
Introduction

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OUR GOAL

Few would dispute that the Creative Industries are important to society – economically, culturally and socially – and that intellectual property (IP) law is highly relevant to them. We were delighted, therefore, to be invited by Edward Elgar to edit a collection which explores the extent to which, and on what basis, this may be so. We thank all at Edward Elgar for this valuable support and also our research assistant Joanna Bac for her tireless, careful and enthusiastic contributions. We have also been privileged to work with a highly talented group of colleagues from a diverse range of countries, sectors and perspectives. Our intention is that the resulting collection is of use to scholars, lawyers, managers, practitioners and policymakers working in any area of creativity and culture.

The collection, after a valued Foreword by Ian Hargreaves, has six parts: Setting the Scene; National and Regional Perspectives; IP, Creativity and Reward; Case Studies: Coping with Legal, Social and Technical Change; Cross-Sector Issues; and Foresighting. Across this wide-ranging landscape and within the generous word limit of the publishers (with which we still struggled), difficult decisions had to be made as to what should be included. We saw this as an opportunity, rather than a problem: it led us, at the very start, to think carefully and creatively about what we thought of relevance to the Creative Industries and to IP; and to respond to challenges when, inevitably, others did not always agree as the project moved forward.

We were aware that our project was timely as it began against the backdrop of several valuable works exploring the Creative Industries from both legal and non-legal perspectives, notably: *Copyright and Cultural Heritage* (Derclaye, 2010); *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (Biagioli, Jaszi and Woodmansee, 2011); *Key Concepts in Creative Industries* (Hartley, Potts, Cunningham, Flew, Keane and Banks, 2012); *The Cultural Industries* (Hesmondhalgh, 2012); *Introducing the Creative Industries* (Davies and Sigthorsson, 2013); *Handbook on the Digital Creative Economy* (Towse and Handke, 2013); *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor and the Everyday* (Murray, Piper and Robertson, 2014); *The Oxford Handbook of Creative Industries* (Jones, Lorenzon and Sapsed, 2015); and *Intellectual Property and Access to Immaterial Goods* (Lai and Maget Dominicé, 2016). In seeking to complement and look beyond these contributions, we identified key themes for this collection: looking to IP beyond copyright; including activities (looking beyond books and music) which, though socially valuable, are rarely commercially successful; analysing law, courts, international institutions and policy developments in and between different countries; and exploring philosophy and motivation, control and sharing, and equality and diversity. This collection looks forward (and back and across) different elements which form part of the Creative Industries and its intricate relationship with IP. Nonetheless, some valuable areas have had to be omitted.

2 *Research handbook on IP and creative industries*

In particular, we acknowledge the importance of the advertising and gaming sectors; of forms of financing; of the relationship between different international treaties; and of policy developments in countries and regions other than those explored here, notably Oceania and Central and South America.

When making our decisions we thought deeply about how, through addressing a variety of countries, sectors, and cross-cutting perspectives, we could explore established and contemporary challenges for the place (or lack of place) of IP in the Creative Industries. Our governing premise was that Creative Industries are in a time of change, both internally (notably in terms of stakeholder relationships, business models and attitudes to control and reward) and externally (from law, policymaking, economics, technological opportunity, social diversity and attitude), and we have sought to explore these across the chapters. Accordingly, and deliberately, the collection has no single voice or writing style (although we thank our contributors for the adoption of the OSCOLA style so familiar to lawyers). The range of styles reflects the variety in stakeholders, perspectives and views relevant to the relationship between IP and the Creative Industries, and also the fact that scholars, practitioners, international policy experts and those working in the sector have different approaches and priorities to the dynamic question of the place of IP in the Creative Industries.

We hope that as a result, the book will be relevant to all with an interest in the Creative Industries. An overview of each chapter is provided below, to highlight to readers the content, to entice readers to look widely, and also to provide an introduction to what we consider to be the main contribution of the collection: a reflection and challenge to the presence and future place of IP in the Creative Industries.

AN OVERVIEW

Setting the Scene

To begin, Philip Schlesinger of the University of Glasgow provides an insightful and reflective analysis of what is and can be meant by the term Creative Industries. He explores its complex relationship with different labels and substantive approaches – cultural industries, the creative economy, and the creative and cultural sectors. Particular focus is placed on developments in the EU in respect of audiovisual activity and the digital single market, the impact of this on non-economic perspectives, particularly in the context of UNESCO activity in respect of cultural diversity, the impact of this in turn on international trade – and its uncertainties in the light of the Trump perspective at the time of writing – and the resulting combatting of the *défi américain*. In this context it is interesting to reflect that as this project is finalised, the UK government included the creative industries in its Building our Industrial Strategy consultation.¹ As part of this, Sir Peter Bazalgette (formerly chair of Arts Council England and with a background in television) conducted an independent review on ‘how the UK’s creative industries, like our

¹ <<https://beisgovuk.citizenspace.com/strategy/industrial-strategy/>> Consultation closed April 2017, see in Green Paper January 2017, pp. 5, 20, 31, 97, 102–3 (quote 103).

world-leading music and video games industries, can help underpin our future prosperity by utilising and developing new technology, capitalising on intellectual property rights, and growing talent pipelines'. Some early responses viewed positively the carrying out of the review – yet what does the economic (indeed industrial) goal of the process (including its focus on finance and valuation)² herald for the wider place of creativity in society?

A tripartite team comprising Stina Teilmann-Lock of the University of Southern Denmark, and Hasan Yilmaztekin and Mathilde Pavis of the University of Exeter then introduce the subject from a legal perspective. They discuss the basic principles of IP rights which are relevant to the Creative Industries at national, EU, regional and international levels, with some key examples of present and potential intersections – some of which are more readily anticipated than others. In order, Pavis discusses copyright, performance and moral rights, their evolving nature and current complexities; Teilmann-Lock explores designs, utility models and patents, their intersections with each other and with other rights; and Yilmaztekin analyses trade marks, passing off and unfair competition.

Christian Handke of the Erasmus University Rotterdam introduces an economic perspective on IP in the Creative Industries, and calls (these are later to be echoed by Nicola Searle) for further embracing of the discipline within the sector. He highlights economic themes and principles (notably regarding allocation of resources and addressing market failure), the goals of engaging with empirical evidence to confirm predictions, and raises the stimulating image of copyright fighting fire with fire, given that it is full of market failures. He explores key challenges for IP, economics and Creative Industries notably balancing sunk and marginal costs and non-rivalrous and non-excluded goods, with particular reference to digital information, communication technologies and 3D printing. He calls for further research across copyright and patents, to identify the links between IP and innovation and creativity in the widest sense and how to shape IP policy, while acknowledging that this is likely to be best done in a variety of ways across sector and country. Within this landscape, much activity takes place at national and regional level, and this is now explored.

National and Regional Perspectives

Building on the definition introduced above, Kristofer Erickson of the University of Leeds discusses the birth of the term 'creative industries' across 13 rather diverse activities by the New Labour UK government in 1997 noted above. He notes the varying challenges these have had in the UK in respect of copyright (for creators and for owners), including the extent to which copyright can in fact be argued to be a driver of activity; and discusses the challenges faced by creators and investors in seeking to extract value using different business models and digital opportunities. Enyinna Nwauche of the University of Fort Hare discusses IP and the Creative Industries across several African countries. He notes the informal growth of Creative Industries while highlighting the key importance

² See e.g., BBC News, 'Industrial strategy 'must help' UK creative industries' (15 April 2017) <http://www.bbc.co.uk/news/business-39604320>. See Sir Peter Bazalgette, 'Independent Review of the Creative Industries' (September 2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649980/Independent_Review_of_the_Creative_Industries.pdf accessed 7 December 2017 pp 5,6, 8, 9, 31–5.

of IP in generating further economic growth, with particular emphasis on enforcement and counterfeiting, collecting societies and the internet. He also notes the key parallel challenges of engaging with cultural diversity and traditional knowledge. For India, a contrasting perspective is put forward by Yudhishtir Raj Isar of the American University of Paris and the University of Ahmedabad, noting the limited intersection between IP and the Creative Industries and also the lack of state intervention in the sector. Development there has come about from economic drivers, in comparison with biodiversity, although new copyright exceptions are also explored.

Turning to Europe Julia Reda, Member of the European Parliament for the Pirate Party, analyses the changes which have taken place through movements to new European Union copyright policy, from one supported by users to one supportive of the Creative Industries (as narrowly defined, excluding authors) and of a copyright based economy. This is explored with particular reference to publishing, music and film and provides interesting comparisons with Nollywood and Bollywood in the preceding chapters.

The position in Japan is seen to be complex. Emiko Kakiuchi, National Graduate Institute for Policy Studies, analyses post-World War II economic growth, focusing on the importance of the creativity of the general populace. Facing globalisation in the 21st Century, the government introduced the 'Cool Japan' initiative. However, she notes that except for computing and software, there has been limited growth of Creative Industries. On the other hand, there are examples of growth in areas that might be considered to be outside Creative Industries, such as the automobile industry, in which the combination of sophisticated computer programming, hardware and styling is vital. More should be done, she argues, to address cultural creativity and, with it, IP.

IP, Creativity and Reward

From this melee we encounter two themes of key practical relevance: sharing and enforcement. Andres Guadamuz of the University of Sussex discusses open approaches to sharing of registered and unregistered rights. After tracking its roots in the work of Boyle, Stallman and Lessig, he explores opportunities for open licensing of copyright (Creative Commons, Open Source Institute, GNU), of database rights, and progress to registered rights, notably Apache software patents and the Tesla declaration that all its patents are openly available. While noting the low level of litigation of open licences, he concludes that the success of businesses and movements which used this model are perhaps supported not by the licence model, but rather by the wider attitude to community and development. In tandem, Nagla Rizk of the American University of Cairo provides an insightful economic analysis of the independent music sector in Egypt by sharing empirical interviews and the place of sharing and different approaches to it through cassettes, CDs, downloading and attitudes to live performance. She finds intersections between awareness of copyright (as also explored by Mandel) and approaches to music delivery and consumer practice. She argues for a greater place for a digital commons (explored also by Guadamuz), notwithstanding a present reluctance to do this because of digital barriers.

But sometimes sharing is not desired, or terms cannot be agreed. Jane Cornwell of the University of Edinburgh provides an innovative empirical exploration of the enforcement of IP rights in the Creative Industries (from initial letter to end of action), drawing on her own work in Scotland, and other work in the US, Australia and England and Wales. She

notes that these questions are largely unexplored. From the limited empirical evidence to date, much litigation activity is generated by high-volume copyright enforcers such as major media actors and collecting societies. On other matters (for example enforcement against online infringement) research shows variance from jurisdiction to jurisdiction. She calls for further work, particularly regarding IP enforcement by smaller creative industry players. Complementing this, Abbe Brown of the University of Aberdeen demonstrates how, even if an IP owner is willing to raise an action, there is variety in the remedies which may be awarded if one is successful. Court approaches to IP, to their powers and to laws other than IP can reduce the likelihood of injunctions being awarded. Accordingly, even if one supports IP on the assumption of the benefits of exclusivity, judicial support cannot be relied on. Brown calls for courts and policymakers to have greater regard to the possible impacts on this on all in the Creative Industries.

Case Studies: Coping with Legal, Social and Technical Change

The fourth part explores some case studies of how the Creative Industries and IP have coped with legal, social and technical change. Smita Kheria of the University of Edinburgh explores (again with a strong political introduction) the complex relationship between visual artists (illustrators, fine and contemporary artists) and copyright. She draws in particular on an extensive empirical study to discuss the relevance of copyright exploitation, and the significance of artists' notional ability to exclude others from use of their works without permission. She calls for greater engagement in empirical research and for greater awareness of the importance of copyright to visual artists. Amalia Sabiescu of Loughborough University London explores arts and crafts from the perspective of both culture and economics, the individual and the community, with particular reference to The Romanian Blouse, widely regarded as a badge of national identity. She discusses the maker movement, and the challenges encountered when the blouse is 'appropriated' by international fashion and art leaders aided by digital technologies and different forms of entrepreneurship. She highlights the need for cultural IP (notably geographic indications) and engages with work of UNESCO and WIPO.

A more contemporary approach, still highly relevant to cultural heritage, is taken by Charlotte Waelde and Sarah Whatley, from Coventry University. They discuss dance and disability, building on the foundations set earlier in the collection by Pavis. Waelde and Whatley explore the stimulating opportunities of interdisciplinary work in identifying the different rules, and resulting legal inadequacies, which can arise when two different fields – dance and law – come together. They note the growing attention focused on deep-rooted questions of ownership and authority of dance, with echoes of the questions seen in respect of AI. This is of particular importance due to increasing digitisation of work, growing interest in disabled dance, and the need for more commercial value and engagement in the sector given the challenges of public funding for the arts.

Steve Collins of the University of the West of Scotland then explores folklore and (again) the work of WIPO and UNESCO. He provides a deep legal analysis of their 60 year efforts to develop legal protection for folklore. He reviews the challenges to identify definitions, key themes driven by African countries and by Bolivia, and takes a positive view on what has been achieved while noting that there is much still to be done. Continuing the traditional knowledge theme, Susy Frankel of the Victoria University of Wellington

also explores identity, in the context of the relationship between the creative sector and traditional knowledge in New Zealand, at national and international level. After exploring different approaches to misappropriation and how best to engage respectfully and to preserve Māori culture, she analyses international developments for example in respect of the Trans-Pacific Partnership Agreement and WIPO negotiations and recommendations of the Waitangi Tribunal. And within this future, technology and in particular Artificial Intelligence (AI) will also be key – both in engagement with creative industry activities, and also being part of them through the broad (and not uncontroversial) UK late 1990s Department of Culture, Media and Sport definition which includes software. Accordingly, Roger Burt of the Chartered Institute of Patent Agents and Colin Davies, independent Intellectual Property Consultant explore the links between AI and IP, notably regarding the potential for AI to generate IP and also legal evolution from an ownership perspective.

The lens then changes again, to institutions. Amalyah Keshet recently retired from, and still consultant to, The Israel Museum explores how to work effectively with copyright law to enable museums to be contemporary cathedrals. After exploring practical challenges and commercial and societal needs from Disney to Picasso, she embraces solutions developed by the museums community, notably that of the Rauschenberg Foundation. In an approach which is both pragmatic and inspirational, she calls for museums, and their place in the community, not to be restricted by the finer (and unclear) points of law. Finally, complementing the case study approach, the next part explores some issues of wider application.

Cross-Sector Issues

First, the collection moves towards more theoretical and philosophical viewpoints. Jaime Stapleton, formerly of Birkbeck University of London and Christiana Research Group, Copenhagen, questions why (some) people create, and examines the place of IP and the attitude of creative people to law and law's inadequacies. He proffers an insightful focus on what is in fact meant by creativity as he moves from once again the UK Blair government of the 1990s, to 14th century laws, to the development of the internet and the place of the market, and on to Aristotle and the links between sharing and surveillance. Gregory Mandel of Temple Law School then challenges the reader with a rich analysis of experiential creativity. He shares his own experiments and those of others exploring how lay people (both IP owners and users/consumers of IP) and legal experts (IP lawyers/attorneys) view IP. He found a strong lay focus on IP being a tool to prevent plagiarism, and a legal focus on IP as a tool for reward. He goes on to highlight other experimental work showing that this might not in turn be an effective approach to encouraging creativity. These disconnects between IP law and perceptions of it, he argues, can have a negative impact on its effectiveness and legitimacy.

Taking a different perspective, Henning Berthold, Melinda Grewar, Shiona Chillias, and Barbara Townley from the University of St Andrews explore the diverse means by which investment can be obtained across the Creative Industries. They discuss the different and evolving approaches to value, to content, to law and to IP in gaming, internet businesses, publishing, fashion and television. The authors discuss the embrace of new approaches to licensing such as through Creative Commons as also discussed by Rizk and by Guadamuz, and highlight the inadequacies of IP law in this respect, as also raised by Mandel.

Complementing concerns expressed across the collection at the possible power of IP, Abbe Brown of the University of Aberdeen, and Nicholas Gervassis and Rumbidzai Mukonoweshuro both of Plymouth University, explore the place of corporate social responsibility alongside IP in the Creative Industries. Building on the work of Schlesinger and of Reda regarding the meaning of the term, highlighting intersections with human rights, open practices such as discussed by Guadamuz, and with a particular focus on what can be learnt from sustainability, they propose a new approach by IP owners as to the power and enforcement of their rights.

Foresighting

The collection closes with some valuable and wide ranging foresighting. Nicola Searle of Goldsmiths, University of London explores the challenges experienced by the eclectic spread of economics in seeking to explore and influence IP policymaking in what she refers to as the Creative and Cultural Industries. She develops possible cogent routes forward – reflecting her chosen title ‘Hard Sell’. Irene Calboli of Texas A & M University School of Law and Singapore Management University School of Law explores past and present diversity issues facing IP law, and calls for a movement away from an economic and market focus on IP to one engaging with other perspectives including race and gender, echoing suggestions made by Brown, Gervassis and Mukonoweshuro. Calboli’s intention is to build a more appropriate future for IP in the Creative Industries.

John Hartley of Curtin University’s contribution explores the meaning and use of language and communication practices (with echoes of the corporate social responsibility and creative/cultural discussion) including translation, indigenous languages and a language in the digital space (all with a focus on fish), and also contrasting cultural values and economic values. He argues that tensions and sharing, key to the development of language particularly in the digital space and as seen throughout this collection, are a driver of innovation. He suggests that a better model for a creative economy is knowledge clubs and groups. To assist in this he calls for an exemption for educational uses of copyright works which would enable IP to engage with, rather than seek ineffectively to block, ‘[t]he semiotic equivalent of earthquakes and eruptions’. Resonances of the collector-editor proposal are also found in the final contribution, as Valdimar Hafstein of the University of Iceland also looks forward and backward regarding the place of folklore and heritage. He makes some rich and reflective comments on Greek mythology, the fate of Echo and resonances of this with modern views of folk tradition, before making more positive calls for a return to a sharing model in digital cultural practice. He notes, however, that in contrast copyright law has the author, rather than collaboration, as its focus. Hafstein suggests the challenging and inspiring premise of a future focus on the collector-editor who has counterparts in Western collections of folklore and Greek and Nordic mythology.

REFLECTIONS

Little more than a decade ago, a collection such as this would have been full of anxiety around digitisation and its impact on IP and the Creative Industries. While that remains an important and vibrant theme, others, more nuanced are gaining increasing traction.

We anticipated that this may be the case at the start of the project, thinking that key determining issues would include the size of the activity, societal attitude, geography and the nature of the IP right and its intersections with other relevant laws. This has been borne out in practice as can be seen by the range of contributions to this collection. But there is much, much more that is driving the sector; and this is replete with threads and themes that are both rich and subtle, and which without exception exhibit increasing sophistication in our knowledge and understanding of both IP and the Creative Industries. If we were to use one word to try and sum up where the trajectory might be going, it would be 'tolerance'. This might seem an odd term to use, but what we see in the contributions is a move from the anxiety mentioned above (although the prospect of Brexit raises further bases for this), to more subtle and, yes, tolerant, thinking about the intersections between the place of IP and/in the Creative Industries. Tolerant thinking is clear, for example, in reference to the Romanian blouse, to corporate social responsibility, to equality and inclusion, to sharing and collaboration, to museums in the community, and to careful understandings of the intersections between creativity and culture at national, regional and international level. IP still has its 'traditional' place of course, as can be seen in the explorations of for instance, AI, litigation and the 'Cool Japan Strategy'. But as befits the Creative Industries, a much broader landscape has been able to be depicted. We look forward to a future of greater tolerance and development – in IP law and more generally.