
Foreword: creative industries and intellectual property

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The history of public intellectual property (IP) law goes back more than three centuries, to the UK's Statute of Anne in 1710, whereas the term creative industries (CI) is not yet three decades old. This asymmetry in time is joined by a symmetry of historical fact; that the lifecycle of both IP and CI were shaped by revolution in the media industry: Gutenberg's innovations in printing in the long cycle which gave birth to IP law and in the final decade of the 20th century, when the great digital communications disruption began.

One way of thinking about the CI, defined in 1997 in the UK as a category to contend with longer established industrial sectors is that strong creative industries depend upon an ever tighter and globally more rigorously enforced IP system. It was argued then and it is argued now that without such an IP regime, adopted in national legislatures, reinforced through international trade agreements and enforced effectively in *all* territories, the core CI (music, film, television and publishing) would lack credibility in financial markets and prove incapable of sustainable business models.

This closeness of the connection between IP and the CI was explicitly stated in the policy documentation of the late 1990s, when the UK embraced the novel idea of a department of state whose name included the word 'culture'. The UK Department of Culture, Media and Sport was built with relish upon the foundations of the more conservatively framed Department for National Heritage. The new department officially defined CI as 'those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property'.

Given this timing, at the turn of the Millennium, when a nascent digital boom encountered a 'dot com bust', those responsible for the policy thinking could not have been expected to foresee the pace or the extent of the emergent digital communications revolution. This limited horizon made it possible for Ministers to pursue a CI strategy of colonisation, drawing software design into the CI as a new sub-category, while also pursuing a stronger IP system. This had the effect of tying the future of the creative industries not only to a particular path on IP, but also to an assumed strategic relationship with digital communications technologies and their underlying computer science.

As the mighty disruptive power of the global internet manifested itself, creative industries and their boosters in Government found themselves pulled in two directions. The internet, clearly emerging as an increasingly pervasive factor in the development of all the CI (along with much else) relied upon unregulated global copying for its core mechanics, and the digital world preferred business models offering services free at the point of consumption. For CI, digital became both a prime partnership opportunity and the top item in company risk registers. As the mostly American owners of the web's powerful search engines, digital device manufacturers and then social media platforms got ever bigger and more powerful, they were thus associated with a threat to creative industries business models which 'could not compete with free', IP law, and especially laws governing

copyright, consequently became an important and scorched site of tension between the newly labelled CI, on one side, and the even younger digital innovators.

In addition to an explosion in access to free copying of files containing books, music and video, the new digital communication system also generated a vast regimentation of data, which was itself subject to dispute in different territories as to its status in the world of copyright and with regard to issues of civil liberty. This data enabled digitally advanced businesses to market products and services with radically competitive tools, capturing customer attention, especially among the young, and seizing the advertising flows upon which many creative businesses relied. For some CI such as newspapers, digital's challenge was judged to be existential. The fact that these new digital markets became dominated by a quartet of American super-platforms – Google, Apple, Facebook and Amazon – guaranteed that Europe would find itself engaged in another round of 'défi Américain', but this time on a scale which made previous struggles, such as the epic 20th century battle of continental cinema versus Hollywood, appear trivial.

These years of high drama at the opening of the digital age, also prompted other polarisations. As laws protecting IP, and especially copyright, became more and more critical to the creative industries, these businesses lobbied harder and harder for measures to control file-sharing and block access to illegal content on the internet. Law-makers on both sides of the Atlantic attempted draconian measures, some involving the exclusion of copyright violators from use of the internet.

The dot com stock market crash at the turn of the Millennium provided a breathing space against the digital advance, but this did not last long. As consumers adopted wave after wave of new devices – smaller computers, then mobile devices and technologies so portable that they became wearable – it became clear that the criminal law was too blunt an instrument to combat the 'free' availability of text, video, data, games and music on the internet. As copyright's hold in the digital world weakened, the creative industries pushed in the opposite direction, emphasising the core function of copyright as a vital source of incentive for the creation of new works and proposing dramatically longer coverage. Today, copyright typically offers protection of works for the lifetime of the artist plus 70 years.

At the time of writing, the temperature around these controversies has eased but certainly not reached comfortable levels. Some countries (China stands out) have taken the draconian step of banning American search and social media companies from a Chinese internet which sits behind the 'great firewall' and which has a reputation for not taking IP enforcement too seriously.

Faced with challenges on all sides, Europe has searched through its own regulatory toolbox and settled upon competition policy, taxation and data protection laws for priority use in their struggle to resist the big American platforms. The European Union has also embarked upon a long series of disorganised attempts to reform copyright in the context of an envisaged but in practice still illusory European Digital Single Market.

This Digital Single Market debate also presents Europe with the uncomfortable question of why its member states have largely failed to achieve a truly effective industrial response to the American digital giants, raising further questions about the quality of their approach to thinking about competition and data protection, on the one hand, and approaches to skills development, research and innovation, on the other.

Against this background, the debate about the CI and IP, thoroughly polarised in 2010,

has become somewhat less binary. Some important CI sectors, such as games, have grown out of a more collaborative approach between developers and gamers than envisaged in the 1997 definition of the creative industries built around individual creativity. The rapidly growing games industry's approach to IP issues reflects that difference. The same is true of the software industry, where 'open' models of development have contended with closed approaches relying upon strong IP defences from the outset.

In a review of IP issues I led for the UK Government in 2011, I argued for a strategic approach which took account of the genuine needs and interests of the core CI, along with the emergent needs of 'a burgeoning service economy based upon the internet'. It was clear then and it remains clear now that some revisions are needed in the boundaries of copyright, especially with respect to the copying and analysis of data, but also with regard to the many areas of copying which operate chiefly outside commercial markets, whether in museums or education.

In a Manifesto for the Creative Economy published by Nesta in 2013,¹ we argued for a better balance between the needs of creative industries as defined in the pre-internet age and the requirements of an entire economy dominated by the new general technology of digital communications. This digital economy, or creative economy, or creative digital economy (all three terms are in circulation) may defy agreement on definitions, because of its scale and pace of change, but there is no doubt that it is an essential source of growth and employment, providing jobs less susceptible to automation than many others. This advocacy of a step away from a binary debate around copyright protection for the core CI was assisted by the gradual and initially resisted emergence of new business models in the CI – the growth to dominance of streaming in the music industry being a good example.

It is in this still edgy, but somewhat less confrontational, atmosphere that the contributions to this welcome collection of chapters by lawyers, philosophers, economists and experts in business studies, media, cultural studies and politics can be understood. The book's co-editors, Abbe Brown and Charlotte Waelde, use the word 'tolerant' to describe the prevailing atmosphere.

In this spirit, the contributors to the collection push the boundaries of the conversation about IP and the CI beyond its familiar limits, drawing in experience and ideas from parts of the world (southern Africa, India, Egypt), which have not so far been central to the discussion, along with insights from important economies like Japan, where a CI focused approach appears to have foundered on its anaemic cultural thinking and commitment.

Contributors also, however, make very sharp points. Julia Reda MEP, a German campaigner for more flexible IP approaches, tells us that the European Commission is 'failing the rest of society' in its legislative programme. Philip Schlesinger, Deputy Director of CREATE, a UK research centre focused upon copyright, assails what he sees in some quarters as an 'economistic and market-oriented concept of culture'.

Christian Handke, an economist, reminds us that IP has been 'a pivotal element in contemporary creative industries' but warns against absolutist positions on either side of the economic arguments about the design of IP and its interaction with competition policy.

There are interesting contributions from lawyers, some of whom stress human rights

¹ Manifesto for the Creative Economy: Bakhshi H, Hargreaves I and Mateos-Garcia J, Nesta, 2013.

concerns at risk in what Jaime Stapleton calls a 'Digital Leviathan'. Others help us to understand the differing legal contexts from one geographic territory to another – an unavoidable perspective in a domain where global communications and market realities interact with distinctive cultural perspectives, many of them local. Andres Guadamuz provides a useful trove of evidence about the extent to which even during a period of intense corporate warfare over copyright, the world has also enjoyed through initiatives such as Creative Commons 'a vibrant licensing ecology' reflecting priorities which reflect values other than the commercial.

Challenges to a one-size-fits-all ecology are also presented from other perspectives, such as the concerns of contemporary Romanian craft 'makers' and their interaction with the fashion industry's distinctive approach to IP. From elsewhere, we are invited to reflect upon the emergence of new claims to IP protection, including in the world of dance and visual arts. Looking in a different direction, Roger Burt and Colin Davies peer into the world of artificial intelligence to offer early illumination of a question which cannot be far away on a substantial scale: how will we assign rights to the creative works of clever machines, rich in artificial intelligence?

These explorations are essential to the work of evolving a healthy rights ecology, which recognises that what is good for the Disney Corporation may not be right for schools or museums or for the many organisations which combine missions focused upon both public value and commercial value.

In these circumstances, the binary intransigencies of a period defined by head-on conflict are no longer helpful. Competing needs do not have to be mutually destructive.

A strong and digitally adaptive copyright system, actionable at reasonable cost in the courts and well understood by competent regulators with consistency across geographical boundaries, will continue to meet the needs of commercially-focused CI and those many firms in the wider creative economy for whom investment in intangible assets such as brand is critical to competitive advantage.

A healthy ecology of rights will also, however, speak to a wider set of values and respond to other concerns, for example about barriers to circulation of works where rights cannot be determined (so-called 'orphan works') and to the legitimate claims of artists whose work refers to earlier art but still belongs to the present. It will seek to extend rather than to narrow flows of knowledge and opportunities for collaboration. We know that creativity is fundamental to human well-being and that, along with the successful harnessing of digital technologies, it is increasingly important to innovation and to business success. There is only one valid general test of any system of IP: does it maximise levels of creativity?