical and modern property theories also by Mossoff (2003: 371) and of contemporary approaches by Underkuffler (1990: 127).

8 E.g. Harris (1996, 6–13): nice to read for the property specialist (who does not need it), but confusing for the beginner.


appropriate. The following section refers to legal theories of property\(^{11}\) and to the classical property concepts by Blackstone, Bentham and the eighteenth-century Scottish jurist and philosopher Lord Kames, whose precise legal-doctrinal as well as socio-psychological property theory is unfortunately little known today but has influenced the present author probably most.\(^{12}\) Modern philosophical-political property theories and justifications and especially classical texts of political philosophy on property, such as by Locke, Hume, Bentham, Kant, Hegel and Marx, will be discussed briefly in the relevant context, provided they are important for the explanation of copyright.\(^{13}\)

1 The Meanings of the Term ‘Property’

In law, property rights within a system of private property\(^{14}\) are rights against\(^{15}\) persons in relation to things. This relation to things that is incorporated in the relation of persons as created by the property rights can be referred to as the ‘person–thing’ relationship,\(^{16}\) and in classical property theory, this – originally emotional-social, and consequently legal – bond between the person and the thing was indeed regarded as the essence of a property right.\(^{17}\) Today, the relational approach prevails which emphasises that property rights are legal, normative relations between persons referring to things.\(^{18}\) The ambiguous term ‘property’ has a variety of meanings in the

\(^{11}\) Such as by Penner (2000) or Drahos (1996).


\(^{13}\) On Locke, Hegel and Kant in particular, see below under Chapter 2.

\(^{14}\) Waldron (1988: 37) on private property as opposed to collective and common property. In the following, private property will be discussed, since this is the type of property which is by far most important for intellectual property law. On issues of common property and the public domain in the context of copyright, see Chapter 2.

\(^{15}\) From a socio-psychological perspective, property rights are rights over persons through the exercise of rights in relation to things, that is, resources. See Cohen (1927–28: 12, 14). This will become relevant in the discussion of the effects of copyright-property rights, see Chapters 5 and 6 in particular.

\(^{16}\) Hence the common (reduced) definition of property as ‘the rights of a person with respect to a thing’, see e.g. Donahue (1980: 30). This person-thing relationship is what dominates the ‘layman’s view’ of property, at least in the view of legal theorists, see e.g. Grey (1980: 69), Waldron (1988: 27) and above.


\(^{18}\) Sometimes referred to as ‘rights plus’ approach, see Underkuffer (2003: 13). See also Penner (1996: 801).
Copyright and creativity

Common law countries, which often astonishes the Civilian lawyer and reveals a lot about the legal culture and the centrality of property in the Anglo-Saxon laws and societies. This is much in Locke’s sense, for whom liberty also entailed the free acquisition and holding of property (he sometimes defines property as ‘life, liberties, and estates’). Whether Locke then echoed a common sentiment or created one is for political scientists to decide, but that deep entrenchment of property in the fabric of the state and society in the Common law world up to the present day explains why any discussion of the philosophical foundations of Anglo-Saxon copyright cannot avoid Locke, although he did not actually address intellectual property rights in his writings on property.

‘Property’ has three, sometimes four, different meanings. It is the collective term for (a) what could be referred to as assets, *patrimonium*, wherewithal (in French law: *biens*, in German law: *Vermögen*), which can largely, though not exhaustively, be broken down into a number of individual property rights; (b) an individual property right; (c) an individual property object or ‘thing’ or ‘res’, to which a person’s property rights are attached. Sometimes ‘property’ is also used (d) to denote ownership, thus a particular type of property right, but this imprecise use should be avoided.

Property in the sense of ‘*patrimonium*’ is the sum total of assets minus the liabilities allocated by law to a person in the form of tangible and intangible objects (especially rights and obligations), which constitutes the person’s estate and which can typically be expressed in a monetary value, for example in the case of insolvency or succession. The other two meanings of property require more detailed discussion.

21 On Locke, see below Chapter 2.
22 One of the earliest clear accounts on this matter can be found in Kames (Home, 1792: 88, note 1), see also Rahmatian (2006: 180).
23 This term is used by Penner (2000: 129).
24 Even these different terms reflect nicely the different legal cultures: *biens* (‘goods’), *Vermögen* (‘ability, power’), see also Kahn-Freund (1949: 20), discussing the meaning of ‘*Vermögen*’.
25 Non-proprietary rights which are part of the assets are personal rights, but also ‘interests’ which may be regarded as personal rights, for example the equity of redemption after the realisation of a mortgaged land, see Lawson and Rudden (2002: 132).
26 This comprises intangible objects (like gas, electricity) and purely intangible objects which are legal concepts, such as debts (see Bridge 2002: 6).
2 The Concept of ‘Property Right’

A property right or real right or *ius in rem*\(^{27}\) is an abstract concept created by law which relates to an object or *res* (‘thing’). The object can be an object of the physical world, such as land or a chattel, and it can also be notional, an abstract legal concept itself. The latter category will be particularly important for the understanding of the proprietary nature of copyright.\(^{28}\)

Since real rights are legal creations, they have no ‘natural’ existence beyond the law and are subject to legal change as to their existence and extent. Property rights are conventional, not natural rights;\(^{29}\) they are invented, not reflected by the law. As already said, property rights refer to *res* but are relations between human beings. Hohfeld took this relational approach to the extreme and dissolved *ius in rem* completely as a separate category within his famous classification of rights-relationships as claim-rights (correlative: duties), liberties/privileges (correlative: no-rights), powers (correlative: liabilities) and immunities (correlative: disability).\(^{30}\)

In the realities of legal practice, this system is not as precise as Hohfeld hoped\(^{31}\) and it is arguably too artificial to be applied satisfactorily to property rights. Hohfeld regarded property rights/real rights as a multitude of identical individual rights held by the right-holder against everyone else who has a corresponding duty to respect the right *in rem* of the right-holder. Thus in Hohfeld’s interpretation a right *in rem* is effectively split into an indeterminate number of rights *in personam* against everyone worldwide except the right-holder.\(^{32}\) Hence when an object of property is transferred from one person to another, everyone else exchanges one duty against the transferor A for another against the transferee B:\(^{33}\) is that a parallel transfer of identical rights from A against everyone in the world and simultaneously a

---

\(^{27}\) The *ius in rem* must be distinguished from the *ius ad rem*, the right to a *res*, which is a personal right and typically arises from a contract: e.g. the right to obtain delivery of goods under a contract of sale. The *ius in rem* arises with (stipulated) delivery. See also Goode (2004: 26).

\(^{28}\) See below, under II.

\(^{29}\) Hume, Book 3, part 2 (1960/1740: 491), Bentham, *Theory of Legislation* (1891/1840: 111–13). The position stated here deliberately stands against any natural law conception of property rights, as can be found especially with classical theorists, such as Grotius, Locke or Kames. Blackstone is ambiguous, but seems to have regarded property as an artifice, Blackstone, Comm. II, 1 (1800/1765: 2): ‘…there is no foundation in nature or in natural law, why a set of words upon perchment should convey the dominion of land’, see also Whelan (1980: 118).


\(^{31}\) Some reservation also in Munzer (1990: 19).

\(^{32}\) Hohfeld (1920: 72–73).

\(^{33}\) Penner (2000: 23).
parallel transfer of correlative duties in respect of A to B with the whole world of duty-holders? One can see that this idea is highly theoretical and not suitable for the analysis of property rights: the more appropriate view is that a transfer leads to a change of the rights and duties of A and B only.34

The substance of property rights is often referred to as a ‘bundle of rights’.35 This concept or metaphor which has a Hohfeldian root36 is not unproblematic: it ‘disintegrates’ property into a number of (claim)rights. Socio-economically this is perhaps a result of the development of a free-market economy to a large-sized industrial capitalism based on division of labour. That enables numerous complex transactions with a disaggregation and recombination of ownership elements.37 Whether the substitution of a ‘bundle of rights’ for a ‘thing-ownership’ conception of property really has the consequence that property is no longer an important category in legal and political theory, as Grey has claimed,38 is highly doubtful.39 The problem of the ‘bundle of rights’ conception should be expressed more precisely as one of legal theory only, not one of political theory. Penner raised some legal concerns against the ‘bundle of rights’ picture: property is not a structural composite, as the ‘bundle of rights’ notion would suggest, but rather a single right protecting a single, identifiable interest. Property should not be seen as merely a bundle of lesser units.40 Thus property is not a matter of degree,41 depending on how many ‘sticks’ or units still remain in a given right.

One may overcome the problems with the ‘bundle of rights’ metaphor with a different idea, borrowed from Spinoza (although he used this idea in another context):42 the substance of a real right can be split into a number

---

37 Grey (1980: 74–75). Grey’s further point, that the decline of the idea of property is one result of the decaying cultural hegemony of capitalism, was perhaps an attractive conjecture in 1980, but has since been fundamentally disproved.
38 Grey (1980: 81). Grey voiced this opinion before the fall of the iron curtain, before the reinvigoration of capitalism and before a renewed interest in property theory as from the 1990s.
41 Penner (1996: 796).
42 Spinoza’s Definitions in the Ethics (Part I, Definitions. 3 and 4) – Substance: ‘that which is in itself and conceived through itself; that is, that the conception of which does not require the conception of another thing from which it has to be formed’. Attribute: ‘that which the intellect perceives of a substance as constituting its essence’. Thus the attributes are part of the substance (compare proposition 2). Spinoza then goes on to define God as the substance consisting of infinite attributes
of attributes that turn the real right into concrete individualised real rights. Thus the attributes emphasise a different perspective: they are aspects of the whole that is the substance of the real right, they are not actually independent ‘sticks’ bundled together. The concrete real rights are determined and delineated as to their existence/extent and content by an external and an internal aspect which can be regarded as coinciding sides of the same coin.

The internal side of real rights is expressed in the content of the real right, and that content is created by the powers that the real right confers and the duties it entails. These powers and duties that form the content of the real right depend on: (a) the type of the real right (e.g. ownership, restricted real right: mortgage, easement); (b) the object of the real right or res, particularly whether it is intangible or tangible, and in the latter case, the physical characteristics of the res (thus the real right in relation to a plot of land confers the power to grow potatoes, for instance, while a copyright does not); (c) restrictions by private law which are often the result of the location or physical characteristics of the object of property (right of way as of necessity of a land-locked plot of land, rules regarding the use of the common parts in a block of flats); (d) public law restrictions (e.g. planning laws). As to (a), the basic and most far-reaching type of real right is ownership. The powers/duties of ownership can be listed as what Honoré
calls ‘the standard incidents of ownership’. They include the right to possess, the right to use and to alienate, the right to manage and to obtain an income, the right to the capital, the liability to execution for debt and others. These incidents depend on the type of res; thus, for example, ownership in relation to a copyright can obviously not involve possession.

The external side of real rights materialises in the right to exclude everybody except the right-holder from the object of the real right: the real right ‘binds the world’, is enforceable against everyone in accordance with the type of the real right in question (thus the mortgagee’s rights are more limited than the owner’s rights). As a consequence, a corresponding duty against the right-holder arises in the (presumptive) intruder to respect the real right and, through that, the object of the real right. This also shows that property rights are eventually legal relations between persons. The realisation of the property right is effectively the legal relationship which comes into existence between the holder of the real right, having especially the right to exclude, and the third party, having the corresponding duty to respect the right as the individual potential encroacher. Thus there is no continually existing abstract Hohfeldian correlative duty to the claim-right, but the duty arises in a concrete form only when the third party is in an actual position to encroach on the individual real right: these duties are expressed especially in the rules of trespass and conversion for land and chattels, and in the infringement provisions for intellectual property rights.

The internal aspect of the real right emphasises the powers as they extend to the borders of the realm of the real right, while the external side looks at the point from which, onwards, the law permits that an act of encroachment on the realm of the real right can be resisted. For example, in relation

---

49 Not everyone sees the right of alienation as an instance of ownership, for example Penner (1996: 760).
51 Compare also Penner (1996: 756). On copyright-ownership, see below under II.
52 See text in Rahmatian (2006: 182–83) which the following two paragraphs largely follow.
53 On the close connection between real right and object of the real right or res, see below under I. 3.
54 The similarity of trespass and infringement rules has been expressed recently in the musical copyright case Fisher v. Brooker [2009] UKHL 41, [2009] 1 WLR 1764, para. 17, per Lord Walker: ‘Where there is trespass to land or goods, or a comparable invasion of intangible property rights, the court’s natural response is to grant injunctive relief’; compare also CDPA 1988, s. 96.
Copyright as property

to a fenced plot of land, the internal aspect of the real right of ownership extends from the centre to the fence (i.e. the use of the land), while the external position considers certain (not all) influences from outside as they extend to the fence: once they cross or ‘transgress’ the fence, the law permits to fight them. One may therefore say that the ‘internal’ powers of use and ‘external’ rights to fend off an encroachment of any kind meet on the fence. This image also illustrates the two different types of ownership in Europe. The Roman law concept of ownership is principally positive, in that it emphasises conceptually the internal aspect: it has the realm of the real right itself in mind; the right of ownership emanates centrally from it and extends up to the inner side of the fence. In continental European Civilian jurisdictions external encroachments are primarily resisted by way of proprietary actions in nature which are remedies growing out of and being part of the real right itself (rei vindicatio, etc.). The real right squeezes out the intrusion.\textsuperscript{55} The English concept of ownership is essentially negative, in that it emphasises conceptually the external aspect: it looks at the extent to which tort (trespass) actions\textsuperscript{56} as a result of an influence on or interference with an object can or cannot be brought, and when the unavailable tort actions are subtracted from all possible tort actions to defend the property, the remainder represents the extent of the property rights in the object. Thus the realm of the property right in English law is determined by the outer side of the fence, that point where a tort action of the right-holder becomes available. The real right prevents the intrusion from coming in. The (notional) area effectively protected is the same with the Civilian and the English concept of ownership protection. The difference between the concepts of ownership in Roman (Civilian) law and English law can be expressed in the Roman notion of dominium, an absolute and principal entitlement, and the English notion of title, a relative entitlement, whereby the strongest of competing titles prevails.\textsuperscript{57} It will emerge in further discussion that, where the object of the real right is incorporeal and thus an abstract legal concept itself, as it is with intellectual property rights, also Civil law concepts of property need to resort to remedies which are effectively tortious (rather than proprietary) in nature, so the difference

\textsuperscript{55} This image is most appropriate for land; for chattels it should be understood in a more metaphorical way. This more metaphorical image also applies to rights emanating from ownership but not being directed at the reinstatement or defence of ownership in a narrow sense, for example, nuisance.

\textsuperscript{56} Harris (1986: 145).

\textsuperscript{57} E.g. Murphy (2004: 61), Gray and Gray (2009: 181). This Common law principle has been considerably qualified by the Land Registration Act 2002.
between Roman rei vindicatio protection of dominium and English tortious protection of title is reduced to practical insignificance.\(^58\)

3 The Concept of ‘Property Object’ or ‘Thing’ or ‘Res’ in Law

It has already been said that property rights can attach to tangible (land, chattels) or intangible objects of property (debts, copyright). Conceptually there is no difference: this is the legal concept of dematerialised property. The law – in this context: the private law – creates any res or thing, whether corporeal or not, through the legal concept of real rights. That enables legal recognition of the res in question. An apple does not exist in the normative world of the law by virtue of its mere existence in the material world. Only if and when property rights are attached to the apple, does it become typified as ‘property’ or ‘a thing/res’, and the law is capable of perceiving it and incorporating it into the abstract-normative system of ‘persons’ and ‘things’, relations between persons (ius in personam) and between persons with regard to things (ius in rem).\(^59\) If property law does not identify an object as technically a res – and it does that by attaching real rights to it – then the object is a nullum in private law. Whether the res has a tangible existence or is itself the product of an abstract legal conception, such as a debt, a company share or an equitable interest, is irrelevant. The object can become an object of property only if real rights create it by attaching to it, and the real rights, in turn, rest on the notional existence in law of that object which may in some cases coincide with a physical existence. There is the possibility of rei vindication of the conceptual property object which is desirable where a change of ownership by way of a transfer of the property-object is sought. In case of tangible property, this is automatic: the materiality of the object that is recognised normatively as res serves as a reifier. The corporeal object, e.g. a chair, is only a convenient ‘social crutch’ for the actors in the physical world and not conceptually necessary for the law and the existence of the concept of the res. Where debts or other interests are involved, normative formalities effectuate the rei vindication: debts can (also) be reified in the formalised paper of a negotiable instrument to ensure practically unassailable transfer;\(^60\) subsisting equitable interests can

\(^58\) See Rahmatian (2003: 427) and below under II.

\(^59\) This idea is expressed in the Roman law system of institutions, according to Gaius: personae – res – actiones. See Nicholas (1975: 34, 60). See e.g. Trahan (2008: 10). Also English law effectively follows the same pattern without being expressly indebted to the Romanist systematisation. See Lawson and Rudden (2002: 5, 19–20), and Simmonds (1988: 206) on the influence of the Roman law on Blackstone.

\(^60\) Bills of Exchange Act 1882, s. 29.
be transferred in writing only which constitutes a reifying formality.\footnote{Law of Property Act 1925, s. 53 (1) (c).} The reification process in case of intellectual property rights is more complex.\footnote{See below under II with regard to copyright.}

This abstract conceptualisation of ‘object of property’ has existed for a long time. Clear indications of that idea can be found with Bentham\footnote{In the Principles of Morals and Legislation, see Bentham, chapter 16 (1907/1823: 230).} and, in the mid eighteenth century, Lord Kames who pointed out that things do not change their physical appearance when they are owned by someone for the first time, or when ownership changes, for example as a result of a sale and subsequent transfer of proprietary entitlements in them. Things in law are the object of a legal conception.\footnote{Kames in the Elucidations, Art. 33 (Home, 1777), Historical Law-Tracts (1792/1758), Tract III. See Rahmatian (2006: 185) with exact references to Kames.} In some areas of the law the notion of the abstract, dematerialised \textit{res} was highly developed well before the eighteenth century: the feudal root of English land law contained the notion of ‘tenure’, which led to the idea of the ‘estate’ in the land in more modern times.\footnote{Megarry and Wade (2008: 22–23, 35, 38), Gray and Gray (2009: 57).} Thus even in case of tangible property the law has been able to interpose an abstract construct between the right-holder and the object which emphasises the general rule that ‘property’ is not the physical thing but a bundle of different rights in the thing which form its abstract legal representation: one owns an estate in the land, since the land itself is (notional) owned by the Crown.\footnote{Gray and Gray (2009: 57). Hence there is no actual private ownership of land in English land law in the form of dominium, see also Harris (1986: 148).}

Thus the concept of dematerialised property means that there is conceptually no ‘property’ without property rights, and therefore any \textit{res} is an abstract normative creation for the purpose of the law, irrespective of whether this abstract notion may also have a physical existence as a kind of embodiment of that notion. The apple only exists in law if someone \textit{could} have property rights to it (but in a concrete case nobody needs to have such rights): the real right ‘makes’ the apple by typifying it as ‘property’ and thereby incorporates it into the system of the law. Hence it is strictly speaking not incorrect to use the terms ‘property’ and ‘property right’ interchangeably: if there are no real rights, there is no \textit{res} in law, if there is no \textit{res} in law (regardless of possible objects in the material world), then

\footnotesize
\begin{flushleft}
\textsuperscript{61} Law of Property Act 1925, s. 53 (1) (c).
\textsuperscript{62} See below under II with regard to copyright.
\textsuperscript{63} In the Principles of Morals and Legislation, see Bentham, chapter 16 (1907/1823: 230).
\textsuperscript{64} Kames in the Elucidations, Art. 33 (Home, 1777), Historical Law-Tracts (1792/1758), Tract III. See Rahmatian (2006: 185) with exact references to Kames.
\textsuperscript{66} Honoré says that according to one school of thought, ‘we ought always to speak of owning rights over material objects, never of owning the objects themselves’, which seems to express a similar idea, see Honoré (1961: 131).
\textsuperscript{67} Gray and Gray (2009: 57).}
there are no real rights. The term ‘property’ (in the meaning of ‘thing, res’) merely emphasises the object of property, and this is entirely comprehensible where there is a tangible object. However, property is a right to a thing, not the (tangible) thing itself.

The concept of dematerialised property involves the typification of phenomena and entities in the real world as 'property-objects', and, in this way, the recognition of such phenomena in law by conferring real rights to them. The law thereby makes the phenomenon in question an object of property or res. This idea will become particularly important in the discussion of copyright-property.

II COPYRIGHT AS A PRIMARY EXAMPLE OF DEMATERIALISED PROPERTY

The property theory offered above departs in some substantive and terminological details from existing property theories; in particular, it pragmatically combines elements of existing theories. It may be criticised for having a certain Civilian angle, but one can nevertheless assume that it is by and large fairly uncontroversial among property lawyers, at least with regard to its results, as far as traditional (especially tangible) property is concerned. The whole picture changes dramatically when the proprietary nature of copyright is discussed. Indeed, it is highly contentious whether copyright is a property right at all, despite the clear pronouncement to that effect in the statute. It has already been indicated that several property theorists have certain misgivings when they have to equate intellectual property with property, or they do not really see it as actual property in the traditional sense, or not as property at all, because it lacks corporeality. Some intellectual property theorists do not want to see intellectual property as

---

69 See Penner (1996: 801). This emphasises again that property is a normative relation between human beings.
70 Below under II.
71 CDPA 1988, s. 1. Deazley (2006: 151) points out that the preceding Copyright Acts 1911 and 1956 did not mention specifically that copyright is a property right; only in the Copyright Act 1956, s. 36 (1) is there an indirect reference regarding transmissibility ‘as personal or moveable property’. The 1956 Act does, however, speak of ‘ownership of copyright’ in the margin to s. 4 and throughout in various sections.
72 Harris (1996: 43).
part of the liberal conception of property but prefer an instrumental non-proprietary attitude instead, or deny the proprietary nature of intellectual property rights altogether and classify these rights as ‘privileges’. The battleground to test these ideas is particularly copyright, perhaps because some authors, especially property theorists who are not also intellectual property lawyers, understand this intellectual property right best. Or so they think.

1 The Application of the Concept of Dematerialised Property to Copyright

What follows now is an application of the findings of the general property theory above to copyright, and, in line with the position ‘contra principia negantem non est disputandum’, some property theorists may stop reading here already. One should have sympathy with authors who canvass for a ‘non-proprietarian’ and ‘instrumentalist’ approach to copyright to curb the unquestionable and highly undesirable proliferation of copyright protection in recent years. But it will be shown throughout this book that the methods by which these authors seek to achieve this goal are flawed and may ultimately damage their cause. It probably has become obvious that the already discussed concept of dematerialised property has been developed with copyright in mind; in fact, the nature of intellectual property rights is a particularly good starting point for the development of a more abstract concept of property in general.

(a) The property-object or res in copyright law

The advantage of the concept of dematerialised property is that it is irrelevant what the object of property consists in. It can be a tangible object, like land or a chattel, but it can also be an intangible object, like air, which has been recognised to be the subject of property rights and property transfer. Or it can be a ‘pure intangible’, something which is itself an abstract concept of the law that does not exist in the material world, an object that is the creation of the law as much as the real rights attached to it. The most obvious example of the latter idea is intellectual property. The

76 Drahos (1996: 213), Deazley (2006: 143, 163), see below under II. 1 c).
77 This is certainly a principal motive behind the theories of Drahos (1996: 214–15) and Deazley (2006: 152).
78 See above under I.
80 Bridge (2002: 6).
abstract conceptualisation of ‘property-object’ does not attach to tangible things as such, such things are merely incidents of the legal concept of res, the device by which the law incorporates the entity in question into its normative system. A chattel is only one realisation of the abstract and normative legal concept of ‘thing’ or res, as is a plot of land or a company share. Hence copyright can be a res in law, and as the law stands at present, it is. The copyright-res is an abstract legal concept itself and a good example of dematerialised property. In such a case it becomes particularly apparent that the enforceable real right effectively creates the notional object by defining, delineating and protecting it. If an object in question is a material thing, it is defined by its physical characteristics (‘properties’) which the law needs to take account of as part of the internal aspect of real rights, but the real rights in it are conceptual. However, if the object is a legal concept, the law also has to provide further conceptual defining points which enable the creation and recognition of that concept. These legal conceptual criteria for the determination of the actual (notional) object of the real right cannot be severed from the real rights themselves attaching to the object.

A work of copyright is protected and thereby created by the real rights of copyright with no direct material reifier which could represent it, unlike a car or land. The material object ‘book’ is the direct reifier of the personal/moveable property right in it, but only an indirect reifier of the copyright in it. The existence, extent and the limits of the copyright-property are determined by the law only. The criteria for the creation of copyright-property under UK copyright law are the well-known protection criteria: broadly, a creation is protected by copyright if it constitutes an original work that is recorded in some permanent form. A ‘work’ is a creation (in a broad sense) of the human mind which falls into one or more of the eight categories the law provides; ‘original’ means not deriving (substantially) from a pre-existing work, but being the product of one’s own (limited) skill.

---

81 See above under I. 2.
82 Compare Rahmatian (2005a: 372). This short formula obviously has to be seen as a short-hand expression. Not all works require originality in the copyright sense (entrepreneurial works) and broadcasts need not be recorded for protection, see Bently and Sherman (2009: 92).
83 Literary, dramatic, musical, artistic works (CDPA 1988, ss. 1, 3–4); sound recordings (s. 5A), films (s. 5B), broadcasts (s. 6), published editions (typographical works) (s. 8).
84 In case of the entrepreneurial works (CDPA 1988, ss. 5–8), the requirement is ‘not being copied’ (CDPA 1988, ss. 5A (2), 5B (4), 6 (6), 8 (2)), rather than originality. For a discussion of differences as a result of this lower threshold, see Bently and Sherman (2009: 111).
labour, effort, financial expenditure, etc;85 ‘recorded’ refers to the requirement of a physical existence of the work through which it is expressed (fixation).86 Once these criteria are fulfilled, the copyright-property comes into existence, or ‘copyright arises’, but it arises only by virtue of the real rights attached to it, specified as ‘acts restricted to the copyright owner’ in CDPA 1988, ss. 16–27.87 These provisions delineate the extent and the properties of the abstract creation ‘copyright’, so the real rights or iura in rem inevitably melt together with the res or copyright itself. Thus it is even more appropriate to use the terms ‘intellectual property’ and ‘intellectual property right’ interchangeably than in the case of tangible property.

The fact that copyright and other intellectual property rights have no tangible existence or no direct tangible reiifer has led some property theorists to believe that intellectual property rights, especially copyright, are not property rights at all or property rights of a lesser nature. McFarlane generally believes that property rights can relate to only physical objects, which by definition excludes intellectual property from being property.88 As to copyright he says,89

…strictly speaking, [the copyright owner] does not have a right against a thing. His copyright does not relate to any physical object that can be located; instead it relates to a form of expression. So I can have Ownership of a copy of this book (a specific thing); but … even though I wrote it, I cannot have Ownership of the book (the form in which I have expressed a set of ideas).

The rejection of the concept of dematerialised property, together with the problem of reification of different real rights in relation to one tangible object, may provoke such misconceptions. The physical book itself is the material reifier of someone’s personal/moveable property right90 (a real right) to the res, here exemplified by the book. Besides, the book, as any other copy of the book, a photocopy, or a copy of the text on the Internet,

86 CDPA 1988, s. 3 (2).
87 On these rights (the internal aspect of the real right of property), see below under (b).
89 McFarlane (2008: 134) (original emphasis).
90 The term ‘personal property’ is the term in English law for what is called moveable property in Scots law and Roman law-based private law systems on the European continent. Technically, ‘personal property’ and ‘moveable property’ are not identical terms, see Bridge (2002: 3–8, 10). However, in the present context of copyright, the overlap of their meanings is so broad that these terms can be used interchangeably.
also acts as an indirect reifier of someone’s (usually someone else’s) copyright-property right in relation to the ‘literary work’ which the text of the book constitutes. The term ‘literary work’ is normative-constitutive: this is the way in which the law normatively turns any text, being my poem, someone else’s poem, a novel, a newspaper article, a table or compilation, a computer program and other works which would not normally be regarded as works of literature, into a res, provided they are also ‘original’ (in the meaning of copyright) and recorded. Copyright law typifies all these possible written expressions of the human mind as abstract objects of property by categorising them as ‘literary works’ and turns them into a property right. Generally, the way in which the law fits elusive concepts of ‘intellectual creations of the human mind’ or ‘creativity’ into its existing system is by turning them into a property right as the only legal category it perceives and recognises. This is the effect of copyright: by conferring copyright protection, the law turns the creation into property, or from a socio-economic perspective, into a commodity. That enables the law to recognise the varieties of human expression within its system of conceptual ‘persons’ and ‘things’. The propertisation can also be referred to as ‘commodification’ in a more sociological or economic context, and this commodification has most unwelcome consequences. In McFarlane’s example, it is irrelevant whether the copyright owner has a right against a physical object. His example is not even correct if the rather atavistic requirement of corporality for a property right were maintained, for in the case of a painting, for example, the relevant copyright very much ‘relates to a physical object that can be located’, more than in the case of a literary work as it appears in/through a book. But that is not a relevant factor anyway; what matters is that the object ‘painting’ and the object ‘copyright-artistic work’ are two different things in law, one a chattel (canvas) and the other one the copyright in the artistic expression it displays, whereby the chattel as direct reifier of the notional personal (moveable) property right also acts as an indirect reifier of the notional copyright. In a slightly

---

91 Compare Harris (1996: 45).
92 CDPA 1988, s. 3.
93 And the law normatively sets out the extent and limits of this category in its definition in CDPA, s. 3 (1).
95 Rahmatian (2005a: 373).
96 See below under Chapters 5 and 6.
97 The last sentence quoted from McFarlane’s text above (McFarlane 2008: 134), ‘… I can have Ownership of a copy of this book (a specific thing); but … even though I wrote it, I cannot have Ownership of the book (the form in which I have expressed a set of ideas)’ is actually contradictory and incomprehensible.
Copyright as property oversimplifying way one can say the chattel represents, but does not constitute, the copyright in the painting.98

More than patents and trade marks, copyright is perhaps the most intricate intellectual property right when it comes to the question of reification of the abstract res and the real rights attached to it, because copyright refers to proprietary rights in intellectual creations that are expressed in things of very different material appearance. A sculpture is a physical thing, and although the copyright does not exist in the individual corporeal sculpture but in the particular expression chosen for a certain idea (e.g. the idea of a sitting person) as embodied or expressed in the specific shape of this sculpture,99 it is tempting to regard the sculpture itself as a relatively true reifier of the abstract notion of the ‘copyright-property’, and in any case, it acts usefully as a ‘social crutch’ to make the concept noticeable in the real world. The situation is similar with design protection.100 The real thing and the copyright ‘in it’ are indeed in a closer relationship to one another with works of the visual arts due to the nature in which these types of intellectual creation express themselves or ‘materialise’.101 A large part of the general public may not even be able to separate copyright from the thing itself as its perceived reifier,102 and may therefore

---

98 Strictly speaking, the chattel does not constitute the personal property-res either, but represents it as its direct reifier, because the law constructs property relations entirely normatively, so every physical object can only represent property rights in the property object (or the res in law) and the property-object itself, but it cannot be property.

99 Protection of sculptures as artistic works, see CDPA 1988, s. 4 (1) (a). The fixation is self-evident and is not specifically required by the law, see Bently and Sherman (2009: 92).

100 Protection as a registered design, RDA 1949, s. 1, and as an unregistered design right, CDPA 1988, s. 213. In the latter case the importance of the social reifier is obviously more important, as there is no entry in a register.

101 Where the social reifier disappears, because the work has been destroyed, the copyright in it does not seem to disappear automatically, too. This indicates again that the copyright-res and the personal property-res are indeed notionally independent. See e.g. Metix v. Maughan [1997] FSR 718, at 721, where protection of an ice sculpture was granted, although it will melt away. Usually the destruction of works is discussed under the heading of the moral right of integrity which arguably does not seem to prevent entire destruction, only disfigurement, see Sterling (2008: 397), for Germany, Dietz in Schricker (2006), § 14 nn. 37–39 (who argues that destruction is covered by the integrity right). However, the moral rights point is a different issue, because it contains a possible prohibition only, it does not decide about the nature of the copyright-res or chattel-res.

102 Even historical author’s rights systems had difficulties with distinguishing between the author’s right-res and the personal property-res, the chattel. For example, the old Austrian Author’s Rights Act of 1846 (Gesetz zum Schutze des
have the impression of ‘owning’ a piece of ‘creativity’ with a piece of creative work, which is sociologically and psychologically very important for the workings of the art market. The situation is more complicated in relation to music. This type of intellectual creation is in its nature incorpo-
real, fleeting and entirely time-bound and requires its recreation in every case by way of a skilled performance. A musical score is not the music itself, rather a kind of building instruction for the (re)making of a piece of music, and, appropriately, copyright does not subsist in the score but in the music which the score seeks to note down. The copyright law requirement of recording (fixation) becomes particularly important in abstract art forms like music, but the fixation of music in a score acts in a similar way as the claims in a patent application: the score delineates the content and extent of the object, that is, the property right claimed. But the score is not the res or object of that property right itself. Furthermore, since a certain piece of music (the ‘object’) is intangible (however, not imaginary, because music is an extant acoustic phenomenon in the material world, unlike the rights attached to it), there is no material object which could serve as a functional ‘social crutch’ that reifies the conceptual real rights claimed. Music can, and in a vast majority of musical cultures does, perfectly well exist without ever being written down, so there is no material embodiment necessary for its existence which could act as a symbolic signifier, while a sculpture, for example, cannot exist without its physical expression. It is at least arguable that a sound recording typically acts as that desired ‘social crutch’ and reifier of the recorded music, because, although it is not the music itself, it is a faithful copy of it, unlike a score, and represents the music in some tangible form as a symbol which mirrors the symbolised.

*literarischen und artistischen Eigentums, 19 Oct. 1846, JGS No. 992*) presumed in § 11 that the ownership transfer of the object of the artistic work (sculpture, etc.) also entailed the assignment of the reproduction right in that work to the transferee of the physical object, subject to an agreement to the contrary.

104 On the specific problems with music, see Rahmatian (2005b: 272, 284–85).
106 CDPA 1988, s. 3 (2); US Copyright Act 1976, 17 USC § 102 (a).
107 The claims define the scope of protection, see PA 1977, s. 14 (5), following the European Patent Convention (EPC) 1973 (revised 2000), Art. 84.
Copyright as property

concept well. The sound recording itself attracts copyright protection as a typical instance of the notion of protection against unfair parasitical competition which underpins Anglo-American copyright law. The sound recording is also a good corresponding material object in relation to its own copyright as the abstract normative concept (besides the music-copyright), because the essence of a sound recording is not much else but a sound recording.

Harris and Penner take a less extreme view than McFarlane, but it appears that for them intellectual property rights are nevertheless less developed property rights. Harris concedes that intellectual property rights do not differ from property rights (especially ownership) in tangible objects in that both concepts establish rules for the access and control of resources, and in both cases, property rules allocate rights to scarce resources. But Harris also says that, unlike real rights in tangible things, intellectual property rights create an artificial scarcity, because ‘ideas’ (in an untechnical sense), once they are in the public domain, cease to be scarce. Ideas as a totality are potentially infinite. The ‘scarcity’ is an issue of publication, unlike with land, where the scarcity is determined by the surface of the earth, or unlike with most chattels, where scarcity is determined by the needs and demands of productive capacity. Once the idea is no longer withheld, it is no longer scarce, and it can be used by everybody at the same time, unlike a chattel which cannot be eaten or used simultaneously by several people. Intellectual property/copyright, so Harris says, creates an artificial scarcity by developing trespassory rules which protect the author from unauthorised use of his ideas which his work comprises and in this way grant the author an ownership interest in them. One should not read too much into Harris’s sketch of intellectual property within his property conception, but it would have been desirable for him to have pointed out with more precision that ‘ideas’ are not protected in copyright at all, only ‘expressions’. That would also have shown that

110 CDPA 1988, ss. 1 (1)(b), 5A.
111 See below under II. 2.
112 See also Waldron (1988: 33, 38). Waldron stresses material resources when he talks about resources and sees intellectual property as an analogy to the principal rules on tangible property (at 34). (Waldron does not go into any specific discussion of this analogy.)
113 Harris (1996: 12, 24).
115 Indirectly Harris acknowledges that; see Harris (1996: 45). The actual application of the idea/expression dichotomy is obviously problematic, see below under Chapter 3.
intellectual property rights do not create more of an artificial scarcity than rights to tangible property. Copyright, for example, is not interested in the raw material of the ‘idea’, but what has specifically been done with it (a certain novel, piece of music, sculpture, etc.); it is not relevant what could have been done with it by others, but what has actually individually been done.¹¹⁶ That realisation is scarce, if not unique, and not artificially so: not the law that makes the expression scarce, but the expression is scarce by itself and the law attaches property rights to it because of this scarcity. The distinction between artificial scarcity (intellectual property) and natural scarcity (tangible property) is unconvincing in any case. Property rights in relation to material resources may also create an artificial scarcity, typically in connection with the economic markets which rest on property concepts for their operation: the oil price is a good example of that. Water, to give another example, can hardly be seen as a scarce resource in Scotland and yet, property rights may be attached to it.

Penner also struggles with the apparent protection of ideas and its proprietary nature. He stresses that intellectual property rights are rights to monopolies, and since these rights clearly correlate to duties in rem, they effectively have the features of a property right.¹¹⁷ But when it comes to copyright, he does not seem to be too sure as to what this right actually protects. He says that ‘patents are not property rights in ideas, nor copyrights property rights in expressions’¹¹⁸ and claims at one point that the idea ‘that intellectual property constitutes property in ideas (patents) or expressions (copyright)’ is an ‘idiotic fiction’.¹¹⁹ In Penner’s view, ‘[a] true property right in an idea or an expression would constitute a right of exclusion from that idea or that expression itself’ which would have the curious result that there would be a duty to refrain from reading about the invention or from receiving the expression of a book or painting, despite the fact that a patent is published and that copyright gives the exclusive right to disseminate the work.¹²⁰ All this indicates a conceptual confusion about intellectual property which appears to be quite common with property theorists. As said, copyright does not protect ideas (nor does patent law, unless one wants to use the elusive and effectively meaningless term ‘idea’ to refer to an invention which is new and involves an inventive

¹¹⁶ Harris’s argument in this respect misses the point, see Harris (1996: 43).
¹¹⁹ Penner (2000: 118).
Copyright as property

step\textsuperscript{121}, but, against Penner’s proposition,\textsuperscript{122} it does protect the specific expression of the idea used – the way in which a plot of a story was individually worded to form a novel, the way in which a harmonic progression was applied in a specific melody line and so on. Copyright does not prevent the enjoyment of the result of the application of an ‘idea’ (reading a book, looking at a painting); it prevents the actual re-use of that very application of the ‘idea’ in substantially the same way.\textsuperscript{123} That ‘application of an idea’ is the ‘expression’, being the conceptual property object (\textit{res}) and the exclusive right, enforceable against everyone, over that object. This type of protection is a proprietarian one through ‘trespassory rules’, to use Harris’s term.\textsuperscript{124}

(b) The nature of the ‘right’ of copyright

Penner also distinguishes between property rights relating to tangible objects, such as land, and intellectual property rights, for example a patent. With regard to land, ‘the landowner’s use-rights are essentially indefinable, comprising every possible use of land. One cannot draw up an exhaustive list of them’, while the patent-holder’s right ‘is an exclusive right to a particular use of the invention or idea’, which is ‘only one of a limitless number of ways in which an idea may be “used” … A patent is like [a] lease to extract oil … in the same way that the lease [is] not really a property right in the land, the patent is not a property right in the idea or invention.’\textsuperscript{125} One can assume that Penner would apply the same argument to copyright, and he indicates that intellectual property rights are ‘not really’ property rights when compared with traditional property rights. A closer look at the nature of the ‘right’ of intellectual property rights, and in particular copyright, reveals that this distinction is imprecise and misguided. If one claims from a formalistic starting point that a lease is not a property right in the land, one also has to accept that a freehold in English law does not confer property rights in the land itself either, but only in the estate in the land.\textsuperscript{126} It is better to abandon such formalistic views and to recognise that patents and copyright give the right-holder rights which are the mirror

\begin{itemize}
\item \textsuperscript{121} Compare Patents Act 1977, s. 1.
\item \textsuperscript{122} One may, however, speculate whether Penner is aware of the specific technical meaning of ‘expression’ in copyright law.
\item \textsuperscript{123} This is a general outline of the principles for the purpose of a discussion of the object of property in copyright within property theory. It should not suggest that especially issues of non-literal copying are easy to resolve. On the idea–expression dichotomy, see below Chapter 3.
\item \textsuperscript{124} Harris (1996: 45). On these trespassory rules, see below under (b).
\item \textsuperscript{125} Penner (2000: 120).
\item \textsuperscript{126} Gray and Gray (2009: 57).
\end{itemize}
Copyright and creativity

image of ownership in traditional property law. What one finds in s. 60 of
the Patents Act 1977 and in ss. 16–27 of the CDPA 1988 are what Honoré
has called ‘incidents of ownership’,127 applied to the specific property type
in the form of intellectual property.128 Since the res in intellectual property
exists only as an imaginary conception of lawyers, the extent and content of
the rights to that res must necessarily be spelt out by the law in the form of a
list of rights (i.e. the infringement provisions); there is no possibility of
relying on physical characteristics of the thing which the law can attach to,
and from which its extent and limits naturally ensue, like the boundaries of
land or the size, shape and properties of a chattel. There is no need to spell
out that a stone cannot be eaten (although ownership rights would allow
this in principle) but can be used to build a wall, while with an apple exactly
the opposite applies. The law and legal doctrine can therefore resort to very
general statements regarding the content of ownership rights (such as:
‘ownership is the greatest possible interest in a thing which a mature legal
system recognises’129) because building walls with apples or eating stones is
‘physically’ pointless. Therefore the idea of ‘essentially indefinable use-
rights’ is a workable concept in traditional property law. In case of abstract
concepts like ‘patent’ or ‘copyright’, however, nobody would know which
rights of use that can entail. Contrary to Penner’s view, patents do protect
inventions,130 as copyright protects expressions of ideas, and in this way turn
them into property (rights). The rights of protection in question must be
defined conclusively by the law which means that a conceptual attribute of
‘indefinable use-rights’ for purely intangible property is not workable. The
legal definition delineates the notional res, and thereby effectively creates it.
Therefore, as already said, intellectual property and intellectual property
right are interchangeable terms, the former emphasising the res, the latter the
rights attached to the res. The delineation/protection of the res happens in
the infringement provisions in particular.131 Or, put differently, the existence
of the substance of the copyright-property (‘subsistence of copyright’) is
determined by the legal criteria of work-originality-fixation (in UK law),132
and the extent of the substance is delineated by its attributes, composed of

---

128 Compare Honoré’s comment to copyright in this context, Honoré (1961:
131).
130 Being an invention (although not defined in the law) is the first requirement
for protection, followed by novelty and inventive step, see PA 1977, s. 1 (1) and (2),
131 Patents: PA 1977, s. 60; copyright: CDPA 1988, ss. 16 et seq.
132 See above under II. 1. (a) and below under II. 2.
the external side (rights to exclude) and internal aspects (rights to use) of the real rights in the substance.\textsuperscript{133}

In intellectual property, the external or exclusionary aspect of the real rights dominates. It is obvious that a purely notional realm defines itself and its area of protection in exclusionary terms, thus negatively or in a tortious way: the realm of protection emerges as soon as all possible trespassory acts are subtracted.\textsuperscript{134} The rules which define such acts as trespassory together put up the notional fence and exclude everybody except the right-holder from the realm of protection. In copyright these tortious or trespassory acts include copying of the work, issuing copies of the work to the public, and performance of the work.\textsuperscript{135} When someone other than the right-holder copies without authorisation, he steps over the notional fence in question. The notional fence is thus formed by the sum of all trespassory acts and delineates the extent of the realm of the copyright-res. If there is no notional fence or remaining area, the copyright-res does not exist or no longer exists (in law), as with works that have passed into the public domain. One can see the purely normative definition of the res in law: the poem out of copyright is very much extant in the real world, but a nullum in copyright law, except for the fact that it has an impact on future works that seek protection.\textsuperscript{137} Where a work derives (substantially\textsuperscript{138}) from a pre-existing work in the public domain, its copyright-originality\textsuperscript{139} is denied and no copyright protection is available.\textsuperscript{140} But there is no infringement of the pre-existing work because the pre-existing res has become a nullum in law: there are no rights in it or trespassory acts left which would delineate a remainder, the notional realm of protection.

The concept of copyright protection is similar to the protection of tangible property, especially in relation to the right of ownership under English law, being a tortious protection or negative protection of ownership. Intellectual property infringement provisions are tortious, especially...

\textsuperscript{133} Compare I. 2.
\textsuperscript{134} See above under I. 2 for traditional property. As regards land, looking into someone’s garden from the street without a licence does not trigger a trespassory action, while entering the land does: a copyright equivalent would be – reading a book without permission: no trespassory action (as regards copyright), photocopying: trespassory action (infringement).
\textsuperscript{135} See CDPA 1988, ss. 16 et seq.
\textsuperscript{136} See above under I. 3.
\textsuperscript{137} See Chapter 2.
\textsuperscript{138} This is a normative term; as is well known, derivative works can be regarded as original and may obtain copyright protection, see Spence (2007: 88).
\textsuperscript{140} Compare Rahmatian (2005b: 292).
trespassory,\textsuperscript{141} in nature, and they share this feature with the protection of ownership rights in real\textsuperscript{142} and personal\textsuperscript{143} property in English law; thus intellectual property protection is in this respect conceptually consistent. In Civil law countries, where the concept of ownership (protection) is the positive Roman law concept,\textsuperscript{144} principal property protection is through the real (not personal) action for recovery of property or \textit{rei vindicatio} in respect of tangible property. This is a central element of ownership and the most important ownership right.\textsuperscript{145} (But the \textit{rei vindicatio} in early classical Roman law was originally a monetary claim based on the (increased) calculated value of the \textit{res} if the defendant did not return the \textit{res},\textsuperscript{146} and was in many cases \textit{in effect} a positive action for recovery.\textsuperscript{147}) From a conceptual point of view, one might expect that in Civil law countries, intellectual property is also protected by specific property rights. Thus in particular one may suppose a distinct ownership recovery right that emanates from the \textit{ius in rem} itself and restores ownership of the intellectual property right or prevents encroachment on the realm of ownership. But intellectual property as a purely intangible cannot be possessed and delivered physically in Civil law countries either, nor can a dispossession take place which a court action would need to seek to reverse, so there is only the option of a tortious remedy. Remedies in Civil law countries against intellectual property infringement would also be regarded as tortious in nature if the categories of English law were used.\textsuperscript{148} This could be seen as a crack in the otherwise generally unitary concept of property (i.e. the same rules generally apply to immovable, moveable, tangible and intangible property) which Civil law countries generally adhere to. Nevertheless, no real action or \textit{rei vindicatio} does not by itself mean that copyright is not a property right.\textsuperscript{149} Courts in

\begin{footnotesize}
\begin{enumerate}
\item[141] Harris (1996: 45).
\item[142] Harris (1986: 144–45).
\item[144] See above under I. 2.
\item[145] For this reason, in some legal systems the right containing the real action cannot be assigned separately from the transfer of ownership in the thing to which the real action relates (e.g. Austria), or the assignment of the real action can be a method of transfer of ownership (e.g. in Germany, if a third party possesses the thing in question at the time of the transfer, German BGB, § 931).
\item[146] \textit{Clausula arbitraria} in the formula of the \textit{rei vindicatio}.
\item[147] Nicholas (1975: 101 and n. 1).
\item[148] See e.g. with regard to copyright, Germany: UrhG 1965, §§ 97 et seq., France, CPI 1992, arts. L 331 et seq. See also Rahmatian (2003: 427).
\item[149] A prominent example of the erroneous (Roman law-based) conclusion that if there is no \textit{rei vindicatio}, then the (copyright) cannot be a property right was Lord Kames’s pronouncement in the Scottish case \textit{Hinton v. Donaldson} (1773) (ed. J. Boswell), p. 18, most accessible source: L. Bently and M. Kretschmer (eds), \textit{Primary
Civil law countries recognise the need for strong and specific infringement provisions (including rules regarding injunctions and damages) for copyright because its incorporeal nature makes it very difficult to protect it otherwise.\(^{150}\) Thus in reality, intellectual property protection principles are conceptually practically the same in Civil law and Common law countries, despite their different ownership (protection) conceptions. With regard to copyright, however, the rights in author’s rights systems have less strong proprietary features than the rights in the copyright systems in the Common law world,\(^{151}\) although this is arguably not relevant in relation to the infringement provisions, that is, the external aspects of the real rights conferred by copyright.

The prominence of the external aspect of real rights with intellectual property rights has led some commentators to define intellectual property rights as merely ‘negative rights’: rights to stop others doing certain things.\(^{152}\) Copyright shows well that such a definition neglects the internal side of real rights and is incomplete. This internal aspect, the right to use, manifests itself especially in the right to assign or license\(^{153}\) and is the principal economic pillar of the copyright industries. This right to alienate is a typical, though not an indispensable,\(^{154}\) defining element of a property right.

(c) Is copyright a real right, a ‘monopoly right’ or a ‘privilege’?
What makes a right a property right is difficult to define. Civil law countries are in a better position in this regard, because codified systems provide an exhaustive list or a *numerus clausus* as to what constitutes a property right (ownership, mortgages, easements and the like).\(^{155}\) The Common law

---

150 So e.g. the Austrian Supreme Court (OGH) with regard to copyright (author’s right) and its liquidated damages provision for infringements in Austrian law, § 87 (3) UrHG 1936, OGH 26 May 1998, SZ 71/92.
151 See below under 3.
152 Cornish and Llewelyn (2007: 6).
153 In the UK CDPA 1988, ss. 90 (1) and (4), 92. See Chapter 5 below.
systems effectively operate such a *numerus clausus* in all but name, for example, whether in English law an activity in question qualifies as an easement, and is thus the exercise of a property right, is determined by the *Re Ellenborough Park* test. The courts effectively shape the *numerus clausus* when deciding whether an event or activity is property. The Common law generally uses rules of thumb: characteristic of a property right is that it is identifiable, has a certain permanence, that it is enforceable against everyone or 'binds the world' and that it is (typically) alienable. The latter criterion is not necessarily free from circularity. Rights have been identified as property rights because they are alienable, but it is in fact their proprietary quality that makes them alienable. Intellectual property rights are property rights because the law – in the UK at least – defines them as such (in the case of copyright, patents, trade marks and designs) or assigns certain powers to these rights which are functionally powers of property, as discussed, and thereby renders the rights permanent, enforceable against everyone and alienable. Such powers are very similar in author's rights countries.

As with traditional property, the *numerus clausus* of intellectual property rights can only be a snapshot of a given jurisdiction at a given point in time and is subject to judicial interpretation and ingenuity. The way in which some judgments have dealt with certain phenomena indicates that the

---

156 Rudden (1987: 244) with references to English case law.
157 The requirements are that: (1) there must be a dominant and servient tenement, (2) the easement must accommodate the dominant tenement, (3) the dominant and servient owners must be different persons, (4) the right must be capable of forming the subject-matter of a grant, see *Re Ellenborough Park* [1956] Ch 131, at 140. See Gray and Gray (2009: 601–2).
158 E.g. no property or quasi-property in a spectacle: *Victoria Park Racing and Recreation Grounds v. Taylor* (1937) 58 CLR 479, 496 (High Court of Australia).
161 CDPA 1988, s. 1 (copyright), s. 213 (unregistered designs), TMA 1994, s. 2 (trade marks), PA 1977, s. 30(1) (patents), RDA 1949, ss. 1 (2), 2 (registered designs). Intellectual property rights are normally also regarded as choses in action (in England). Patents are apparently not, see PA 1977, s. 30 (1), Cornish questions why patents should be different, Cornish and Llewelyn (2007: 279, n. 55). See discussion in Firth and Fitzgerald (1999: 231). In the present context of the concept of dematerialised property, the matter is of limited importance.
162 See above under II. 1. (a) and (b).
163 See below under II. 3.
Copyright as property

courts are prepared to treat these effectively as property,\footnote{See example by Lord Devlin with regard to copyright in *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 WLR 273, at 291: a shop window arrangement of wine bottles (no copyright), making a list (potentially copyright). E.g. in the US case *International News Service v. Associated Press*, 248 US 251, 236 (1918). See also Heverly (2003: 1128–29).} for example, information,\footnote{E.g. in the US case *International News Service v. Associated Press*, 248 US 251, 236 (1918). See also Heverly (2003: 1128–29).} or confidential information in breach of confidence actions.\footnote{See also M. Rose (1993: 78–82, 95–104), Sherman and Bently (1999: 13–15), Deazley (2006: 15–25).} Such interpretations open up the closed list of intellectual property rights by treating certain claims functionally as proprietary rights without necessarily calling them thus. This approach can also work as a restriction of existing rights, including those where the proprietary nature of the intellectual property right is (at first sight) beyond doubt, such as copyright. The law chooses whether a phenomenon is property or not, and therefore copyright can be abolished or restricted in its scope at any time in relation to any type of work.

There is no difference either whether copyright is a common law right or a statutory right, these are merely different means of legal form.\footnote{This is contrary to Brennan’s argument (1992–93: 675).} Both statutory and (where it exists\footnote{In the US at state law level, to the extent to which it was not pre-empted by Copyright Act 1976, 17 USC § 301. Thus common law copyright is very limited in the US (works not fixed in tangible medium of expression). On the history of the US common law copyright, Ginsburg (2007: 150–53).} common law copyright are not natural, but conventional rights, and therefore no conclusions as to permanence or perpetuity of the right can be drawn. This is what critics against proprietorianism of copyright often overlook: they see the need to develop long, historically well-informed arguments that there was never a common law copyright in England,\footnote{Deazley (2006: 15, 20, 23).} forgetting that in any case a common law creature has no more force or permanence since it is as much a legal artefact as a statutory one. The common law itself showed that: *Donaldson v. Becket*\footnote{(1774) 4 Burr 2408, 98 ER 257, 1 ER 837.} decided, against the earlier case *Millar v. Taylor*,\footnote{(1769) 4 Burr 2303, 98 ER 201.} that no perpetual common law copyright existed.\footnote{At least this is one interpretation, see discussion in Ginsburg (2007: 142). See also M. Rose (1993: 78–82, 95–104), Sherman and Bently (1999: 13–15), Deazley (2006: 15–25).} Common law copyright has therefore
been judicially removed from the numerus clausus of (intellectual) property rights or was apparently never part of it.

Copyright-property is always ‘made’, either expressly through statute,173 or by giving certain powers to the rights of copyright which are functionally powers of property.174 However, Drahos175 and especially Deazley176 prefer to see copyright as a ‘privilege’, not as a property right. If the powers of such a privilege are functionally those of a property right, then the only effect of calling them privileges would be a pointless re-labelling.177 It will therefore be necessary to ascertain the meaning of the term ‘privilege’ in the context of copyright.

There are at least three meanings of ‘privilege’: (i) the pre-copyright privileges of the rulers of the various principalities in Europe (especially before the French Revolution), (ii) the privilege in Hohfeld’s classification of rights, and (iii) the ‘exclusive privilege’ in Scots law, a term that theoretically still seems to be in existence in modern Scots law,178 but was used mainly in the eighteenth century by Adam Smith and others for what would now be called intellectual property rights, although the old term went beyond the scope of the modern meaning.

(i) A privilege, for example, under the ancient régime in France before the French Revolution in an area which covers to a large extent that of copyright today would be a protection against unauthorised reprinting or performance, given by the grace of the ruler, not as of right.179 Famous examples in history are the privileges that the French King Louis XIV

---

173 Currently, s. 1 of the CDPA 1988.
174 This was arguably the situation before the CDPA 1988, because the preceding Copyright Acts of 1956 and 1911 did not specifically define copyright as a property right. This is also the position in author’s rights countries with regard to the economic rights aspect of the author’s rights.
178 Reid (1996: 10–11), para. 5.
179 See Le Chapelier who refers in his report of 1791 (version in Moniteur Universel, vol. VII, p. 116) to this paradigm shift from the ‘privilege’ of the ancient régime to ‘law’ as from the French Revolution: ‘mais [faisant jouir un auteur de son travail] est une exception qui, dans notre ancien régime, était consacrée par des privilèges royaux; qui, en Angleterre, est l’objet d’un acte tutélaire; qui, dans notre nouvelle législation, sera l’objet d’une loi positive, et cela sera beaucoup plus sage’. (‘but [giving an author the benefit of his work] is an exception which, under the old regime, was effected by royal privileges; which in England, is the subject of a protective statute; which, in our new legislation, will be the object of a positive law, and that will be much wiser.’) Quote from and translation by Sterling (2008: 1567–68).
granted to his court composer and Surintendent de la Musique Royale Jean-Baptiste Lully (1632–1687). Such a privilege (‘avec privilege de sa Majeste’) could look like this\footnote{Compare discussion of the rather formalised structuring of privileges in Germany by Jänich (2002: 23).} – small excerpts are taken here from the printed libretto of Jean-Baptiste Lully’s opera \textit{Alceste} (1674, libretto by Philippe Quinault):\footnote{Lully/Quinault, \textit{Alceste} (libretto) (1674: 73–74). The approximate translation is mine.}

\begin{quote}
\ldots bien informez\footnote{The old spelling has been retained throughout in the following quote.} de l’intelligence & grande connoissance que c’est acquis nostre cher & bien amé Jean-Baptiste Lully au fait de la Musique \ldots Nous\footnote{The French King Louis XIV.} lui permettons de donner au public toutes les pieces qu’il aura compose, mesme celles qui auront esté representée devant Nous \ldots

Comme aussi de faire chanter aucune piece entiere en Musique, soit en vers Francais ou autres Langues, sans la permission par écrit dudit Sr Lully, à peine de dix mil liv. d’amende & de confiscation des Theatres, Machines. Décorations, Habits & autres choses, applicable un tiers à Nous, un tiers à l’Hôpital General, & l’autre tiers audit Sr Lully \ldots

\ldots well-informed of the understanding and great knowledge which our dear and beloved Jean-Baptiste Lully acquired in the area of music \ldots We permit him to present to the public all pieces which he has composed, even these which were performed before Us \ldots

As also to have no piece, be it a piece of music only, or in French verses or other languages, sung (performed) without the permission in writing of the said Sieur Lully, punishable by a fine of ten thousand pounds and the confiscation of theatres (stages), machinery, decorations, costumes and other things; one third to go to Us, one third to the General Hospital, and the remaining third to the said Sieur Lully \ldots
\end{quote}

The almost unfettered and unassailable powers that were arbitrarily given by way of privilege to some chosen individuals to reward real or perceived merits (‘l’intelligence & grande connoissance que c’est acquis nostre cher & bien amé Jean-Baptiste Lully au fait de la Musique’) in the late stages of feudalism, together with the closely connected system of purchases of state offices and the ensuing corruption, were one triggering factor for the condemnation of feudalism which early liberal thinkers expressed in the eighteenth century.\footnote{Another, connected, central point of criticism was that feudalism did not allow the free transferability of property, especially land, see e.g. Kames on the.} Lord Kames was a particularly vociferous representative of this criticism when he said that feudalism, this ‘violent and
unnatural system’, was against human nature and liberty and hindered modern commercial and political development.\(^{185}\) In a debate whether copyright could be a privilege rather than a property right, the cardinal flaw of liberalism, the assumption that legal equality would also mean political, social and economic equality should not lead to the erroneous idea that the earlier feudal privilege system was in any way better.

(ii) In Hohfeld’s scheme of jural relations, a ‘privilege’ (or ‘liberty’)\(^{186}\) is the opposite of a duty and the correlative of a ‘no-right’.\(^{187}\) In contrast with claim-rights, the privilege holder is at liberty with respect to some others to do or not to do a given thing, but the others have no claim-right against the right-holder (and the right-holder has no duty against the others) that he has to do/not to do the thing in question.\(^{188}\) Hohfeld clearly conceived property rights principally as claim-rights \textit{in personam} (with the problem of creating a rather artificial construct of a multitude of correlative duties\(^{189}\)): ‘whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off.’\(^{190}\) Thus a copyright-owner may have the privilege to publish or not to publish the work, but she has a claim-right (not a privilege which has no correlative duty) against anybody copying the published work and everybody has a correlative duty to refrain from copying. It is the external aspect of the copyright, the claim-right (and correlative duty) regarding infringement which Drahos and Deazley are presumably concerned about; in this respect the Hohfeldian concept of ‘privilege’ is of no assistance to their argument.

(iii) The meaning of ‘exclusive privilege’ in classical Scots law has been set out by Adam Smith in his \textit{Lectures on Jurisprudence}. Exclusive privileges were a mixture of trade monopolies and privileges given to tradesmen and (trading) corporations (e.g. the East India Company), hunting rights, Scottish entail (Kames (Henry Home), \textit{Sketches of the History of Man}, Appendix, 2007/1788: 907); or that it hinders economic efficiency, general progress and the creation of wealth. See e.g. Adam Smith, Book 2, chapter 3, Book 3 chapter 2 (1976/1776: 334, 384–88). On the revival of feudalism with the assistance of copyright, see Chapter 6.

\(^{185}\) Kames (Henry Home), \textit{Historical Law-Tracts}, Tract III (1792: 141, 155–56). See also Rahmatian (2006: 198) with further references.

\(^{186}\) This is the term preferred by later legal theorists, see Becker (1977: 12).

\(^{187}\) Hohfeld (1920: 38).

\(^{188}\) Becker (1977: 12–13).

\(^{189}\) See discussion above under I. 2.

\(^{190}\) Hohfeld (1920: 39), ibid.: ‘… the correlative of X’s privilege of entering himself is manifestly Y’s “no-right” that X shall not enter.’
rights which one may call \textit{profits à prendre}, but also the privileges of inventors and writers out of which grew the patent and copyright laws.\footnote{Smith (1762–63, 1978/1766: 81–82, 85).} Adam Smith regarded ‘exclusive privileges’ as real rights and as monopoly rights and therefore viewed them with suspicion: \footnote{Smith (1762–63, 1978/1766: 82–83).}

The greatest part however of exclusive privileges\footnote{The old spelling has been retained throughout in the following quotes.} are the creatures of the civil constitutions of the country. The greatest part of these are greatly prejudicial to society. Some indeed are harmless enough. Thus the inventor of a new machine or any other invention has the exclusive privilege of making and vending that invention for the space of 14 years by the law of this country, as a reward for his ingenuity, and it is probable that this is as equall an one as could be fallen upon. … if the invention be good and such as is profitable to mankind, he will probably make a fortune by it; but if it be of no value he also will reap no benefit. In the same manner the author of a new book has an exclusive privilege of publishing and selling his book for 14 years … as an encouragement to the labours of learned men. And this is perhaps as well adapted to the real value of the work as any other, for if the book be a valuable one the demand for it in that time will probably be a considerable addition to his fortune. But if it is of no value the advantage he can reap from it will be very small. – These two privileges therefore, as they can do no harm and may do some good, are not to be altogether condemned.\footnote{The same argument in his \textit{Wealth of Nations}, see Smith, Book 5, chapter 1 (1976/1776: 754–55).} But there are few so harmless. All monopolies in particular are extremely detrimental.

Exclusive privileges, where they are intellectual property rights, are conceptually property rights, they confer a legal monopoly right, which entails the right to exclude everyone except the holder of the privilege and confers in its widest version the right to use and dispose of the object unreservedly: that is the quality of ownership, the principal and most far-reaching property right. There is no need to distinguish between ‘exclusive privileges’ and property rights when it comes to intellectual property,\footnote{Rahmatian (2006: 188).} and nothing can be gained from this term when the proprietary nature of copyright is critically assessed. This is even so if one looks at the following most interesting passage in Smith’s \textit{Lectures} which has been left out in the extract above: \footnote{Smith (1762–63, 1978/1766: 83).}

Some inde(e)d contend that the book is an intire new production of the authors and therefore ought in justice to belong to him and his heirs forever, and that no one should be allowed to print or sell it but those to whom he has given leave, by the very laws of naturall reason. But it is evident that printing is no more than a
speedy way of writing. Now suppose that a man had wrote a book and had lent it to another who took a copy of it, and that he afterwards sold this copy to a third; would there be here any reason to think the writer was injured. I can see none, and the same must hold equally with regard to printing.

Smith’s observations do not, as adherents to a non-proprietarian concept of copyright might conclude, indicate that copyright is not really a property right but a privilege. Rather, they point towards possible limitations of the powers that this property right confers. These limitations exist, not despite the fact that copyright is a property right, but because it is a property right.\textsuperscript{197} The fact that copyright is a property right does not mean that it must last forever (‘… ought in justice to belong to him and his heirs for ever …’) and that it must extend to all possible uses of the work (‘… any reason to think the writer was injured. I can see none …’).

What is now the content of Drahos’s and Deazley’s non-proprietarian conception of copyright as a privilege? Their idea of privilege is apparently not one which resembles the three types of privilege that have just been set out.\textsuperscript{198} Drahos argues for an ‘instrumental attitude’ to intellectual property rights. His instrumental approach regards law as a tool, and tries to investigate the contingent connections and processes that exist between property and the formation of groups and factions, between property and power, between property and economic growth and development, and the social patterns and organisations which shape property. It endorses an approach that calculates the social costs of intellectual property protection. The instrumental attitude also requires property to serve moral values.\textsuperscript{199} And: ‘Intellectual property rights are liberty-inhibiting privileges. Our claim is that instrumentally based privileges are accompanied by duties that fall on the holder of the privilege.’\textsuperscript{200} Deazley echoes Drahos’s concept.\textsuperscript{201}

The evident lack of precision of this approach can be tested in a nice example where an allocation of rights is required in the situation of conflicting claims. In the year 2000, the well-known British artist Tracey Emin was commissioned as artist in residence at a primary school for an art project with eight-year-old children. Under her guidance, the children created a patchwork quilt. The school decided to have it sold at an auction house which advised that the work could be sold for up to £35,000 if Tracey

\textsuperscript{197} On the limitations, see Chapter 3.
\textsuperscript{198} Hence referring to copyright as a privilege is confusing, compare Strowel (1993: 126).
\textsuperscript{199} Drahos (1996: 214).
\textsuperscript{200} Drahos (1996: 220). So this is clearly not a Hohfeldian privilege.
\textsuperscript{201} Deazley (2006: 162-63), criticising that Drahos did not maintain his approach sufficiently in his later writings.
Emin authenticated that the work was hers. The school wanted to raise money for future art projects and approached the artist. However, Tracey Emin refused to authenticate the blanket as hers, but at the same time requested the school to return it to her because the school apparently did not sufficiently appreciate being ‘in possession of such a historically valuable collaborative work’ with ‘one of the country’s leading contemporary artists’. An art critic commented that the children’s primary experience of art should not be as a commodity. With Drahos’s instrumental approach one could argue (unsympathetically) that Tracey Emin should be the only one to obtain the benefit of the work in question, because she is an established artist whose creations have a substantial value in the art market, and therefore the market must not be deprived of realising this value (or its potential value), otherwise economic growth and development would be impeded. The fact that she is an established artist means that what she produces (also vicariously?) is art and has therefore value. Or, one could argue, she has produced an artwork by virtue of her being a recognised artist, and power (rights) should not be given to anyone but the creator of the work, hence her entitlement. If entitlements were transferable, art and creativity would be reduced to a mere commodity, and children should not experience art as a commodity. The children are either not ‘artists’ or do not produce anything of value in the eyes of the art market, hence no entitlement. Or, on the contrary, the children should obtain rights because otherwise their creativity would be stifled. Some of these results are surely unwelcome to ‘non-proprietarianists’ but their envisaged concept of copyright is as vague and arbitrary as the old privilege system. It may effectively result in a simple privilege in the style of the ancien régime which was then handed down to an artist often by some corrupt or imbecile superior as a matter of grace. As Louis XIV granted Lully his privileges, we (who actually?) may give Tracey Emin a copyright privilege today if we want to reward her apparent artistic merits, or if the calculated social costs of intellectual property protection of her work are considered as acceptable and if her work is perceived to serve certain moral values, for example. What the necessary duties are that fall on her as the holder of the privilege is unclear. In contrast, a possible solution of the conflict between the artist and the children along the lines of conventional personal property and copyright laws could give the artist copyright in the blanket in the form of joint authorship only if there was collaboration between her and the children, or no copyright at all, depending on her actual

---

Copyright and creativity

input in the work; and the right to the quilt itself is to be determined according to the personal property rights to the old scraps of cloth out of which the blanket has been made. The right allocation based on property rights is much clearer and more predictable. It appears that a properly understood property paradigm is fairer and far more advantageous than a diffuse ‘privilege’ concept of copyright.

The historic root of copyright and patents in the old privilege system may have contributed to the rather unhelpful debate as to whether property rights (including intellectual property rights) are monopoly rights or not. It has been pointed out that property rights and monopoly rights are not the same, but that depends on what kind of definition one chooses. A patent under the old privilege system granted rights far beyond those of modern patents, and these rights could indeed amount to economic monopolies. From an economist’s perspective today, (intellectual) property rights are not monopoly rights, because the economist’s term refers to the factual situation of a market monopoly, and that is technically independent from (but potentially influenced by) individual property rights conferred by law. (Intellectual) property rights deal with issues of identification (attribution), not of economic monopoly. If property rights are, as in the present context, seen as legal institutions, then the emphasis of this perspective lies in their exclusivity which has an internal aspect (here especially the incidents of ownership), and an external side (manifested in trespassory or infringement actions), and this exclusionary aspect can also be named ‘(legal) monopoly right’. However, this term, whether it be used for copyright or for property rights in general, has little additional explanatory value for the lawyer. So one can equate copyright-property rights with ‘(legal) monopoly’ or even with ‘exclusive privileges’, but it is better to

---

204 Ibid.
208 This was in principle still so during Adam Smith’s time, and should be taken into account when Smith refers to exclusive privileges and monopoly rights in his Wealth of Nations, see Smith, Book 5, chapter 1 (1776:755).
210 As discussed, see above under I. 2.
213 See Rahmatian (2006: 188) and discussion above.
stay with the term ‘property right’ to avoid erroneous and confusing distinctions.

2 The Proprietarian Common Law Conception of Copyright: Protection against Parasitical Unfair Competition and Free-Ride

Some essential features of the Common law conception of copyright have in fact already been discussed because the presented idea of dematerialised (copyright) property has been modelled upon this conception, especially upon its British version. The underlying rationale of copyright protection is the creation of property as a legal concept for the potential commercial benefit of its ‘author’ or maker and/or the presumed investor. A creation of the human mind (out of a catalogue of intellectual creations) is given protection by law, because the mechanism of copyright law transforms the creation in question into (intangible) ‘property’ within the normative meaning of the law. This propertisation renders the creation protectable, because once it is property it can benefit from the protection mechanism which the law provides for property. The creation is (in law), because it is property, or, put differently, because the creation is property, its maker/investor obtains protection for it. This idea can be attributed to Locke’s liberal personality concept. Locke repeatedly equates ‘property’ with ‘life, liberty and estate’: thus a person has only got (protected) freedom if his/her property and property acquisition are also protected. Hence an intellectual creation must also be turned into property, so that its maker can obtain protection for his/her freedom through the protection of that property. The protected property is notionally attached to the maker’s personality and represents it in part: in this way, the property protects its maker.

The legal mechanism of copyright through which intellectual creations are turned into property has already been summarised: a creation is protected by copyright if it constitutes an original work that is recorded in some permanent form. ‘Work’, ‘originality’ and ‘recording (fixation)’ are the criteria for the subsistence of copyright under UK law or, in other

---

214 On the specific meaning of ‘author’ in copyright laws, see below under (d) and Chapter 4. The author will also be referred to neutrally as ‘maker’, because that is what he is in the eyes of copyright law.
215 See above under II. 1.
217 The concept of author’s right protection is principally exactly the other way round: as the maker’s personality is protected, so must be his/her creation as an extension to his/her personality, see below under II. 3.
words, the elements of the res or property object which copyright law turns the intellectual creation into.

(a) The elements of the copyright-property I: work

To constitute a ‘work’ in law, the intellectual creation must fall into one of the normative categories provided. In the UK, this is a conclusive list of eight categories; the ‘works’ which the CDPA 1988 provides (category approach) are: the ‘authorial works’ – literary, dramatic, musical and artistic works,\(^{218}\) and the ‘entrepreneurial works’ – sound recordings, films, broadcasts, published editions.\(^{219}\) This list is characteristic of the British copyright philosophy. What is really at the heart of protection is the grant of a legal monopoly or exclusive right which enables the entrepreneur to obtain protection for his investment, that is, to recoup his expenses and to make a profit. Copyright protects the potential economic value of a creation and therefore permits the creator/investor to gain a profit from it. Whether the ‘work’, the object of protection, is an artistic creation or the mundane result of unimaginative labour is unimportant, and the maker is ‘entrepreneur’ for copyright purposes, whether he is a poet or a record producer. This is obvious from the fact that the ‘entrepreneurial works’, none of which (except perhaps\(^{220}\) films) have any artistic element, are (almost\(^{221}\) on an equal footing with the authorial works which are traditionally associated with artistic effort of some sort. The 1988 Act abandoned the old separation between authorial ‘copyright’ works and neighbouring rights for entrepreneurial works\(^{222}\) and thus emphasised the protection of entrepreneurial investment further. This central aspect of copyright protection can already be found in the Statute of Anne 1710, the first Copyright Act in the UK and the world.\(^{223}\) The legal definitions of authorial works also contain a lot of creations that are usually the product

\(^{218}\) CDPA 1988, ss. 1, 3–4.

\(^{219}\) CDPA 1988, ss. 5A, 5B, 6, 8.

\(^{220}\) A ‘film’ in UK copyright law is not only a cinematographic work (which is undoubtedly ‘artistic’) but also the recording by an unsupervised camera, see Bently and Sherman (2009: 111).

\(^{221}\) Not exactly with regard to copyright originality, see below under II. 2. (b).

\(^{222}\) Cornish and Llewelyn (2007: 415).

\(^{223}\) 8 Anne, c. 19, 1710, preamble: ‘WHEREAS printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing... books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families...’. See also Rose (1993: 42–48).
Copyright as property

of purely entrepreneurial endeavour: within literary works, these are especially computer programs,224 compilations and databases;225 within artistic works, these are diagrams, charts and photographs, for example, and the statute stresses that protection is granted irrespective of their artistic quality.226 Although in the UK the list of works is closed (i.e. no copyright is available if the creation does not fall into any of the categories provided227), the drafting of the statute and the courts’ interpretation suggest an open-ended approach with regard to the scope of each individual category.228 Established case law generally shows clearly that investment protection is the decisive factor.229

In the United States, the list of works capable of copyright protection is non-exhaustive,230 but contains the usual demonstrative list of copyright-protected works, including entrepreneurial categories such as sound recordings and audiovisual works. From a property theorist’s perspective, the existence of a non-exhaustive list of categories, or flexibility of categories constitutes a weakening of the *numerus clausus* of property rights or a blurring of the boundary between res and non-res, because the compliance with the requirement of copyright ‘work’ is the first step towards the creation of the legal concept of copyright-property.

It has already been pointed out that the term ‘work’, for instance ‘literary work’, contains normative definitions that may not reflect any everyday understanding of its meaning, but cater for investors’ commercial interests. Another aspect of the normative nature of the term ‘work’ is that through this device the law translates entirely different forms of intellectual creations, such as street directories, novels and computer programs, into a legally recognisable concept and typifies them, as part of turning them into objects of property. Thus poems, paintings, maps, theatre plays, sound

---

224 As a result of international harmonisation with a strongly entrepreneurial drive, see TRIPS Agreement, Art. 10 (1). The Berne Convention (1971), to which the TRIPS Agreement refers, is silent in the definition section in Art. 2 (1); Computer Program Directive 2009 (2009/24/EC codifying Directive 91/250/EEC), Art. 1 (1).
225 CDPA 1988, ss. 1(l)(a), 3A.
226 CDPA 1988, s. 4 (1) (a).
228 E.g. *Nova Productions v. Mazooma Games* [2006] RPC (14) 379: bitmap files in a computer game which enable the display of specific images and composite frames are graphic works (i.e. artistic works).
recordings, are all ‘works’ in the eyes of the law: only if an individual poem is a ‘work’ does it exist for the purpose of copyright law (provided the other protection criteria are fulfilled), and if it exists, it must exist as a form of property, otherwise it does not exist in law at all. The property-object or res, for which the criterion ‘work’ is one constituting element (besides originality and fixation), may be represented by a specific poem in question written on a sheet of paper or by the score of an individual piece of music, but neither the writing nor the score are the ‘work’, they are only concrete reifiers and incidents of the abstract notion of copyright-property.231

In copyright countries, not only the category of ‘work’, but also the second element, ‘originality’, is principally geared towards the protection of the investor.

(b) The elements of the copyright-property II: originality

Not to reward artistic ingenuity, but to prevent a short-cut and a free ride on a competitor’s efforts and expenses, the law requires that the work must originate from its maker to obtain protection (i.e. to become property). ‘Originality’ in UK copyright law means that the work is the result of one’s own independent skill, labour and judgement and does not derive from elsewhere. Whether the work also shows any (artistic) originality, novelty or creativity, is irrelevant.232 The criterion of ‘originality’ is the second element in the making of copyright-property. This principal originality rule within the Common law world can, however, be accepted only with certain qualifications. It is true, ‘original’ means non-derivative, ‘originaire’ (in French), not ‘originell’ (in German), but one has to distinguish between different types of originality which depend partly on the level of a certain required creativity and partly on the level of a required independence of the work from pre-existing works. As to the level of originality/creativity, in the United States the test of originality, developed in *Feist*, a decision on listings in a telephone book, is a stricter test than the ‘sweat of the brow’ test in the UK: the work has to be independently created and (unlike in the UK) must possess at least some minimal degree of creativity.233 Canada followed the United States in a decision in relation to a telephone directory,234 but pointed out in a subsequent case regarding reports of judicial decisions and

---

231 See above, I. 1. (a). The paper on which the poem is written is a direct reifier of the res as to personal property and an indirect reifier as to copyright.


other legal material that creativity is not required to make a work original, provided the necessary exercise of skill and judgement is not so trivial that it is purely mechanical. Australia follows the British ‘sweat of the brow’ model with regard to the level of originality: industrious effort on the part of the maker suffices.

Even within one jurisdiction, here the UK, one has to distinguish between ‘truly independent’ creative or non-creative ‘original’ works, works which have to be ‘not copied’ instead of being original in the strict copyright sense, and (moderately) derivative works that are nonetheless acceptable. Truly independent original works are those which use a negligible amount of material, either as formal elements or as substantive content, from pre-existing works (either protected or in the public domain). Whether the effort is artistically creative or not is irrelevant, but it is obvious that even highly ‘original’ artistic works borrow from older material and have been influenced by previous works to some extent. Entrepreneurial works do not even require originality, it is sufficient for their protection if they are not copied from a previous work of the same kind.

This shows again the emphasis of copyright on investment protection and protection against anti-competitive practices, not necessarily the promotion of creativity – in the case of a sound recording or a typographical arrangement there could hardly be any. A similar protection philosophy applies to derivative works. It is the skill and labour applied to the derivative work (whether artistic or not) which brings about a potential economic value independent from the pre-existing work and therefore deserves separate copyright protection, such as a translation, the photograph of a picture, the shorthand notes of a speech, the restoration, deciphering and analysis of fragments of ancient scrolls, or the preparation of a

---

235 CCH Canadian Ltd and Ors v. Law Society of Upper Canada (2004) SSC 13 (Canadian Supreme Court).
237 CDPA 1988, s. 5A (2) (sound recording), s. 5B (4) (film), s. 6 (6) (broadcast), s. 8 (2) (published edition). The protection threshold is therefore potentially lower than the ‘originality’ requirement for authorial works, see Bently and Sherman (2009: 111).
238 Byrne v. Statist [1914] 1 KB 622.
239 Graves’ Case (1869) LR 4 QB 715.
240 Walter v. Lane [1900] AC 539.
241 Eisenman v. Quimron (Israel Supreme Court) CA 2790/93, 2811/93, 54 (3) PD 817.
performing edition of baroque music from surviving (sometimes fragmentary) manuscripts and prints.\textsuperscript{242} It seems that for protection the gap between the pre-existing work and the derivative work must be wide enough to allow intervention of independent skill, labour and effort by the maker of the derivative work.\textsuperscript{243} Such works are independent, though derivative, works, not (unprotected) copies for the purpose of copyright.\textsuperscript{244} If there is no scope for a separate input of skill and labour, no protection of the derivative work is possible,\textsuperscript{245} but if an input of independent skill and labour is feasible within a small area, then protection is granted, however, only within narrow limits; a tiny departure of an infringer’s work from the protected derivative work takes the infringer’s work out of the scope of infringement.\textsuperscript{246} Despite the low standard of originality in the UK, there is a \textit{de minimis} rule for derivative and non-derivative works.\textsuperscript{247}

The essence of originality protection in the UK and in Australia, and effectively also in the United States and Canada, can be summarised as a protection against a short cut by a competitor and as the prohibition of parasitical and free-ride competition.\textsuperscript{248} The central UK cases on originality state that unambiguously:

\begin{quote}
\ldots it is a sound principle that a man shall not avail himself of another’s skill, labour, and expense by copying the written product thereof. To quote the language of North J. in another case: ‘For the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labour and expenditure of the plaintiffs \ldots’.\textsuperscript{249}
\end{quote}

\begin{quote}
\ldots there remains the rough practical test that what is worth copying is prima facie worth protecting.\textsuperscript{250}
\end{quote}

If a wine merchant, it was argued, selected a dozen different wines as having in combination a special appeal, and arranged the bottles together in a shop

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{243} Rahmatian (2009b: 582–84).
\item \textsuperscript{244} Compare MacMillan v. Cooper (1923) 93 LJPC 113, at 118: Protection is granted if ‘the labour, skill and capital expended [is] sufficient to impart to the product some quality or character which the raw material did not possess, differentiating the product from the raw material’.
\item \textsuperscript{246} Kenrick v. Lawrence (1890) 25 QBD 99.
\item \textsuperscript{247} Cramp v. Smythson [1944] AC 329.
\item \textsuperscript{248} Compare Cornish (2004: 79–80).
\item \textsuperscript{249} Walter v. Lane [1900] AC 539, at 552, per Lord Davey.
\item \textsuperscript{250} University of London Press v. University Tutorial Press [1916] 2 Ch 601, at 610, per Peterson J.
\end{itemize}
\end{footnotesize
window, there was nothing to prevent a rival trader copying the arrangement. Ought it to make any difference if, instead of a shop window arrangement, the merchant makes a list? My Lords, I think, with respect, that this argument is based upon a fundamental misapprehension of the law of copyright. The law does not impinge upon freedom of trade; it protects property. It is no more an interference with trade than is the law against larceny. Free trade does not require that one man should be allowed to appropriate without payment the fruits of another’s labour, whether they are tangible or intangible. The law has not found it possible to give full protection to the intangible. But it can protect the intangible in certain states, and one of them is when it is expressed in words and print.251

The solution accords with a reasonable view of public policy – that the sort of work done by the claimant should be encouraged. It saves others the time and trouble of recreation of near-lost works, but in no sense creates monopoly in them. If someone wants to use the claimant’s short cut, they need his permission.252

Thus the work, as the product of the skill and labour that went into it, has a potential economic value and is therefore to be protected as a type of property.253 If someone takes a short cut and tries to copy, this is an indication of the potential economic value of the work and the skill and labour behind it. The rationale of copyright protection is exactly the same in the United States; the language of ‘creativity’ deployed in the Feist case does not mean ‘true’ creativity, but denotes merely a normative level that indicates a different de minimis rule, a higher threshold of originality than the British ‘pedestrian’ approach. But this is a quantitative, not a qualitative conceptual difference.254 In all Common law countries, copyright protection is effectively a protection against parasitical free-ride competition. The protection mechanism is through existing notions of property law: copyright turns the intellectual creation into property. In this way, the free rider becomes a trespasser and the vague and hardly definable notions of ‘intellectual creation’ and ‘short cut’ become clear and familiar, though fairly simplistic, categories of the property law system.

251 Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. [1964] 1 WLR 273, at 290–91, per Lord Devlin.
252 Sawkins v. Hyperion [2005] EWCA Civ 365, para. 87, per Jacob LJ.
253 An old statement to this effect in the plaintiff’s argument in Tonson v. Collins (1761) 1 Blackstone W. 321, 96 ER 180, at 322 (182).
254 Compare Feist Publications Inc v. Rural Telephone Service Co Inc 499 US 340, at 345–46: ‘… the requisite level of creativity is extremely low; even a slight amount will suffice’.
Copyright and creativity

(c) The elements of the copyright-property III: fixation
The third protection requirement, that the work must be recorded in some permanent form (fixation) to obtain protection,255 is a peculiarity of the copyright systems of the Common law countries and seems to take account of the need for a material rei
er256 which represents the otherwise purely intangible notion of dematerialised (copyright) property and which acts as a social ‘crutch’ without actually being the property object itself.257 Hence a poem or a piece of music which could perfectly well exist without any notation have to be recorded in some way, for example written down, to gain protection. The law is quite pragmatic in this respect, for a musical score is certainly not the music itself258 and does not even represent it too accurately,259 and to a lesser extent, this also applies to poems and other works of literature or of the theatre. The text or the score provide some physicality to the copyright res (i.e. the original and fixed literary or musical work), but they are rather hazy pointers towards the res (or, more precisely, towards the concrete instance of the abstract res); they cannot be regarded as truthful images of it. This becomes apparent in the performative arts (especially drama and music) when a decision has to be made whether a rendering of a written text or musical score in form of a performance is merely interpretation or already an independent, original and protectable, though derivative, work.260 The really exact rei
er of such works is the sound recording which is, however, a copyright work in its own right,261 so that investment protection can be provided for the entrepreneur or deviser of the sound recording. The law is quite willing to recognise a fixation that enables the making of copyright-property; not only electronic and other forms of recordings are suitable, but even recordings without authorisation

255 In the UK, CDPA 1988, s. 3 (2); in the US: Copyright Act 1976, 17 USC § 102 (a).
256 Compare the US Copyright Act 1976, 17 USC § 101: ‘… embodiment in a copy or phonorecord … sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated …’.
257 See above under II. 1. (a).
258 This case is an example of an abstraction removed by two degrees: the score is a physical and tangible entity denoting (incompletely) the music, itself a physical, though intangible, entity, and the music is a concrete instance of the abstract legal notion of res, here in the form of ‘original and fixed musical work’. The fixation is brought about by the musical score.
261 In the UK, CDPA 1988, ss. 3(2), (3), 5A.
Copyright as property

are acceptable fixations and render the otherwise unrecorded speech or music protectable.\textsuperscript{262}

The author’s-rights countries do not have a fixation requirement,\textsuperscript{263} and even copyright systems are not entirely consistent.\textsuperscript{264} In relation to the visual arts, the question of fixation does not become a separate issue because artistic works necessarily come into existence only through fixation.\textsuperscript{265}

\textbf{(d) The allocation of the copyright-property: ‘author'/investor as initial owner}

The figure of the author and the relationship between authorship and ownership will be explored in more detail elsewhere.\textsuperscript{266} At this stage, it must be sufficient to make the sobering comment that in copyright systems the ‘author’ is really not more than the maker of what would become copyright-property.\textsuperscript{267} The normative definition of authorship is rather remote from the ordinary meaning of author: timetable compilers and computer programmers are also ‘authors’. The ‘author’ in copyright law is in fact merely a reference point in relation to two matters: ownership allocation and duration of copyright. First, once the copyright-property is created – the intellectual creation is a ‘work’, ‘original’ and ‘recorded’ – the new property must be allocated to someone, and that is normally the ‘author’ who is by default the first owner (except for works made by employees) and therefore initial beneficiary of the property.\textsuperscript{268} The makers/devisers of entrepreneurial copyrights are also called ‘authors’ (e.g. broadcasters or record producers) or ‘publishers’, and they have, unconvincingly, the same legal status as authors of classical authorial works.\textsuperscript{269} It is typical of the proprietary nature of copyright that ownership is so closely linked with authorship; they are almost stapled together. Whether that is satisfactory is open to debate;\textsuperscript{270} in author’s rights systems where the author is, at least conceptually, a true author in a more traditional sense, such an

\begin{itemize}
\item\textsuperscript{262} CDPA 1988, s. 3 (3).
\item\textsuperscript{263} Sterling (2008: 330).
\item\textsuperscript{264} No specific fixation requirement exists for broadcasts in the UK, see Bently and Sherman (2009: 86, 92).
\item\textsuperscript{265} Perhaps for that reason the CDPA 1988 does not have a separate fixation requirement for artistic works, compare s. 3(2) and Sterling (2008: 330).
\item\textsuperscript{266} See below, Chapters 4 and 5.
\item\textsuperscript{267} CDPA 1988, s. 9.
\item\textsuperscript{268} CDPA 1988, s. 11 (1), (2).
\item\textsuperscript{269} CDPA 1988, s. 9 (2). Cornish and Llewelyn (2007: 415): ‘… a grossly misshapen definition of this authorial creature …’.
\item\textsuperscript{270} Compare Ginsburg (2002–03: 1070).
\end{itemize}
Copyright and creativity

approach would be untenable. In the UK, for example, in court decisions where ownership issues cannot arise (e.g. works already in the public domain), problems of (joint) authorship are not even discussed, although this would actually be necessary from a theoretical point of view. As a second reference point, the author (normatively defined) provides the relevant ‘life’, according to which the term of copyright protection is calculated with regard to authorial copyright works (including films), irrespective of whether the author still is, or ever was, owner of the copyright in question.

(e) The duration of the copyright-property

So far the making of copyright-property and its allocation have been discussed. The question of duration deals with the termination of the property right. There is the misguided belief that if something is property, the property right in it must always be perpetual. For obvious reasons, the entertainment and software industries as large holders of a great number of copyrights are particularly keen on this argumentation. However, the situation is more complex. In case of personal/moveable property, the property-object is typically evanescent, tangible and perishable, for example an apple: the real right in it can well be given for an indefinite period, because the object of property rots in some four weeks or so anyway and the eternal property right perishes with it. In contrast, land can indeed last forever, and English law has therefore always imposed a time limitation as to ownership and user rights. This has happened in the many types of historical tenure and, today, most prominently, in the

271 An example is Sawkins v. Hyperion [2005] EWCA Civ 365. Theoretically the question should arise whether the editor of a musical score could become a joint author alongside the composer. But since the edited music at issue was composed in the early 1700s and never in copyright, the court did not discuss this point at all, see Rahmatian (2009b: 577–78).


273 A root of this opinion is the Roman law idea of property (dominium) which is in principle perpetual, also in Civil law jurisdictions today, see e.g. France, Terré and Simler (2002: 136–38), however with provisos notably for intellectual property rights; and see for the French discussion of the (proprietary) nature of author’s rights in the nineteenth century, Ginsburg (2007: 148) with further references. On the unlimited duration of ownership of corporeal property as opposed to intellectual property, see Janich (2002: 221, 223) for Germany.

274 See e.g. the discussion with regard to plans in the EU to extend the term of protection for performers and phonogram producers, Geiger (2009: 78). See also Chapter 3.


If a property object is a purely abstract creation of the law, such as a copyright, it can obviously also last forever, but then it is necessary that its extent (in this case as to time) also has to be determined by law, since it cannot rely on (non-existent) physical characteristics which could act as limiting factors.

It has been stressed that property rights are conventional rights, an artifice, completely a creation of the law. Hence the duration of the copyright-property right is purely determined by the law and can be changed, also reduced, at any time. Not even the copyright industries which sometimes claim a ‘natural’ or ‘morally intrinsic’ property right of copyright would be able to deny that. Their constant lobbying for an extension of the copyright term is their implicit recognition that copyright is not a natural property right, because an extension of the right is in the same way a legal artifice as a reduction. There is no ‘natural property’ or natural copyright. Or one could say that the Natural Law is always reflected in the law of the land at a given time – which shows nicely the whole meaningfulness of a Natural Law conception in general. However, support for such a Natural Law conception of copyright came recently from an Irish court decision which claimed that ‘there is a fundamental right to copyright in Irish law’, even a ‘human right’. One may hope that this low point of legal reasoning stays in the extreme west of Europe.

In Europe, the duration of copyright has been harmonised in the EU Term Directive, with the basic rules that authorial works are protected during the author’s life and for 70 years after the end of the year in which the author died (hence the need of a normatively defined author as a reference point for calculation). In the case of films, the authorial element has somewhat prevailed over the entrepreneurial aspect and the relevant connecting factor is the death of the last of the nominated.

---

278 On the original, and later dropped, references in the preamble of the Statute of Anne to ‘undoubted property’ in ‘Books and Writings’, although a term was set for copyright, see Rose (1993: 45). So the legislators could reconcile the idea of (literary) property with a limited term as from the start of copyright legislation.
279 Recently, it has been argued from a philosophical point of view that there is no intrinsic moral right to own intellectual property rights, see Wilson (2009: 395), and with regard to copyright, at 416.
280 Already Hume, Book 3, part 2 (1960/1740: 491), Bentham (1891/1840: 111), probably Blackstone, II, 1 (1800/1765), 2. See also above under I.
281 Proponents of the idea of a property right based on natural law still exist, e.g. Finnis (1980: 169, 281–90).
Copyright and creativity

authors. Otherwise, entrepreneurial works are, broadly, protected for 50 years from fixation/transmission or first lawful publication. The duration of copyright is already extremely long, which approximates copyright to perpetual personal property rights and allows the use of copyright as an investment vehicle. The Berne Convention provides a shorter term of protection, but that will not influence such trends. The old British term of copyright for authorial works before harmonisation was life of the author plus 50 years, closer to the protection period for entrepreneurial works then, which also indicates the emphasis on the protection of economic value irrespective of potential creative achievement. The duration of copyright as an example of the limitation of the powers of property will be discussed in more detail later.

(f) Not an element of copyright-property: qualification requirements and moral rights

The discussion of the making (work, originality, fixation), allocation (authorship) and extinction of the copyright-property right has not mentioned the qualification requirements for protection and moral rights. From the perspective of property theory, the qualification requirements can be regarded as a condition, but not as a quality, of the real right/ownership, thus not as a constituting element of the property right. Furthermore, the practical importance of the qualification rules has diminished significantly, because most countries have now joined the Berne Convention. As far as moral rights are concerned, these are a relatively recent alien insertion in

---

284 Art. 2: these nominated authors are: principal director, author of the screenplay, author of the dialogue, composer of the music specially created for the work.
285 Art. 3 (2) (phonograms); Art. 3 (4) (broadcasts); Art. 3 (3) (first fixation of films). For a more detailed discussion of the term of protection see e.g. Cornish and Llewelyn (2007: 443–50). The intricate rules of the copyright term are not relevant in the present context and not discussed further.
286 See below under Chapter 5.
287 Berne Convention (1971), art. 7 (principal rule: life of the author plus 50 years).
289 Below, Chapter 3.
292 They are conceptually alien in copyright law; whether they are also philosophically alien to a Common law copyright system is a different matter: the (indirect) protection of a person through his/her work and the economic value it represents, does not necessarily stand against moral rights. However, resistance
Copyright as property

the existing copyright concept in the UK\textsuperscript{293} and in other Common law countries,\textsuperscript{294} and not in all of them are moral rights granted to all types of authors.\textsuperscript{295} Moral rights have no decisive relevance in a copyright system because they can be curtailed (often in the context of dealings with the copyright) especially by way of a general waiver of the moral right.\textsuperscript{296} Copyright assignments are frequently combined with a waiver of moral rights. In general, moral rights are constructed in a way so as not to interfere with the economic rights which copyright represents, and they are not included in the infringement protection mechanism of copyright\textsuperscript{297} but are given a separate protection as a statutory duty.\textsuperscript{298} Moral rights are not an ingredient of copyright-property (moral rights as property would also be difficult to justify) and therefore they can be seen as a conceptually largely irrelevant addendum to the system of copyright; they are not part of copyright.\textsuperscript{299} This is, at least theoretically, very different from the author’s rights in the Civil law countries.

3 The Less Proprietarian Civil Law Conception of Author’s Rights
(\textit{Droits d’Auteur}): Protection of a Person’s Creation through Personality Protection

While the Common law copyright systems focus on the work and its potential economic value, the author’s rights systems concentrate on the author\textsuperscript{300} and protect his work because it bears traces of the author’s personality. It is not the work that protects (indirectly) the author/maker and his economic interests, but the author’s protection as a person which extends to works emanating from that person. This personal aspect of author’s rights protection is embodied in the moral rights, and they are the

\textsuperscript{293} Cornish (1989: 449). There were some rudimentary predecessors of moral rights in the UK Copyright Act 1956, s. 43 (right to object to false attribution), s. 6 (duty to mention title and author of a work).
\textsuperscript{294} E.g. Australia, Copyright Amendment (Moral Rights) Act 2000, No. 159.
\textsuperscript{296} In the UK, CDPA 1988, s. 87. Assignment of the moral right is (naturally) not possible, s. 94.
\textsuperscript{297} In the UK, CDPA 1988, ss. 96 \textit{et seq}.
\textsuperscript{298} Grosheide (2009: 263–64). In the UK, CDPA 1988, s. 103.
\textsuperscript{299} Cornish (1989: 449).
\textsuperscript{300} Grosheide (2009: 243).
Copyright and creativity

foundation and ultimate reason for the protection of works in author’s rights systems. A person’s economic concerns are obviously an essential and inevitable part of that person’s protected interests, but their safeguard is an important and desired effect, not the principal cause, of the droit d’auteur protection system. The basis of the author’s rights laws is the author, and theoretically, he is true creative author, not merely maker of future property. Whether this image is one of a ‘romantic author’ and if so, whether this is necessarily detrimental, will be discussed later. The reality is, however, that also in author’s rights countries the economic aspects eclipse possible personal elements in everyday dealings, and the practical difference between copyright and author’s rights systems is much smaller than their theoretical foundations would suggest. It is somewhat like the early medieval feudal system which focused on the personal bond between lord and vassal (homage and fealty), whereby the proprietary element (benefice), the land, was originally facultative and secondary, while later the proprietary element prevailed completely over the personal aspect, and the property subsequently became the basis for the personal contract since the late Middle Ages. But unlike in the history of feudalism, the commercial interests, especially of publishers, were always a strong driving force behind the evolution of author’s rights from the beginning, and the economic rights were at least as important as the moral rights. Fairly recently, rights for ‘entrepreneurial’ creations, particularly computer programs, have been inserted, and alien as they may appear to an author’s rights system, these developments nevertheless stress the shift from droit d’auteur to propriété (intellectuelle). The property theory explained above still holds good in author’s rights countries, it may only appear less obvious. The French and German laws can be regarded as typical examples of author’s rights laws and the following discussion will be confined to mostly these two jurisdictions.

(a) Authors and moral rights

The focal point of protection in author’s rights systems is the author, a human being. The ‘author’ must be the creator of the work in question that

---

301 See e.g. in Germany, Schricker in Schricker (2006), § 1 n. 2, France: Lucas and Lucas (2006: 125).
302 See Chapter 4.
is to be protected, and since the work must embody the creator’s spirit in some way, ‘author’ can only be a natural person. Author’s rights systems recognise the personal and the economic side of the right granted, but Germany refuses to split these aspects from one another: rather, it sees the author’s right as an undivided whole, whereby the personal or moral rights (Urheberpersönlichkeitsrechte) and proprietary or economic rights (Nutzungsrechte, Verwertungsrechte) are inseparably connected or ‘stapled’ together. This so-called monist theory of author’s rights means that personal and proprietary elements are two sides of one coin, different roots feeding one trunk of a tree (so Eugen Ulmer’s famous tree metaphor), and the economic rights, the closest equivalent to ‘copyright’, are everywhere ‘marbled’ with the moral rights which theoretically keep the powers of economic rights in check. The effect of the monist theory is that author’s rights cannot be assigned or waived – because the obviously inalienable personal part cannot be torn from the principally transferable economic part – and moral rights have the same duration as the economic rights – because the term of protection can only refer to the author’s right as a whole. The idea of eternal moral rights does not seem to be popular in Germany.

The author’s rights in Germany are seen as a type, but not as a part, of the general personality right (allgemeines Persönlichkeitsrecht) which is given protection under private law and constitutional law. Author’s rights,
and within these, moral rights, are a separate body of law, not a version of the general personality right. Thus the application of author’s rights law prevails over the law on general personality rights as a lex specialis.\(^{320}\) This can be relevant in the case of private letters.\(^{321}\) The emphasis on the protection of the person is also reflected in the separate right in one’s own image which is regulated in the author’s right law.\(^{322}\) but is nevertheless considered as a special example of the general personality right.\(^{323}\) In Germany, the list of moral rights as part of the author’s right goes beyond that required by the Berne Convention,\(^{324}\) and contains, beside the paternity right\(^{325}\) and integrity right,\(^{326}\) the right of first publication,\(^{327}\) and, as a kind of mixed economic-personal right, the right to withdraw the grant of a licence for exploitation because of a change of conviction in relation to the work.\(^{328}\) The right of first publication illustrates the different emphasis of protection. In a copyright system, this would essentially be one of the powers given to the copyright-property holder within the usual publication/distribution right,\(^{329}\) while in Germany, this is an inalienable personal right of the author, independent of exploitation rights (and their possible violation): the work is primarily rooted in the person who created it and not property that is dependent on whichever owner.\(^{330}\) The right of first


\(^{321}\) Because of the higher threshold of originality, letters are not necessarily protected by the author’s right as literary works, but may still have subsidiary protection under the general personality right, see Loewenheim in Schricker (2006), § 2 n. 94.

\(^{322}\) § 60 UrhG 1965, in connection with § 22 KUG 1907 which is still in force in this regard.

\(^{323}\) Götzting in Schricker (2006), § 60/§ 22 KUG, n. 8. Unauthorised publication of one’s picture has been recognised as an action for damages based on constitutional law by the German BGH BGHZ 26, 349, GRUR 1958, 408/409 – Herrenreiter.

\(^{324}\) Paternity right and integrity right, Berne Convention (1971), art 6bis.

\(^{325}\) § 13 UrhG 1965 (Anerkennung der Urheberschaft).

\(^{326}\) § 14 UrhG 1965 (Entstellung des Werkes).

\(^{327}\) § 12 UrhG 1965 (Erstveröffentlichungsrecht).

\(^{328}\) § 42 UrhG 1965 (Rückrufsrecht wegen gewandelter Überzeugung), Götzting (1995: 75). See also below under Chapter 5.

\(^{329}\) UK: CDPA 1988, s. 18. The UK previously recognised a right of first publication only (divulgation right) under the Copyright Act 1956, s. 3 (5), (b) and its judicial interpretation, Infabrics v. Jaytex [1982] AC 1, at 15. See also Bently and Sherman (2009: 142).

\(^{330}\) Dietz in Schricker (2006), § 12 n. 2. German law distinguishes between Veröffentlichung (making public or making available to the public) und Erscheinen (offer for sale and putting into circulation of tangible copies), § 6 UrhG 1965, see also Sterling (2008: 195). The German Erstveröffentlichungsrecht under § 12 relates to Veröffentlichung, see Dietz in Schricker (2006), § 12 n. 7.
publication and the right to withdraw the grant of a licence are examples of the slightly idealistic notion that the author is and remains ultimately in charge of the fate of the work (droit de destination) irrespective of later exploitation by others.\footnote{Rahmatian (2009a: 311) with further references.}

In France, the moral rights (droits moraux\footnote{Or one droit moral which has as its attributes the droit de divulgation, droit de repentir, droit à la paternité and so on, compare Lucas and Lucas (2006: 348).}) and the economic rights (droits patrimoniaux)\footnote{E.g. Lucas and Lucas (2006: 187).} are conceptually separated, forming a kind of double-right that is united in the person of the author. This dualist theory of author’s rights emerges from French legal tradition and the author’s right statute as a whole, but not necessarily from the droit d’auteur definition in CPI 1992, art. L. 111–1 which does not stand against a monist interpretation.\footnote{Discussion of this area in Lucas and Lucas (2006: 35–7).} The author’s moral rights\footnote{On these see Lucas and Lucas (2006: 339).} which last forever and cannot be transferred\footnote{CPI 1992, art. L. 121–1.} are the paternity and integrity rights,\footnote{Droit à la paternité, droit au respect de l’œuvre: both in CPI 1992, art. L. 121–1.} the right of divulging the work,\footnote{Droit de divulgation: CPI 1992, art. L. 121–2.} the right to withdraw the work despite an existing grant of the economic right,\footnote{Droit de repentir ou de retrait: CPI 1992, art. L. 121–4. However, adequate indemnification of the grantee is required.} and the right to publish a collection from own articles and speeches.\footnote{CPI 1992, art. L. 121–8.}

The dualist system in French law allows a stronger conceptual separation of economic rights from moral rights and therefore permits the (partial) assignment of economic (patrimonial) rights,\footnote{CPI 1992, art. L. 122–7. Similar the dualist system in Swiss law, see Swiss Art 16 URG 1992.} in contrast to Germany. However, whether the transfer of economic rights is achieved by way of an assignment or a licence is of limited importance in dualist systems, because once the conceptual separation of economic rights from the moral rights is made, and the continued dominance of moral rights is ensured, the decision as to the format of the actual grant of exploitation rights is a secondary issue that can be left to the contracting parties. In dualist countries it seems that the question of assignment or licence tends to be more a terminological problem.\footnote{So Lucas and Lucas (2006: 432). The situation in Sweden seems to be similar.} In the proprietary systems of the copyright countries it is
obviously essential to know whether the copyright-property has been assigned or licensed.\textsuperscript{343}

In France and Germany the author is the first ‘owner’\textsuperscript{344} of the author’s right,\textsuperscript{345} but the main source of his/her powers is not the position of ownership, but of authorship; in theory, the moral rights can reach into the exploitation rights granted to third parties (by way of assignment, where possible, or licence), and the author and his/her heirs\textsuperscript{346} always remain in the background for the protection period of the work.\textsuperscript{347} This is very different from the copyright systems where the author, once he has given up ownership in favour of an assignee (or in case of employee works, never became owner), drops out of the picture completely.\textsuperscript{348} The author has no droit de destination\textsuperscript{349} under copyright law.

(b) Work and originality
The Civil law countries also have a list of works which attract author’s rights protection,\textsuperscript{350} and this list includes works of literature, music, artistic works, works of pantomime and dance,\textsuperscript{351} dramatic or dramatic-musical works and original computer programs.\textsuperscript{352} The law of France and Germany consider that all works of human creation are protected unless specifically excluded.\textsuperscript{353} This is not quite right, however, because there are works that are not object of protection, such as certain information and data used in the commercial context.\textsuperscript{354} The rules concerning database protection are complex and will not be covered here.\textsuperscript{355} The civil law countries have a notion of originality which is in essence the same as the literary copyright concept under the Berne Convention.\textsuperscript{356} The Civil law countries are also Parties to the Berne Convention, and have to observe the provisions of that Convention.

\textsuperscript{343} See in relation to this issue generally Rahmatian (2009a: 300, 304–5).
\textsuperscript{344} Because the author’s right is not primarily perceived as a property right, the statutes do not use the term ‘ownership’ but grant the author rights that contain powers of a proprietary nature. On the question whether author’s rights are property rights, see below under II. 3.
\textsuperscript{346} The author’s rights (including the moral rights) are transmissible on death, see France, CPI 1992, art. L. 121–1, Germany, § 28 (1) UrhG 1965.
\textsuperscript{347} In France potentially even beyond the term of protection (of the economic right) because of the droit moral perpétuel in CPI 1992, art. L. 121–1. On the symbolic value of that rule Lucas and Lucas (2006: 389).
\textsuperscript{348} See e.g. Rahmatian (2009a: 290–91).
\textsuperscript{349} For French law see Lucas and Lucas (2006: 206): ‘Il s’agit pour l’auteur de contrôler non seulement les modalités de la commercialisation des exemplaires, mais aussi, en aval, certain usages faits par les acquéreurs ou les détenteurs.’ The exact meaning of the term droit de destination which is used in French and Belgian law is not uncontroversial.
\textsuperscript{350} For France, see CPI 1992, art. L. 112–2 and Germany, see § 2 (1) UrhG 1965.
\textsuperscript{351} So Germany, § 2 (1) (3) UrhG 1965. That includes choreographic works. Dramatic works are not a separate category in Germany, they either fall under literary works (theatre plays) or choreographic works, or they are works consisting of a combination of categories, e.g. operas (literary, musical works), ballets (choreographic, musical works), see Loewenheim in Schricker (2006), § 2 n. 95. In France, choreographic works are protected according to CPI 1992, art. 112–2 (4).
Copyright as property

works, cinematographic works, photographs, graphic and typographic works and the like. One can see that the list of categories varies from jurisdiction to jurisdiction, although there are large overlaps with regard to the core works of author’s rights protection. The exact categorisation is, however, not of fundamental importance for two reasons: first, the enumeration is demonstrative and the laws adopt a generous approach when assessing the type of work which a creation in question represents and secondly, the main emphasis is on the originality of the work. This refers back to the personal, individual input of its author. The work has to be an *œuvre de l’esprit*, not merely the product of someone’s skill and labour. Principally relevant is the *esprit*, not the mere existence of a product. One can say, in an overstated way, if the work is creative, a category is likely to be found for it. However, what the author’s rights systems share with the copyright laws is the normative typification which the categorisation of works entails. It is no longer a poem, but a literary work, no longer an opera but a dramatic-musical work (France) or a work consisting of the combined categories of literary and musical work (Germany). This serves as a basis for their propertisation or commodification, the first step for becoming a res in law. For that, it does not matter which category the human creation falls into.

The work has to be *original* to obtain protection. The German author’s rights law requires that the work be a ‘personal intellectual creation’, the French statute is silent, but court decisions define the meaning of

352 A separate category in France, CPI 1992, art. 112–2 (3).
358 Lucas and Lucas (2006: 53). The exact meaning of this term is obviously difficult to ascertain.
359 Compare the idea of the ‘einheitlicher Werkbegriff’ (unitary concept of the work) in Germany, consisting of the four elements: personal creation, intellectual content, perceivable form (the copyright idea of ‘fixation’ is narrower) and individuality, see Loewenheim in Schricker (2006), § 2 nn. 9, 31.
360 See above under II.
361 § 2 (2) UrhG 1965.
originality: the work does not have to be novel, but it must bear the ‘imprint of the author’s personality’ (l’empreinte de la personnalité de l’auteur). In whichever way this criterion is expressed, the essence is always that the work appears in the way it is because it has been shaped by an individual creator’s distinct personality; it is not commonplace. German law concurs: the spirit of the human author must be expressed in the work itself, and the work, shaped by the characteristic creator’s mind, must show individuality. The courts sometimes also speak of ‘creative distinctiveness’ as the necessary criterion. This insistence on individual creativity nevertheless permits the separate protection of derivative works, provided that this derivative work (translation, compilation, etc.) also shows individual traces of its creator’s distinct personality.

There are no formality requirements for author’s rights protection, and that includes, from an author’s rights perspective, that there is no requirement of recording of the work or fixation. So the impromptu speech, the improvisation on the piano are protected per se. It seems that

---

366 The Austrian Author’s Rights Law illustrates graphically the originality requirement when it says that works must be ‘eigentümliche geistige Schöpfungen’ (distinct/peculiar intellectual creations) to obtain protection, Austrian UrhG 1936, § 1 (1), since ‘eigentümlich’ has besides the slightly dated meaning of ‘proper to someone’ also that of ‘peculiar’, ‘eccentric’ which expresses well the individuality of the author’s personality that is mirrored in the work.
368 Loewenheim in Schricker (2006), § 2 n. 23.
369 ‘Schöpferische Eigentümlichkeit’: e.g. BGH GRUR 1998, 916/917 – Stadtplanwerk; BGH GRUR 1994, 206/207f. – Alcolix; BGH GRUR 1986, 739/740 – Anwaltschriftsatz (see also a summary in English, Sterling (2008: 346); BGH GRUR 1985, 1041/1047 – Inkassoprogramm.
374 The Berne Convention in art. 2(2) leaves the fixation requirement open; it does not stand against the prohibition of formalities for copyright protection.
the author’s rights countries do not need a social reifier that symbolises the abstract notion of the res or of possible author’s rights-property. But the reality is different; apart from the fact that some categories of works can only come into existence through fixation (artistic works), and there are exceptions to the no-fixation rule, the need for recording is typically an evidential, though not a legal, requirement if one seeks to pursue an infringement action. In any case, the work must be capable of being perceived by the human senses to obtain author’s rights protection.377

The effect of author’s rights originality is not a protection against unfair parasitical competition, as is the case under British copyright law.378 The higher protection threshold could leave a gap, but continental European systems have separate statutes prohibiting parasitical or free-ride unfair competition, and while a certain product may not qualify for copyright protection, because it does not meet the higher originality requirements (a simple register, etc.), its copying without permission, for instance, may still constitute a violation of the Unfair Competition Acts.379 In this way, the economic interests of the maker of a certain product/creation are safeguarded.380 If author’s rights protection is available then it prevails over protection against unfair competition.381

Thus at first sight the process of turning intellectual creations into property appears to lack one essential step in author’s rights systems: there is the legal typification of human creations as ‘works’, and there is (whether or not this is indeed relevant) normally some kind of recording of the work which acts as a social reifier of the abstract res, but the idea of creative originality seems to stand against a complete propertisation. In addition, this idea of an individual intellectual creation is intertwined with the moral rights – the personal protection mechanism for the author as a human being, not as a

376 In France, choreographic works have to be recorded (also in form of an audiovisual recording), see CPI 1992, art. L. 112–2 (4), and Lucas and Lucas (2006: 62–3, 114).
378 Compare the position of the UK to specific Civil law-style unfair competition laws, Cornish (2004: 80).
379 E.g. Germany, Gesetz gegen den unlauteren Wettbewerb (UWG) 2010, § 3 and § 4 (9), which is particularly relevant in this context because it prohibits the exploitation of another’s reputation or the misappropriation of another’s work (ergänzender Leistungsschutz). See Schricker in Schricker (2006), ‘Einleitung’, nn. 42–43.
380 The remedies under unfair competition law and under author’s rights law are very similar, but the requirements for standing to sue differ (it is not necessarily the author who is entitled to sue under unfair competition law).
maker of intellectual products (in a wide sense) or res with a potential economic value that is therefore worth protecting. At least in theory.

(c) Proprietary aspects of author’s rights

What has just been presented is an idealistic image of the author’s rights which helps underline the essential conceptual features of this protection philosophy in Civil law countries. But it will now be shown that pragmatic legal reality deviates so significantly from this ideal that, if not in law, so at least in fact, one has to regard author’s rights as effectively property rights. The theoretical high level of originality is often traded far more cheaply, by way of the concept of ‘small change’ of the author’s right; some types of hardly individual works are protected for commercial reasons, especially computer programs, and to some extent, films; entrepreneurial works which cannot possibly fall under the individual authorial conception nevertheless find protection in the form of neighbouring rights; some concessions are made in favour of employers’ rights for works created by employees; and moral rights tend not to interfere with the economic rights and the exploitation of the author’s right in general.

The first major inroad into the heroic notion of the author’s personality protection is the very pragmatic approach to the required level of originality. Author’s rights systems regard the originality requirement as elastic and relative and dependent on the category of work, so that rather commonplace works of practical use may obtain protection. The de minimis rules in the copyright and author’s rights countries can come close indeed. Copyright lawyers in the UK are familiar with a similar variability of the originality threshold, when one compares, for instance, the low level in Walter v. Lane and the high level in Macmillan v. Cooper, both within

382 Discussion of whether the droit d’auteur is property (or: propriété, which is not the same), see e.g. Vivant and Bruguère (2009: 34) and immediately below.
383 Compare Vivant and Bruguère (2009: 177) on computer programs: ‘Logiciels: Et voici le loup dans la bergerie.’
384 This will be discussed in Chapter 5.
385 A classical example of the last point is the German § 42 UrhG (right to revoke a licence because of changed conviction, but only against adequate compensation which makes the enforcement of the right unrealistic); similar French CPI 1992, art. L. 121–4, see for the French law Lucas and Lucas (2006: 363), for the German law Göttin (2005: 75) and generally Rahmatian (2009a: 309), and below in Chapter 5.
the same category of literary works. What pushes down in particular the originality threshold in Germany and France is the concept of ‘kleine Münze’ or ‘petite monnaie’ \(^{389}\) (‘small change’). This is the idea that certain (not all) works of practical use and of rather commonplace appearance are regarded as having just sufficient originality that they can be granted protection. These works are conceived of as borderline cases, because they dilute the idea of a personal intellectual creation considerably. The limit where the work drops out of protection seems to be everyday works of mere routine or banausic works, irrespective of the quality of purely technical craftsmanship, because such a work lacks individual character and cannot possibly reflect its maker. \(^{390}\) But under the ‘kleine Münze’ principle telephone directories, \(^{391}\) lists, tables of radio and television programmes \(^{392}\) and other compilations have found protection. \(^{393}\) It is difficult to see a difference between UK cases and French cases on, say, directories \(^{394}\) – in both jurisdictions one cannot seriously claim an individual character of the work that reflects the author’s personality; the only dissimilarity is that, because of its different conceptual starting point, the UK does not need to uphold the legal fiction of some creative input to find originality. In view of this small contrast between concepts of originality in copyright and author’s rights one should perhaps not give the Feist decision in the United States too much weight. The real motive for the protection of these works, also in author’s rights countries, is the protection of the investment which has gone into the work, and that economic value which the work represents is sought to be protected as property – for the full term of author’s rights protection. It is in effect also a protection against unfair parasitical competition, as in the copyright systems. Interestingly, critics of the ‘kleine Münze’ protection in Germany have suggested abolishing this concept and to protect lists, directories and the like by the unfair competition laws or by a new sui generis law with a shorter protection period. Another reason for their criticism is that the ‘kleine Münze’ protection threshold is as inconsistent as the originality level in general; for example, works of applied art do not benefit from ‘kleine Münze’ protection, because in many cases German


\[^{390}\text{Loewenheim in Schricker (2006), § 2 n. 26.}\]

\[^{391}\text{CA Paris, 18 déc. 1924: } \text{DH} 1925, \text{p. 30.}\]

\[^{392}\text{CA Paris, 1re ch., 22 mai 1990: } \text{Légipresse 1990, I, p. 67.}\]

\[^{393}\text{References to case law in Germany, see Loewenheim in Schricker (2006), § 2 n. 38.}\]

\[^{394}\text{In the UK, } \text{Kelly v. Morris} (1865–66) \text{LR 1 Eq 697.}\]
Copyright and creativity

design law (in the form of Geschmacksmusterschutz) would step in. Commentators have indeed asked whether the originality concept of author’s rights countries is une notion vide. In many cases it seems to be a reference point or a lodestar only.

Computer programs are protected because of the implementation of the EC-software directive, and are considered as an application of the ‘kleine Münze’ rule. They are generally regarded as an alien element within the author’s rights protection system. In the light of the other ‘kleine Münze’ cases, this appears a bit hypersensitive, but Germany theoretically postulates that the computer program be coined by the author’s individual spirit. This is in effect immediately cancelled out by the statute which, to uphold conformity with the EC directive, does not permit any qualitative or aesthetic criteria for the assessment of originality. Without this restriction, the requirement of creative originality may well have denied protection to computer programs, as has happened in Germany before the implementation of the software directive. The real reason for software protection as (literary) works is the economic interests of the software industry: computer programs have to be turned into the legally recognised concept of property to gain protection for their commercial value, here by way of the copyright mechanism. The author’s rights systems in their difficulty to achieve this result may have to resort to some insipid and enigmatic terms in their originality definition which can be filled with almost whatever criterion needed to obtain originality in a given case. The French Pachot decision demonstrates that well, when it requires for originality merely some ‘mark of intellectual contribution/provision’ (‘marque

399 Especially in France, see Lucas and Lucas (2006: 80); Vivant and Bruguière (2009: 177). But see also the initial reluctance of the courts to grant computer program protection by author’s rights in Germany: Loewenheim in Schricker (2006), Vor §§69a ff, nn. 1–2.
402 § 69a (3) UrhG 1965.
403 BGH 9. 5. 1985, GRUR 1985, 1041 – Inkassoprogramm.
404 Germany differentiates between literary works and depictions of scientific or graphic character (§ 2 (1) (1) or (7) UrhG 1965), depending on the content of the computer program, see Loewenheim in Schricker (2006), § 69a n. 1.
Copyright as property

This objectifying interpretation is a far cry from the passionate and subjective l’empreinte de la personnalité de l’auteur, but it suffices for computer programs and other works of low artistic and intellectual creativity but of high economic value. So the desired propertisation can be accomplished.

Several other measures facilitate the propertisation to protect investment into intellectual creations, for example the concept of neighbouring rights (droits voisins, verwandte Schutzrechte, Leistungsschutzrechte). These rights arise in connection with personal intellectual creations, but cannot themselves be classified as author’s rights because they lack the characteristic requirement of a creation that bears the individual imprint of an author: sound recording rights, broadcasting rights, film producer’s rights in particular fall into this category. The Rome Convention was an important impulse for the enactment of a comprehensive neighbouring rights regime in author’s rights countries. Copyright systems can absorb neighbouring rights as entrepreneurial copyrights, because the author’s personality plays a minor part in their protection philosophy. The neighbouring rights are connected with the author’s rights but remain conceptually separate from them. For example, in German law photographs (Lichtbildwerke) are protected as artistic works if they are personal intellectual creations, thus they need to comply with the originality requirement, at least down to the ‘kleine Münze’ level. If they do not, they can still obtain protection as ‘Lichtbilder’ under a neighbouring right. The major difference between these two categories is a shorter term of protection for the non-creative photographs (50 years) and a narrower scope of protection, but its exact limits are not so easy to detect, especially in view of the approval of the ‘kleine Münze’ principle for authorial/creative photographs. This rather smooth transition from the protection of a work through its author (original photograph) to the protection of an author/

---

407 E.g. France, CPI 1992, art. L. 215–1, Germany, § 94 UrhG 1965. These rights have to be distinguished from the author’s right of, say, the film director, in the cinematographic work.
maker through his/her work (non-original photograph) indicates an approximation to the copyright-property philosophy. Neighbouring rights form a rather heterogeneous group which is not exclusively geared towards the protection of an entrepreneur’s investment; for example, performers’ rights, which certainly contain elements of personality protection, belong to this group. Neighbouring rights nevertheless shift the emphasis of protection from the author to the work and the economic value it embodies, and that is a characteristic of copyright systems.

The sharpest weapon against the propertisation of intellectual creations of the human mind are theoretically the moral rights, but they are in fact surprisingly blunt when they come into conflict with the economic rights. This will be discussed later.411

Author’s rights systems may come from a different protection philosophy when compared with copyright, but from what has been shown, one has to conclude that author’s rights have so many strongly proprietary features that one has to think of them as primarily property rights, at least with regard to their commercially relevant aspects. It is, however, necessary to take account of the meaning of the term ‘property’ in a given jurisdiction.412

III CONCLUSION

The discussion has shown the way in which the law constructs the concept of property as a notion of a normatively created dematerialised property, that is, the abstract concept of property right or real right (ius in rem) relating to an object. This object (or ‘res’, ‘thing’) can exist in the physical world, like land or chattels, or it can be a pure legal concept itself, for example a copyright. It is the abstract normative conceptualisation which makes an object a res, that is, an object in law, irrespective of whether the object exists in the physical world or is a legal creation itself, as are intellectual property rights. Human relations in the form of real/proprietary rights are attached to the object and thereby make the object ‘real’ in law; otherwise, if the object is not made into property, the (private) law is unable to perceive it, it is a nullum in law, and it is conceptually

411 See Chapter 5, together with the possible transferability of economic rights.
412 For that, and as to the way in which author’s rights systems themselves consider the nature of author’s rights, see the Conclusion immediately below under III.
irrelevant whether it exists in the material world or not.\footnote{In practice the law will take account of the existence of physical objects and incorporate them – as property – into its system quickly to remain responsive to social realities. The drive to propertise the material world to leave no gaps which could remain legally unaccounted for sometimes leads to curious and grotesque results, for example the creation of 'extraterrestrial real estate' on the moon. Although this appears rather bizarre, the UN-Agreement governing the Activities of States on the Moon and other Celestial Bodies (1979) found it necessary to prohibit the grant of such ownership rights (in art. 11), and it is even more peculiar that none of the important space-faring nations have signed this treaty, so they seem to keep their options open.} Thus the legal concept is one of dematerialised property: legally, every property object is necessarily conceptual, and its possible tangible existence merely acts as a reifier of the abstract legal concept of res. The legal res itself never has a physical existence, it is created, defined and delineated by the real rights attached to it, but in many cases it may refer to a material object incidentally. Such an approach can accommodate a copyright easily as a property right, because it is unimportant whether the property object is material or a conceptual pure intangible. The substance of property rights, which comprise the rights' content and extent (often regarded as a ‘bundle of rights’), has an internal and external aspect. The internal aspect is reflected in the powers over a thing which these real rights entail (‘right to use’), whereby ownership confers the widest possible power (as compared with restricted real rights, e.g. mortgage rights). The concrete powers over a property-object depend on the physical characteristics, if any, of the object (e.g. growing apple trees on a copyright would be impossible) and on restrictions according to private law and public law rules. The external aspect of the real right materialises in the ‘right to exclude’ everybody except the right-holder from the object of the real right in accordance with the type of the real right in question (ownership, mortgage, etc.), often expressed as: a real right ‘binds the world’.

A poem, a film, a song, a computer program and other intellectual creations of the human mind exist in the physical world but they are not objects of property by virtue of their mere existence. Property laws turn these physical objects into the normative category of property-object or res, and by way of that abstract-conceptual step the law perceives and recognises the poem/film/song/computer program as ‘property’ and decides about allocation or entitlements and powers which ‘property’ entails. The transformation of such intellectual creations into property to render them perceivable and thus protectable in law is achieved through the legal mechanism of copyright. The law of copyright creates copyright-property by assessing the creation in question against certain normative criteria. A
creation is protected by copyright, or becomes copyright-property, if it is a ‘work’ that is ‘original’ and ‘fixed’ or recorded in some form of physical existence. Thus if the creation in question is found to be a ‘work’, ‘original’ and ‘recorded’ according to the normative meanings of these terms, copyright transforms the individual poem/film/song/computer program into a res, a normative and de-individualised typification, with property rights attached to it which define and demarcate the extent of the powers that the allocation of this res comprises. These powers are allocated to the owner, that is in principle initially the author, and, as with all property rights, they are divided into an internal side, the right to use (that is, the acts restricted to the copyright owner, and especially, the right to assign and/or license the copyright), and the right to exclude, expressed in the infringement provisions. Theories which deny the proprietary nature of copyright, by claiming that copyright is only a lesser real right or no property right at all, refuse to undergo a precise analysis of the legal concept of property, obscure its socio-legal effects, and are confined to delivering a merely superficial critique. Copyright is made, in the form of property, artificially created through a formalised normative process.

A result of this purely normative conception of property, including copyright, is that any kind of property is an artifice and can therefore be extended, restricted or abolished at any time. There is neither a ‘natural property right’, nor a ‘natural copyright’. The root of such normative creations is human behaviour or (formalised and formulaic) performance: human beings who make norms in the belief that they actually enforce them. A debt only exists because both creditor and debtor, as well as potentially organs of enforcement if invoked (courts), behave as though there were a debt. Their behaviour, and the standardised behaviour of a large number of persons in comparable situations, creates the concept of debt and the rights/obligations that flow from it. If the creditor assigns his debt, this debt can only remain/become a ‘reality’ if the debtor shows the same behaviour towards the new creditor that he showed to the old creditor (willingness to pay in principle), that is, he acknowledges the debt, hence

414 And there is no ‘natural’ intellectual property right either in the shape of its now familiar categories (patents, copyright, etc.); for the history, compare Sherman and Bently (1999: 101, 141).
415 This is against the recent pronouncement in the Irish case EMI Records v. Eircom Ltd [2010] IEHC 108, para. 28.
416 Compare Hägerström (1965: 17–18) on his interpretation of the ancient Roman action directed at ownership in trial.
Copyright as property

many jurisdictions require acknowledgement or a notice for a valid assignment. But the debtor in particular and the other parties involved create/re-create the debt through their behaviour; the debt cannot have any independent material existence, it is a pure concept which exists only in the persons’ conduct seemingly following, but in fact creating, this concept. The debtor’s acknowledgement is crucial because it is his conduct which allows the initially personal obligation to affect the legal position of third parties and thereby gives it proprietary features. The same applies to copyright: a copyright only exists because people behave as if it were there. This could not be otherwise in the case of a purely intangible *res* with no physical characteristics. The behaviour of independent third parties – they ‘respect’, thus contribute to the making of, the copyright – makes the copyright a property right which ‘binds the world’. This conduct is also necessarily a conventional conduct and can always change, so there can never be an immutability of copyright protection as to its extent and time. The explanation of property rights offered here – legal rules are created by their presumed enforcement – is influenced by the Legal Realism of the Scandinavian Realist School, but these are matters of general legal theory which go well beyond this book and cannot be discussed further.

The idea that a creation of the human mind, or indeed any phenomenon with or without a tangible existence, must be property, or transformed into property, to obtain recognition and protection by the law is a strongly Anglo-Saxon conception. ‘If it is not property, it is nothing at all in law’, especially in private/commercial law, sounds like an extreme statement, but is only a pointed distillation of the workings of the private law and intellectual property regimes in the Common law world. The UK is a particularly good example for that. Recently the House of Lords in *Fisher v. Brooker* confirmed that Matthew Fisher, the former Hammond organ player of the pop group Procol Harum, was joint author and copyright owner of the song ‘A Whiter Shade of Pale’ (1967) because of his famous eight-bar organ solo introduction which was recognised as a musical work and an original contribution to the song. The House also held, overturning the ruling of the Court of Appeal, that Mr Fisher’s extraordinary delay

---

417 E.g. in German law, § 409 BGB, in Austria, § 1395 ABGB. In Scots law there is the requirement of the intimation to the debtor as a substitute for transferring possession to the transferee, see Reid (1996: 530), para. 656.
418 The trespasser/infringer obviously does not respect the copyright: but the fact that this act is classified as a trespass is a negative confirmation of the property right-creating behaviour.
421 This was the decision of the High Court, *Fisher v. Brooker* [2007] FSR 12, and was not appealed before the House of Lords.
of 38 years in claiming his share in the musical copyright does not stand against the enforcement of his right.\textsuperscript{422} Baroness Hale remarked that '[a]s one of those people who do remember the sixties, I am glad that the author of that memorable organ part has at last achieved the recognition he deserves'.\textsuperscript{423} One may be amused by the fact that perhaps former members of the ‘flower power’ generation have at last managed to become part of the high judiciary, but the case is not about Mr Fisher’s deserved recognition as an author. It is about the recognition of his property right which he created in the form of a copyright, and because of the protection of his (musical) work as property he obtains indirect protection as an author. The property right as the strongest and most absolute right meant that Mr Fisher did not lose his interest in the copyright as a result of estoppel, laches or acquiescence.\textsuperscript{424} In the absence of a proprietary estoppel the court would see it as a bold step to deny Mr Fisher the opportunity of exercising his right of property in his own share of copyright:

The law of property is concerned with rights in things. The distinction which exists between the exercise of rights and the obtaining of discretionary remedies is of fundamental importance in any legal system. There is no concept in our law that is more absolute than a right of property. Where it exists, it is for the owner to exercise it as he pleases. He does not need the permission of the court, nor is it subject to the exercise of the court’s discretion. The benefits that flow from intellectual property are the product of this concept. They provide an incentive to innovation and creativity. A person who has a good idea, as Mr Fisher did when he composed the well-known organ solo that did so much to make the song in its final form such a success, is entitled to protect the advantage that he has gained from this and to earn his reward. These are rights which the court must respect and which it will enforce if it is asked to do so.\textsuperscript{425}

Another example of the notion that protection depends on the existence of a property right is the much older case of \textit{Du Boulay v. Du Boulay}.\textsuperscript{426} In that case the Privy Council had to decide whether the assumption of a name by a stranger who never had that name before could be the subject of a civil action, so that the present bearer of that name could prevent the stranger from taking the name. The twist was that in St Lucia, where this case arose, the French law of 1803, before the island fell under English jurisdiction (also in 1803), prohibited the change of name, except under certain prescribed formalities. The Privy Council ruled that the French law was

\begin{itemize}
  \item \textsuperscript{422} \textit{Fisher v. Brooker} [2009] UKHL 41, paras. 9, 80, 81.
  \item \textsuperscript{423} Ibid., at para. 20.
  \item \textsuperscript{424} Ibid., at paras. 63, 68, 78–80.
  \item \textsuperscript{425} Ibid., paras. 7 and 8 (quote), per Lord Hope.
  \item \textsuperscript{426} \textit{Belisle du Boulay and Others v. Jules René Herménégilde du Boulay} (1867–69) LR 2 PC 430.
\end{itemize}
Copyright as property

probably no longer in force, and ‘[i]n this Country [England] we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a Stranger’.

Under English law there is no right of property in a person to the use of a particular name. Had there been a property right in the name, the claimant would have had a remedy. The analogy in copyright is noticeable: if a poem is property (by virtue of the mechanism of copyright), it obtains protection, otherwise not. The curious point is that old French law did regard rights in names as property rights, while modern French law does not, but protects names in their own right. This has a certain parallel in the development of moral rights protection in French law.

It has been shown that author’s rights have so many clearly proprietary features that one has to regard them as primarily property rights. The great flexibility in the application of the originality requirement – theoretically requiring a personal intellectual creation – and the pragmatic approach to the protection of entrepreneurial works (really investments relating to intellectual creations), partly in the form of neighbouring rights, almost inevitably leads to this conclusion. French law sees author’s rights indeed as property rights in principle; it speaks of propriété intellectuelle, which includes the droit d’auteur. However, French jurists point out that this is property of a special kind because of its atypically personal nature which is expressed in the moral rights and which has no equivalent in ‘ordinary’ property. Usually a pragmatic approach is taken and author’s rights are generally regarded as property, particularly because (this is undisputed) they apply erga omnes. The emphasis on the personal element in the French droit d’auteur is to a significant extent the result of German influences in the late nineteenth century. Before, especially during the French Revolution, French law stressed the proprietary nature of author’s rights, with a strong reference to natural rights as their source. This reflected the Enlightenment idea that liberty and protection of personality

---

427 Ibid., at 441.
is interwoven with the grant and protection of property (as opposed to the feudal system of dependency and privileges of the ancient régime), and that refers back to Locke, the Empiricists and the Scottish Enlightenment. The impact of German jurists, especially Josef Kohler and Otto v. Gierke, whose writings became translated into French in the last decades of the nineteenth century, prompted French scholars to qualify the proprietary nature of author’s rights, stress the personal aspects and develop a theory of moral rights. Similar was the development of the legal treatment of surnames as (not) being property in French law. German law has always emphasised the personal root of the Urheberrecht. An early sign of this theory of personality rights is Kant’s ‘Von der Unrechtmäßigkeit des Büchernachdrucks’ (1785). Kant made a strong impression on Otto v. Gierke, who developed the theory that there are property rights (Sachenrechte, rights over things), personal rights (persönliche Rechte, rights in relation to other persons), and personality rights (Persönlichkeitsrechte) which are rights in relation to the personality of the individual and are incorporeal. The latter rights guarantee the individual to be the master of, and to be protected in, his/her personal sphere. Author’s rights are such personality rights. Josef Kohler put forward the notion that author’s rights are sui generis rights, Immaterialgüterrechte besides the usual categories of rights. These ideas live on in modern German law, in that author’s rights adhere to the monist theory and are indeed seen not as technically property rights, but as Immaterialgüterrechte, a form of sui generis rights, but modern German doctrine is sufficiently pragmatic to recognise the exclusivity of the author’s right and therefore views it as a quasi-dingliches Recht (‘quasi-proprietary right’). If one looks at the powers which an assignment of the economic rights in a dualist author’s rights system (such as France) or an exclusive licence in a monist system (such as Germany) entails, then it becomes apparent that at least from a functional perspective, these powers are functionally powers of property. Thus author’s rights should be seen as property in essence.

One has to be careful with the import and translation of the concept of property into different jurisdictions and languages. ‘Property’ is not the

---

433 Strowel (1993: 93), quote from Diderot, ibid., at 87.
436 See Chapter 2.
439 See Rahmatian (2009a: 300, 302–3) and below, Chapter 5. Licences as such are assignable in the monist systems of Germany (§ 34 UrhG 1965) and Austria (§ 27 UrhG 1936).
same as ‘propriété’ and certainly not as ‘Eigentum’. This is a complicated matter of general property theory and cannot be discussed here, but it should be noted that the meaning of propriété in French law is legally defined and narrower than the concept of ‘property’ in Common law jurisdictions. In Germany, the constitutional guarantee of property is subject to a characteristic proviso: ‘ownership obligates’, which is at odds with the extremely liberal classical English conception of seemingly unfettered property. Furthermore, German private law, as a result of the special development of the ius commune under Pandectism, recognises corporeal things only as property and distinguishes them from claims/debts (Forderungen), which is one of the purely technical reasons why the author’s right cannot be a straightforward property right in Germany. The term ‘geistiges Eigentum’ (the translation of ‘intellectual property’) has a historic root in Germany but has had little effect on the doctrine of modern private law. However, in the last decade or so, this expression, although not a technical-legal term, has become widely used in the German-speaking jurisdictions, which seems to reflect a tendency to a conceptual propertisation of author’s rights, presumably because of Anglo-Saxon economic and legal influences.

This chapter has considered only the technical-legal conception of property rights and copyright; it had nothing to say about the possible social, economic and political consequences which such rights may involve. The legal aspects of these effects will be dealt with in the remainder of the book.

---

442 German Grundgesetz (Basic Law), Art. 14 (2): ‘Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.’ (‘Property/Ownership entails obligations. Its use shall also serve the public good.’)
444 § 90 German BGB. In contrast, Austria in § 285 ABGB recognises incorporeal things, including debts, as property.