



# Intellectual property and innovation

Edited by Ian Hargreaves and Paul Hofheinz

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# Intellectual property and innovation: A framework for 21<sup>st</sup> century growth and jobs

Ten leading European thinkers look at the challenge of managing intellectual property in the 21<sup>st</sup> century – and the steps we should take today.

Edited by Ian Hargreaves and Paul Hofheinz

Foreword by Ian Hargreaves

By Lilian Edwards, Reto Hilty, Bernt Hugenholtz, Paul Klimpel, Till Kreutzer, Jeff Lynn, Cédric Manara, Nico Perez and Michel Vivant

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The ideas expressed in these essays are those of the individual authors alone, and do not necessarily represent the views of the Lisbon Council or any of its associates.

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Ian Hargreaves is professor of digital economy at Cardiff University and author of *Digital Opportunity: A Review of Intellectual Property and Growth*, a high-level review commissioned by UK Prime Minister David Cameron.

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# Foreword

— Ian Hargreaves

When I was asked in October 2010 to conduct an independent assessment of the United Kingdom’s framework of law on intellectual property rights, three questions immediately arose. “Why Hargreaves?” “Why now?” And from the most exasperated, “Why at all?” The United Kingdom has not been short of intellectual property reviews – four in six years. None resulted in significant reform, especially in the area of copyright. So why another?

In launching the review, Prime Minister David Cameron gave his response. This review, he said, would be charged with answering a different question: “Is the UK’s IP framework best designed to promote innovation and growth?” More controversially, he drew attention to Google’s view that innovation and growth are better served by the relatively open-ended United States legal defence against copyright infringement known as “fair use” than by the European system, which relies upon a more restricted and specific menu of exceptions to copyright under the “fair dealing” approach (and which therefore differs from state to state across Europe). To its well-organised enemies, my review thus became known as the Google review – something, by inference, to be resisted by all patriots.

“Why Hargreaves?” is not a question I am best placed to answer. It was certainly not because of my long record as an analyst of IP issues. In short, I had no fixed opinions, but I did have a reputation for being prepared to follow where rigorous analysis of the evidence leads, based upon a career spent mostly in the serious end of journalism (*Financial Times*, *BBC*, *The Independent*, *New Statesman*). My grasp of economics was learned chiefly in the FT newsroom. My love of the creative arts and my admiration for artists have been with me from childhood. My best friend is a poet.





Ian Hargreaves is professor of digital economy at Cardiff University and author of *Digital Opportunity: A Review of Intellectual Property and Growth*, a high-level review commissioned by UK Prime Minister David Cameron.



I was not given long to reach conclusions. Supported by a team of experienced officials from the UK's Intellectual Property Office, we had six months to gather evidence, think, write and report. From an early stage I knew what kind of report we should produce – as short as possible (60 pages, I said, and it came in at twice that) with no more than 10 recommendations and we stuck to that limit. It was clear from the outset that in a field as legally complex and contested as IP, a highly detailed programme of change would be too tangled to drag through the political undergrowth. What was needed was a straight answer to the prime minister's question. "Are we on the right track? If not, how do we correct our course so that over time a sequence of adjustments can occur to put things right?"

The first job was to re-express the prime minister's mandate as an exam question. The foreword to the review sums up question and answer with deliberate bluntness: "Could it be true that laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators' rights are today obstructing innovation and economic growth? The short answer is: 'yes.' We have found that the UK's intellectual property framework, especially with regard to copyright, is falling behind what is needed. Copyright, once the exclusive concern of authors and their publishers, is today preventing medical researchers studying data and text in pursuit of new treatments. Copying has become basic to numerous industrial processes, as well as to a burgeoning service economy based upon the Internet. The UK cannot afford to let a legal framework designed around artists impede vigorous participation in these emerging business sectors."<sup>1</sup>

This paragraph is followed immediately by a further point: "This does not mean that we must put our hugely important creative industries at risk. Indeed, these businesses too need change, in the form of more open, contestable and effective global markets in digital content and a setting in which enforcement of copyright becomes effective once more."<sup>2</sup>

The review's 10 recommendations build upon these two statements. I advise the government to ensure that the IP system is shaped by objective evidence – a reflection

'We need a re-balancing and de-cluttering of commercial returns to copyright in a digital environment, not their abandonment.'

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of a lengthy history of decisions (for example on the ever-extending duration of copyright protection) based upon response to assertive and sometimes emotive lobbying, not upon economic impact analysis. Another touches the international connectivity of IP legal issues. Points are made about the particular needs of the smaller, high-technology companies, which account for most innovation in advanced economies, and about the risks to them of a clogged up patent system. The design industry, one of the largest and most important of the UK's creative industries, has been strangely neglected in the IP debate; the review proposes a remedy. It also recommends changes to the UK's institutional arrangements on IP, giving the Intellectual Property Office a clearer legal mandate and more clout, especially on competition issues, which have been

regrettably under-addressed in the IP debate of recent years.

The most controversial recommendations, however, concern copyright, where the review concludes the IP system is most in need of change. It is in copyright where lobbyists most dramatically outnumber solid evidence-bearers and it is here where previous attempts at reform have most spectacularly foundered.

Much of the detail of what the review actually proposes also featured in earlier reviews: action to open up the vast treasure trove of copyright works whose authorship is unknown ("orphan works"), along with take-up of exceptions to copyright law permitted under EU directives, such as private file-sharing and permission to engage in satire and parody. I also propose a number of changes designed to contain the encroachment of copyright regulation into non-artistic (or "non-expressive") areas, to make use of data and text mining easier, and to enable EU copyright law to flex in response to technological shifts without the need for legislative processes which can and do take decades.

In one area I recommend an important move which does not require any change in the law: the UK government should build upon the large number of existing private- and public-sector initiatives to establish inter-operable databases of copyright material, and so facilitate the formation of a digital copyright exchange, learning from the insights arising

‘Europe’s digital economy desperately needs better soil in which to grow. That means, first and foremost, a legal framework for intellectual property which recognises that need.’

from (failed) initiatives like the Google books agreement.<sup>3</sup> This exchange would be designed to nurture global trade in rights by increasing the speed and lowering the costs of rights licensing transactions.

The over-arching aim of this ten-point package is to alter the UK’s strategic direction of travel on IP law, in the belief that a course correction of, say, five or 10 degrees, while small at first, over time becomes a spacious zone for innovation. This, I am convinced, is what is needed in the UK and throughout Europe.

The response to the review was not as gloomy as some predicted. In the UK, rights holders welcomed the fact that I had not given the prime minister the answer he appeared to want: a move to US fair use provisions in the UK. That, I had decided based on conversations with lawyers, would guarantee political inaction for another generation. Soon enough, however, the vanguard of the creative industries lobby mobilised against the review, stressing their longstanding view that the government’s only useful contribution in this field is to ensure tougher policing against online infringement of rights. The review argued in detail that enforcement can only work well when the law is reformed to fit with reasonable consumer expectations and when rights holders fully grasp the need to make available digital products and services through easily accessed legal digital channels at realistic digital prices.

The UK government responded in August 2011 in a statement signed by three senior ministers.<sup>4</sup> In it, the ministers broadly accepted the review’s 10 recommendations, noting “the potential benefits are considerable: adding between 0.3% and 0.6% to the size of the UK economy by 2020 – between £5 billion and £8 billion [€5.72 billion and €9.15 billion] – and cutting deadweight costs in the economy by over £750 million [€858 million]. The government believes this is fundamentally the right view. We are prepared to make changes to give the UK the IP system that best equips us to meet current conditions and opportunities and that

can develop further to meet future ones. Of course, this is in the context of a global IP system. The UK must work within international agreements and European law, as well making the case with international partners for changes to meet the challenges of the future.”<sup>5</sup>

The government has subsequently undertaken a detailed consultation and declared its intention to move to implementation. Given the history of failed attempts to reform IP in the UK, it cannot be assumed that parliament will agree to the government’s proposals, though there are signs that British members of parliament, like the population at large, is increasingly aware of the costs to the economy of defending an inflexible view of copyright at the cost of deadlock in the digital economy. We shall see.

Meanwhile, the review’s proposed digital copyright exchange has been feasibility tested by Richard Hooper, a media business leader and former deputy chairman of the Office of Communications (Ofcom), the independent regulator and competition authority for the UK communications industries. In April 2012, Mr. Hooper published a “diagnostic” first report, in which he identified “significant problems” with regard to digital licensing in sectors as widely different as libraries, archives and museums, educational institutions, film and television, publishing, music and photographs/images.<sup>6</sup> Mr. Hooper also acknowledged “an overarching cross-sector and cross-territory problem which, if resolved, will further improve copyright licensing for the mixed media and borderless world of the Internet.”<sup>7</sup> The second and final phase of his work, published in July, proposed practical mechanics for creating a “digital copyright hub,” itself connected to a network of rights exchanges in the UK and beyond.<sup>8</sup> The Hooper design draws explicitly upon the work of the Linked Content Coalition, itself closely connected to the important groundwork of the European Publishers’ Council.<sup>9</sup>

The international response to my review has been substantial and sustained. My e-mail inbox overflowed with

requests to travel to every continent. At one meeting, hosted by the Lisbon Council in Brussels, the seeds were sown for this collection of essays.

These 10 essays have been garnered from around Europe with a view to exploring a diverse range of perceptions. They are written either by business or other leaders who are struggling with copyright issues on a day-to-day basis or by legal and other academic experts in IP whose depth of learning greatly exceeds my own. They have three arguments in common:

1. The current system is not working. Views differ on the extent of the dysfunctionality, but no one defends the system as it is.
2. Copyright is not finished. That view does exist (“information wants to be free”) in some American assessments that grow out of an idealistic prioritisation of the free speech properties of the Internet. The authors here take the view, which I share, that we need a re-balancing and de-cluttering of commercial returns to copyright in a digital environment, not their abandonment.
3. This re-balancing of interests is achievable – politically, technically and culturally.

The stakes, these essays say, are very high both in terms of economic and cultural cost. As one of our German contributors, Paul Klimpel, writes: “To the extent that it stays offline, Europe’s culture is going to fall out of the world’s awareness.” The conclusion I draw is that there is now a stirring for copyright reform in Europe that can only grow, as a generational shift continues towards those born digital. The recent campaign to persuade the European Parliament to block ACTA, a further international codification of IP rules, is indicative of this mood. The danger is that the change will come too late to prevent further comparative, structural weakness in Europe’s digital economy.

My own work has focused chiefly upon the economic costs of inaction. At the European level, this takes us to the debate over the digital single market, which is of critical strategic importance for a European Union struggling to achieve levels of productivity and innovation that will enable it to keep pace with old and emerging giants to the east and west.<sup>10</sup> In the words of a study from the European Policy Centre and Copenhagen Economics: “Global competitors, such as the US, Japan and South Korea, are expanding the







‘Copying has become basic to numerous industrial processes, as well as to a burgeoning service economy based upon the Internet.’

digitalisation of their economies and increasing productivity and innovation is expected to follow. If Europe does not keep up, we risk missing out on a major boost to competitiveness.”<sup>11</sup>

It is true that economists are still struggling to quantify the economic impacts of the Internet, just as they struggled to quantify the impact of earlier and much less powerful waves of change in information and communication technologies. But who can doubt that this is an unavoidable frontier for Europe? The EPC/Copenhagen Economics study argues that the completion of a digital single market is as important in economic terms to the European Union as the original single market (and worth four percentage points on EU GDP). A McKinsey Global Institute study published in the same week as my review, and timed to coincide with President Sarkozy’s G20 summit in Paris, estimated that the Internet has contributed 21% of all economic growth in G8 countries in the last five years.<sup>12</sup>

Whatever view you take about this type of economic evaluation, it is difficult to contradict the argument that Europe has not enjoyed a great second decade in the life of the commercial Internet (assuming that the first decade started in the mid-1990s). In this second decade, Google, Facebook and Apple have emerged from Silicon Valley as globe-striding pioneers in Internet search, content curation, device manufacture and user-generated content. Europe, with historic strength in creative content, has struggled with the consequent pace and disruption, partly I believe because of the too ready resort to the traditional tool of protection by copyright. A device designed to reward and show respect to individual creators is seen by too many as an instrument of economic protectionism, with all the consequences that implies for competitiveness.

The period has also seen big changes in the politics of copyright. This year, Barack Obama became the first US president to block legislation designed to toughen up

compliance with copyright. He did so because the SOPA (Stop Online Piracy Act) and PIPA (Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act) laws provoked popular outcry, symbolised by the withdrawal from service for a day of Wikipedia and other mighty deliverers of web-based innovation. Meanwhile, the complex set of events that the news media label “the Arab spring” has bestowed further radical salience upon the place in our lives of social media and user-generated content.

Europe’s response to all of this has been too anxious. The European Commission’s 2011 policy statement on IP strategy covered a lot of ground and it has this year resulted in welcome, if cautious, reforms concerning orphan works and the operation of collecting societies, not to mention agreement on a unified European patent system, which has taken all of 40 years to achieve.<sup>13</sup> But much more is needed, including a debate about revising the Information Society Directive itself in the light of the best available evidence about the relationship between IP, innovation and economic growth. We must hope that heightened political interest in IP, and concern about extracting maximum benefit from the Internet, will lead to a more constructive and balanced IP debate, followed by bolder and timely proposals for change.

Europe’s digital economy desperately needs better conditions in which to grow. That means, first and foremost, a legal framework for intellectual property which addresses the growth agenda. The prizes include an end to confusion among consumers, along with better functioning markets and richer business opportunities for creative companies. You can put alongside that the flourishing of a digital public domain, without which we will diminish ourselves culturally, as well as economically. This is the “digital opportunity” referred to in the title of my work for the UK government. It is an opportunity which Europe needs to seize right now. **IP<sub>21</sub>**

A man in a dark suit, white shirt, and patterned tie is sitting on a spiral staircase. He is looking down at a laptop computer that is open on his lap. The staircase has a prominent yellow handrail. The background shows the structure of the building, including metal railings and a glass railing on the right side.

# Copyright for growth

— Jeff Lynn

Jeff Lynn is co-founder and CEO of Seedrs, an online crowdfunding platform for investing in start-ups, and chairman of Coadec, the Coalition for a Digital Economy, a UK-based advocacy group.

‘One of the most exciting things about the Internet, reflected in particular by the concept of Web 2.0, has been the advent of platforms that host user-generated content.’

One thing that tends to happen when you are a young corporate lawyer is your old friends who are launching start-up businesses come to you for free legal advice. It’s par for the course – much as young doctors spend cocktail parties bombarded by questions about unidentified aches and pains. For many lawyers, this is a minor nuisance tolerated in the interest of maintaining friendships. For me, however, it was transformative.

After graduating law school, I worked in the London office of one of the world’s leading international law firms, representing very large companies as they bought or raised money from other very large companies. I had some great clients and worked on some major deals, but I was coming to find the work deeply unfulfilling. Being lawyer N°19 on a team of 27, structuring a buyout that was labelled as “highly innovative” but really was the same basic deal we had done hundreds of times before, was not how I wanted to spend my life. The only problem was that this was business as I knew it, and none of the other roles to which I was exposed professionally – be it on the financial side or even in operations – seemed any more exciting.

Then I began to get the questions from friends about their start-ups. They were a motley crew of businesses: a website for people to buy and sell home-cooked food; an India-based legal process outsourcing firm (before legal process outsourcing was a thing); a novel video games company. What they all had in common was that they represented true innovation. They were run by people who looked at the world and, to borrow from Bobby Kennedy, dreamed of things that never were and asked, “Why not?” They faced immense risk and knew that the odds were stacked against them, but they set out to accomplish something that was not only great but different from what others had done before. And I was captivated.

What I was seeing in these companies and throughout the start-up world was genuine innovation in action. These were the gales of creative destruction that Joseph Schumpeter

wrote about, and to a number they were being generated by small, entrepreneurial ventures. Larger companies can manage incremental innovation, but the really transformative stuff – the things that could change the world and bring massive value to investors and society alike – was all being done by businesses unburdened by legacy obligations, on-going overhead and inertia.

This was where I wanted be, so I left my law firm, went off to do an MBA and started to think deeply about the obstacles that entrepreneurs face and how to remove some of them. At one level, being an entrepreneur is supposed to be hard, and it is the struggle that leads to greatness. At the same time, it was clear to me that for all the innovation that was occurring, so much more could happen but for a handful of inefficiencies and unnecessary complexities that make starting a business much more difficult.

The inefficiency I came to focus on professionally was the market for seed-stage capital – the first €100,000 (or £150,000) that an entrepreneur needs in order to take a “first step” before raising more capital or launching. Given the administrative structure of venture capital firms and historic approaches to angel investing in Europe, there are very few organised sources of capital that invest at the sub-€100K level. The result is that only entrepreneurs with wealthy friends and family have the chance to get off the ground, and vast amounts of entrepreneurial talent go untapped. Combining this with the observation that investing in start-ups is currently limited to the very rich (due to transaction costs), and that the mass affluent would like to invest in start-ups if they could, I co-founded Seedrs, an online “crowdfunding” platform for people to invest small amounts directly in start-ups.

It took us about three years to bring Seedrs from conception to launch, due largely to the strict (but important) process of obtaining the necessary regulatory approvals. As we worked away over those three years, I had the chance to meet and talk with hundreds of different start-ups, and it gave me a chance to learn and think about what else, beyond



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seed funding, was holding start-ups back. Some mentioned restrictive immigration rules. Others talked about the bureaucracy of setting up a business and employing people.

But the one issue that stood out and came up again and again was intellectual property and, in particular, copyright. Entrepreneurs and would-be entrepreneurs talked about the mismatch between the way copyright law is written and the way people – both businesses and consumers – actually interact in the digital age. As the curation and distribution of creative content becomes an increasingly ripe source of innovation, old-fashioned notions of what it means to make a copy – and how infringement of copyright is enforced – lead to many potentially great business models being blocked.

What is particularly ironic about this is that the whole purpose of copyright law is to encourage innovation. Protection of intellectual property emerged only when

‘It is therefore time that we think about copyright infringement in terms of scale, and treat *de minimis* copying differently from large-scale commercial copying.’

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lawmakers realised it was necessary in order to incentivise innovation: ensuring that books and music were written (copyright), useful devices were invented (patent) and branded goods were sold (trademark). It was never intended that these protections create inherent rights in the way that, for example, land ownership does. Instead, these were statutory monopolies granted because the harm of exclusive rights was outweighed by the benefit of the creativity and innovation they incentivised. For copyright law to stifle innovation rather than encourage it is not only frustrating but undermines its entire purpose.

While the funding inefficiencies that I am trying to address with Seedrs are well-known, the impact of copyright

on innovation tends to receive less focus. The issues are intricate and a bit obscure and, because demonstrating what innovation failed to occur due to copyright law amounts to trying to prove a negative, the scope and magnitude of the problem often are not apparent to lawmakers and commentators. But the effects are very real, and there are three ways in particular that current copyright law stifles innovation:

## 1. Failure to account for transformative copying

Until the end of the 20<sup>th</sup> century, copying was primarily just that: the mere reproduction of an existing work, without any form of value addition from the copier.<sup>1</sup> This form of copying, when done on an illicit basis, adds little to society or the economy: assuming the work is already being made available to the public through a legitimate publisher or producer, then illicit copies do nothing other than to enrich the copier. Digital technologies have radically transformed what it means to make a copy. It is now far easier to start with an existing work and add important creative elements to it to create a brand new, valuable work. In the simplest form, we see this in mash-ups and parody: the *Newport State of Mind* video – parodying Jay-Z and Alicia Keys’ *Empire State of Mind* by replacing dynamic New York with less-than-dynamic Newport, South Wales – is an oft-cited example.<sup>2</sup> But it also applies to more serious areas, most notably data and text mining. Brilliant new techniques make it possible to scan thousands of journal articles to garner vital information that could lead to cures for major diseases and other scientific breakthroughs. Because the articles must, as a technical matter, be copied in electronic form as part of this process, data and text mining currently infringes copyright (even when the miner has purchased the original articles).

This sort of copying was never conceived when most modern copyright regimes were adopted in the second half of the 20<sup>th</sup> century, but it represents precisely the sort of innovative, value-adding activities that copyright law is meant to encourage. It is therefore essential that any modern copyright regime address and embrace transformative copying. In some cases this can be done purely through exceptions, such as a broad statutory carve-out for data and text mining (which currently exists in Japan). In other cases, we may need to think more deeply about what constitutes transformation of a

‘It is simply impossible to confirm the rights to every image, block of text or sound clip that one shares with friends on Facebook or incorporates into a home video to send to the grandparents.’

work, and at what point the additional value of the new work outweighs any harm from the use of the original.

## 2. Lack of distinction between *de minimis* vs. large-scale copying

A second issue relates to the binary notion of copyright infringement: under current law, you have either violated someone’s copyright or not, and minimal regard is paid to the scale on which you have done so.

Returning again to the pre-digital age, this had little impact. Making copies took a meaningful amount of time and resource, meaning that the set of people and firms likely to engage in it was limited – and those who did were almost certainly doing so on a commercial scale. For an ordinary person going about his daily activities and business, few concerns could have been further from his mind than the possibility that he might infringe copyright. But digital technologies have made copying a cost-less exercise, so in place of a few criminals working a hidden printing press, ordinary individuals around the world now find themselves infringing copyrights – often inadvertently – merely by pressing a button on a home computer.

This “incidental” sort of copyright infringement is not only inevitable, but it is part and parcel of using the Internet and participating in innovation generally. It is simply impossible to confirm the rights to every image, block of text or sound clip that one shares with friends on Facebook or incorporates into a home video to send to the grandparents.

And while this sort of copying may not always be innovative itself, its inextricable link with the highly innovative activities associated with Internet use means that quashing it results in quashing a lot of collateral good. At the same time, this type of infringement has

no real effect on the rights holders: whereas I accept the argument that large-scale torrent sites do cannibalise purchases (although not everyone would agree even on that), I think it is clear that any hypothetical loss from the failure of a handful of people to buy a licence to a given work shared casually among a small network is not only negligible but is almost certainly outweighed by the discovery advantages.

It is therefore time that we think about copyright infringement in terms of scale, and treat *de minimis* copying differently from large-scale commercial copying. Beneath some threshold of activity – and that would have to be determined carefully – copyright infringement should not be an actionable offence. That would leave everyone free to devote resources to the infringers above that threshold, and it would remove ordinary people, going about ordinary use of innovative products and services, from the long arm of copyright law.

## 3. Absence of codification of the mere conduit principle

A third concern turns on the distributors of content. Just as pre-digital copying tended to be the preserve of a limited number of firms, so was pre-digital distribution – and they were almost always the same firms as the copiers. So if someone was distributing copyright-infringing materials, he was probably also the person making the copies (or at least closely connected to him), and the distribution was as much a wilful infringement as the copying itself.

One of the most exciting things about the Internet, reflected in particular by the concept of Web 2.0, has been the advent of platforms that host user-generated content. It is difficult to overstate the importance of these platforms as both sources of democratisation and pools of incredible talent. Suddenly, people of all backgrounds,

‘The innovations being dreamed up every day by entrepreneurs throughout Europe will do amazing things for society.’

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skills and prominence have the ability to publish things – be it a blog post, a social media profile, a tweet, or even a Wikipedia entry – and have them read around the world.

Much of this has very little value, of course – with no gatekeeper blocking inane material, the Web is filled with vast quantities of noise. But within that noise some amazing signals come through, and the power of the crowds to produce truly brilliant material is inspiring. The difficulty for copyright law is that when you allow user-generated content, some users may provide content that they have copied rather than generated themselves. Subject to the above points about transformative and *de minimis* copying, these users should stand fully liable for infringement.

However, if the platform itself becomes liable for all the material it hosts, the consequences will be dire: virtually no firms that operate these platforms have the resources to monitor and investigate all content that is uploaded to them and were they required to do so, they would have to shut down. Consequently, it would become nearly impossible for new models to develop – both because entrepreneurs will be dissuaded from trying and because, even where entrepreneurs do try, investors will be reluctant to invest – and further innovation in facilitating user-generated content would slow dramatically.

To promote the innovation these platforms bring, it is therefore essential that the law adopt a clear “mere conduit” approach to platforms, establishing that they are not liable for content they host. Notice-and-takedown regimes, such as the one implementing the Digital Millennium Copyright Act in the United States, are a step in the right direction, but even they can be difficult for small businesses – which are often the most innovative – to manage effectively. Instead, we need an approach establishing that as long as the spirit and purpose of the platform is a genuine and law-abiding one

– that it is not a torrent site or otherwise set up expressly for the purpose of facilitating copyright infringement – the platform faces no liability or obligations with respect to the material that its users choose to post.

## Conclusion

The innovations being dreamed up every day by entrepreneurs throughout Europe will do amazing things for society. And as a society, we should be looking for ways to make it easier for those dreams to become reality – doing so will create jobs, generate wealth, and improve the day-to-day lives of consumers in ways that we cannot even imagine. I’m working on one way to make it easier, by helping to facilitate funding, but certain changes can only be made by lawmakers.

Reform of copyright to make it suitable for the digital age needs to be at the top of those lawmakers’ lists. **IP<sub>21</sub>**

# Preserving Europe's cultural heritage

— Paul Klimpel

Paul Klimpel is a German lawyer specialising in intellectual property. From 2006 to 2011, he was director of administration at *Deutsche Kinemathek*, a major German archive and museum of film and television, in Berlin. He writes here in a personal capacity.

**G**lobalisation and international competition are not limited to industrial goods or services. Cultural traditions, lifestyles and morals also compete – be they the “American way of life,” the values of Islam or “Asian virtues.” In this competition, Europe must assert its place. The power and influence of cultural traditions and the recognition in the history of ideas is not an end in itself, but has great political and economic implications. It comes down to determining Europe's place in the world.

The awareness of cultural traditions and the impression they give is increasingly shaped by the Internet. To the extent it stays offline, Europe's culture is going to fall out of the world's awareness. Europe can only succeed in gaining attention for its diverse cultural traditions if it provides for easy and user-friendly access to the testimonies of its cultural heritage. This is not an issue of digitisation of individual works, but of mass digitisation.



Technological innovation often outpaces law. Certainly, that's been the case in the digitisation of European culture. Many European archives, museums and libraries are making an effort to digitise their collections and make them available online, giving the public broader access to our cultural heritage. Yet by doing so, they often violate the law, even when they are very careful. Museum curators, archivists and librarians are not usually considered criminals, but from a strictly judicial perspective we have to concede: they are.

Take the Lost Films project ([www.lost-films.eu](http://www.lost-films.eu)), an Internet portal for collecting and documenting films believed to be "lost." About 85% of all silent films ever made are missing, and numerous talking films have not survived either. Many social historians and film scholars agree that finding more lost films is the only way to gain a more complete understanding of our rich film history.

Launched in 2006 by *Deutsche Kinemathek*, the German cinemateque and museum of film and television, with funding from the German Federal Cultural Foundation, the Lost Films project aims to fill in the holes in our knowledge. Fortunately, many lost films left behind rich clues to their original plot, theme, style, and existence through photographs, scripts, letters, and other "surrogate" evidence. Drawing on this material, an international network of experts is patching together and documenting a wealth of information about previously unknown films. Through projects like Lost Films, they share this knowledge online to make their findings more widely known and to invite submission of additional "clues" to other lost films. New tools and features are constantly added to the website to make it more effective and user-friendly, such as a function for the web browser to play a movie or film fragment found in an archive that could not be identified.

A good example of how successful projects like this can be is the rediscovery of the Hungarian film *Farsangi Mámor* (Carnival Dizziness) by Márton Garas, one of 38 Hungarian silent films that survive as short fragments. Of approximately 600 Hungarian feature films believed to have been produced between 1911 and 1930, only 51 are known to exist in more

'The search for rights holders can be considered similar to saving a ring from the bottom of the sea – theoretically possible, practically impossible.'

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or less complete form. The rest must for now be considered completely lost. For this reason, every metre of Hungarian film that can be recovered is of great value to the Hungarian National Film Archive, which has the duty to safeguard Hungary's film heritage for the future.

A long-thought lost fragment of *Farsangi Mámor* was identified by Gyöngyi Balogh in February 2009 from a selection of images posted on Lost Films. In 2010, the *Deutsche Kinemathek*

donated the fragment to the Hungarian National Film Archive. A video version, produced especially for Lost Films by the Hungarian National Film Archive and the *Deutsche Kinemathek*, is now available on the site for all to see, along with a range of other documents kindly supplied by different European archives. Making these documents available online hopefully not only serves to inform a wider public about this sadly still lost film, but in the process may also improve the chances of the rest of the film turning up one day.

Incredibly, preserving all of this culture is a criminal act in the eyes of the law. Without the consent of the copyright holder, the digitisation and online presentation of a film is an infringement of copyright and a criminal offence.

As the director of administration of the *Kinemathek* at the time the Lost Film initiative started, I found clearing the rights of these materials to be the largest challenge we faced. In cases where the film no longer exists, it was extremely difficult to identify the copyright holders of photos, letters, or other secondary sources. In the end, the only feasible strategy to overcome this problem was one of consistent risk minimisation: The most famous and well-known copyright holders of historic material were contacted and usually agreed to support the project. But were we really contacting the right people? It was frankly hard to tell. And why were we always spending so much more time – and money – seeking the rights holders of film fragments than looking to locate other fragments of that film, or making the films themselves available to a wider public whose vast cultural heritage these works form a part of as well?

‘Every metre of Hungarian film that can be recovered is of great value to the Hungarian National Film Archive, which has the duty to safeguard Hungary’s film heritage for the future.’

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Europe’s restrictive and archaic system for managing intellectual property is the main reason so much of Europe’s rich cultural heritage is gathering dust in the archives, libraries, and museums and cannot be shown online. This is especially true for works of the 20<sup>th</sup> century whose copyright protection periods have not yet expired. For mass digitisation, the evaluation of the copyright status of each and every work is simply not practical. The record of 20<sup>th</sup> century European culture is likely to remain a blank spot on the Internet for decades.

The uncertainties problem is most pressing with respect to so-called orphan works, works still under copyright protection whose rights holders cannot be identified or localised. It is often even unclear whether a work is in fact still protected by copyright or not. Particularly for older works, the copyright protection period might have expired. The protection period relates to the author’s lifetime, with works being copyright protected for 70 years after their author’s death. If the author is unknown, it is likewise uncertain whether those 70 years have passed.

To make things worse, most European countries do not have a clear definition of “diligent search” that specifies how much fruitless research must be done to locate the current rights holders before a work can be considered “orphan.” Yet the search for rights holders can be considered similar to saving a ring from the bottom of the sea – theoretically possible, practically impossible.

Of course, many content owners don’t bother to search for the rights holders, even if it is possible, because they want to avoid spending their resources on a long-shot bet with a highly questionable payoff. Already they are required to put a steadily increasing share of their resources into copyright research, so much so that these expenses are now much higher than the actual licence payments.

Ironically, without museums, archives, and libraries, “orphan” works would not exist. There would be no orphans, only lost works. It is only through publicly funded memory institutions that those cultural works with little or no long-term prospect of lucrative commercial exploitation have survived. The archives and libraries are foster parents of these orphans, not exploiters.

Although the problem of legal uncertainty is particularly acute in the case of orphan works, it highlights a much larger problem in film curation. For the core of the orphan works problem – namely the uncertainty about who holds which particular right – is also very relevant for many better-known works, the history of which is known but where the interpretation of contracts and the scope of rights assignments are uncertain. Again, in everyday life, archives and museums often defer digitisation and online use of cultural heritage in order to avoid legal risks.

What is especially difficult is the clearing of rights for works where several authors are involved, such as films. It is often unclear to what extent creators and authors have actually transferred their copyright during the making of a film. Contracts and production records are often lost. In a silent film from the 1920s, the full transfer of rights can hardly ever be documented for all authors involved – especially regarding the rights for then completely unknown uses, such as digital distribution. If today the rights in such films are often attributed to individual firms, this is usually based on a fiction, mutually accepted by the stakeholders. These fictitious arrangements are increasingly questioned and the involved authors or their descendants later re-assert their rights.

This unclear copyright status of old content creates a paradise for real fraudsters. To make false claims of copyright is becoming a popular business model – and memory institutions are the common victims. Museums



and archives are being blackmailed by firms or individuals to pay “licence fees” to avoid a preliminary injunction or other legal cases about an alleged copyright infringement. Because of the complicated and unclear copyright status of historic content, public institutions sometimes actually pay in response to those false claims. They do not want to run the risk of being accused of copyright infringement, something

they can hardly fight off otherwise because they can never entirely disprove false claims.

The biggest reason for all these rights uncertainties are excessively long copyright protection periods. Only in exceptional cases does the normal revenue-generating cycle of a work exceed five years. And, for the vast majority

## ‘ Copyright reform is essential to preserve our past achievements and encourage other great works.’

of cultural works, long periods of protection actually reduce their value to society by restricting their use. Yet despite the need for public access to the European cultural heritage, there is a tendency among lawmakers these days to extend copyright protection terms. As a recent example, the European Commission, the European Parliament and finally the European Council decided to extend the terms of protection for sound recordings from 50 to 70 years – although many experts have warned against the negative effects of such a move.<sup>1</sup>

Instead, radical reduction of exclusive rights should be the order of the day. A good way to limit the negative effects of exclusive rights while preserving the interests of authors would be to separate exclusive rights and economic participation rights, as recommended in the *Guidelines for a Copyright for the Digital World in the Form of a Control System for Creative Informal Goods* of the Internet and Society Co:llaboratory in Berlin, which my friend and colleague Dr. Till Kreutzer describes in an essay beginning on page 27.<sup>2</sup> Under the model proposed in these guidelines, artists and rights holders would retain the right to economic participation even after the monopoly right to determine the conditions of use ends. This approach would respect the authors’ interests to participate in the economic success of their creations, unlike current law, which makes new and innovative use of intellectual goods by recyclers/users or content brokers very difficult and therefore harms the creators’ economic possibilities.

### Consequences

Today’s legal requirements will have no positive impact on the vast majority of creators but a devastating impact on education and science. Already, these legal conditions are partly responsible for the fact that the use of digital copies in the libraries and research institutions in the US are generally better than in Europe. By staying offline, Europe’s culture risks sliding into oblivion.

This competitive disadvantage isn’t inherently European. It stems entirely from differences in the legal framework. The US didn’t join the Berne Convention until 1989. As copyright protection was previously granted by registering at the US Copyright Office, products of creativity before 1989 are *de facto* protected only upon registration. In case of such registration, the legal situation is obvious and the legal uncertainties that have such a debilitating effect in Europe do not exist. Second, the legal principle of “fair use” serves as

a very flexible framework for the use of copyrighted material by public institutions for purposes of culture, education, and science. And third, digitisation is driven forward in the US on the basis of a widely accepted “opt out” doctrine, meaning the content must be withdrawn only if the copyright owner appears and intervenes. In contrast to this pragmatic approach, copyright discussions in Europe tend to happen at a very theoretical and categorical level. An unlicensed use of copyright protected material is seen as a fundamental attack on the rights of man, not a correctable mistake.

### Take two

What would it take to change this absurd situation in which a law designed to protect and promote culture actually serves to destroy it?

1. A reduction in the general statutory periods of protection for exclusive rights would be required. They should be aligned with the usual economic recovery cycles of about five years.
2. We should let authors and producers retain the right to participate in any revenues even after expiration of their exclusive rights. No reduction of the protection period is needed for rights of economic participation. Rather, these rights of economic participation have to be strengthened and made enforceable. Collecting societies will play a crucial role here.
3. We should protect authors’ “moral rights,” enabling them to intervene against uses that would mutilate their work.
4. We should introduce a general exception to copyright that covers museums, archives, and libraries as well as educational and scientific institutions. Such a general copyright exception would be enough to give these mostly publicly funded institutions the room they need to operate.

Whether these proposals or others are adopted, copyright reform is essential to preserve our past achievements and encourage other great works. Only after the regulatory environment has been changed will the mass digitisation of Europe’s rich cultural and scientific legacy be complete and available to be used to its full potential. And only then will it be able to stand its ground and defend its place in the world. **IP<sub>21</sub>**



# New creative- and content-delivery services

— Nico Perez

Until Johannes Gutenberg invented the movable-type printing press in Mainz, Germany around 1440, the costs involved in producing a book of any length were prohibitive. After the mechanisation of book-making, the price dropped – helping bring about the democratisation of knowledge, mass communication and the start of modern day knowledge-based economies. It also gave rise to the first arguments about intellectual property and copyright.

Nico Perez is co-founder of Mixcloud, an award-winning Internet radio start-up based in London.



Fast-forward more than 500 years, and the Internet has further reduced the cost of information distribution down to nearly zero (mainly thanks to hardware developments obeying Moore's law).<sup>1</sup> And copyright law, based primarily on the Berne Convention of 1886, has come to be fundamentally outdated in the European Union.<sup>2</sup> Given the dramatic advances in technology over the last 125 years, the main question is, how can the EU help copyright law evolve and create a fruitful environment for the emergence of new creative- and content-delivery services?

This essay looks at some of the current hurdles and difficulties faced by small- and medium-sized enterprises, drawing on our experiences at Mixcloud, an Internet radio start-up based in London, which I co-founded in 2008. In addition, I will outline a potential solution to help solve some of the existing problems.

## The Mixcloud story

Mixcloud is a platform for on-demand Internet radio, including both music and talk formats. Our audience is comprised of listeners who select a pre-recorded radio show, disc-jockey mix or podcast that has been uploaded to the platform by a presenter or DJ.

The founders met while DJing and producing shows for Cambridge University student radio. We found that we shared a common frustration: there was no legal way for radio-show hosting services to host a podcast containing copyrighted music, and many DJs had to resort to using generic file-hosting sites like Megaupload, YouSendIt, etc. The result was a relatively few number of sites providing these new, Internet-hosted shows, and an awful user experience for everyone, especially listeners.

To fix this problem, Mixcloud needed to tackle the copyright question head on, and from the beginning we were determined to create a legal alternative to the status quo. In order to do this in the UK, we were forced to hire an expensive lawyer and lobby the collecting societies for nearly a year. This is a challenging hurdle that significantly raises the barrier to entry for any start-up trying to operate in this space. After many months, Mixcloud eventually managed to successfully negotiate first-of-their-kind licences for the service in the UK.

The wider question of other territories is the next hurdle to overcome, and the situation in the EU at the moment with 27 different countries, and even more collecting societies, is daunting for any company – let alone a new start-up. A simple EU-wide licensing framework, which I propose below, would go a long way to help more start-ups that deal with digital rights to flourish.

## Looking for investment

Like a newborn child, the first few months in the life of a company are critically important. Most start-ups fail within their first two years, and one of the many reasons for not surviving is lack of capital. An early stage business does not usually have enough revenue to survive on cash flow alone, and must rely on some form of financing. Bank loans are rare, and most entrepreneurs seek angel or venture capital funding.

Mixcloud pitched to several angel investors early on, and time and time again the investors turned away due to the involvement of licensing and copyright in the services we were providing. A few had direct experience investing in companies like Last.fm where difficulty and delays in music licensing negotiations had left them very reluctant to enter the space again.<sup>3</sup>

Unsurprisingly, this sort of reputation has meant that many investors steer away from innovative services that might involve or rely upon licensing and copyright. This in turn has meant that fewer new services are given a chance to succeed and ultimately the listener or consumer has to make do with the status quo. Mixcloud was forced to persevere without investment and the team worked without salaries for two years before finally reaching sustainable revenue.

## Licensing music

During the late 19<sup>th</sup> and first half of the 20<sup>th</sup> century, when the music industry was first beginning, the major source of income for composers was from selling or licensing sheet music for performances. During the second half of the 20<sup>th</sup> century, as average family incomes grew and better recording technology emerged, the recorded music industry was born and prospered.

Underlying every recorded musical work are three main rights that can be licensed and through which royalties are collected:

- Mechanical royalties are paid to a songwriter, composer or publisher when music is reproduced as a physical product or for broadcast or played online.
- Performance royalties are paid to a songwriter, composer or publisher whenever their music is played or performed.
- Sound recording royalties are paid to the owner of a sound recording (usually a record company) whenever the sound recording is played.

Since it would have been unfeasible for every business or venue to seek licences from individual songwriters, composers and record companies, collecting societies were set up to represent these groups and issue blanket licences.

In the UK today, the mechanical and performance rights are administered by PRS for Music (formerly the Performing Right Society), while the sound recording rights are administered by a collecting agency known as PPL. In our experience at Mixcloud, the former was far more willing and open to granting new licences.

The main problem with PPL was that Mixcloud did not fit into any pre-existing category. There were options for live Internet radio, but not for a hosted podcast-style service. This meant we had to hire another expensive lawyer and spend nearly 12 months pitching and lobbying before we finally managed to secure a licence.

Clearly, technology is moving faster than legislation; this is why any new proposals to solve this problem must include a framework that is flexible and adaptable, or a solution that can be further adapted to fit new challenges and needs that we can hardly imagine today.

## Collecting societies

Collecting societies are a double-edged sword: they allow organisations to obtain blanket licences, but by their very nature they have no competitors and are therefore *de facto* monopolies. This was highlighted in the recent report on *Digital Opportunity*, chaired by Professor Ian Hargreaves and commissioned by UK Prime Minister David Cameron.<sup>4</sup> The result is a classic monopoly situation where rates are set by the collecting societies themselves, or the copyright tribunal, and there are no market forces adjusting the prices.

Thus royalty costs remain high, even though the costs of production and distribution have dropped dramatically. Some collecting societies demand higher rates for mobile, or try to charge based on a percentage of revenue. These are the main reasons why large US Internet radio providers like Pandora have chosen not to operate in Europe.<sup>5</sup> As physical sales of music CDs and records fall, and Internet consumption of music rises, a solution that works with the economics of the Internet is essential. Some form of market for digital royalties could help resolve the long running question of “how much is a song worth?”

## The European question

Until now, music licensing has been administered on a territory-by-territory basis, due to the way collecting societies were initially set up. Just as a pizza vendor sells slices at a premium to a whole pizza, it is in the interest of large rights holders like record companies to slice up the rights into smaller country-sized slices in order to make a premium.

The resulting problem is therefore two-fold:

- There is only one pizza seller in each country, which leads to monopoly prices.
- Ordering pizza from 27 different countries is very difficult, especially for small- and medium-sized enterprises.

In recent years there have been a number of developments in pan-European licensing. On the mechanical and performance side, it is now possible to get a European licence through CELAS (a company set up by PRS for Music, GEMA from Germany and EMI), but there is general confusion in the industry as publishers pull catalogues from certain territories and fragmentation occurs. This makes licensing exceedingly difficult for innovative start-ups like Mixcloud that want to be legal. It also confuses artists and musicians about who they should register with, and ultimately hinders consumers.

On the sound recording side, there are no cross-border agreements. It is worth contrasting this with the US where the price of sound recording royalties are set by Congress and administered by a separate body called SoundExchange. The result is that an organisation in the US needs only one licence to play sound recordings for more than 300 million people.



‘Technology is moving faster than legislation; this is why any new proposals to solve this problem must include a framework that is flexible and adaptable, or a solution that can be further adapted to fit new challenges and needs.’

## Competing with piracy

At Mixcloud, we respect and admire the creative output of artists and musicians, and fully believe that they should be compensated for their works. We are striving to build a compelling legal alternative to the current status quo where even podcasts that contain music are illegal. Despite reduced ownership of the content on Mixcloud (people cannot download radio shows or podcasts on the site due to

licensing restrictions), we feel that by offering a superior user experience to file sharing, people will make a transition from an “ownership” to an “access” model of consuming music and radio. This is evident in younger generations who no longer want to buy and own CDs, but are happy to access music on services like YouTube, Spotify and Mixcloud.

One of the challenges of creating a legal service is that you have to compete with piracy. We believe that the most

‘One of the challenges of creating a legal service is that you have to compete with piracy.’

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effective way to do this is not with the proverbial stick of civil lawsuits against consumers, but with the carrot of a better user experience. The reality of file hosting sites is a very poor user experience, and as entrepreneurs we hope to fix both this problem and the licensing one, but co-operation from rights holders and collecting societies is needed. The alternative is the status quo in which piracy continues and everyone loses.

## A new solution

It has been clear for a few years that a new EU level solution for copyright and licensing is needed. As Viviane Reding, vice-president of the European Commission and former commissioner for information society and media, puts it: “In the EU, consumer rights online should not depend on where a company or website is based. National borders should no longer complicate European consumers’ lives when they go online to buy a book or download a song.”<sup>6</sup>

The question is what does a solution look like? The Hargreaves review in the UK recommended a digital copyright exchange to “facilitate copyright licensing and realise the growth potential of creative industries.”<sup>7</sup> Others have called for a global repertoire database.<sup>8</sup>

Mixcloud is in favour of an open, efficient and effective pan-European digital market where rights can be easily licensed and protected. This could function something like a commodities market, but where rights are sold and licensed with market forces helping determine the value of a copyrighted work.

One potential idea would be to separate the reporting aspects from the collecting ones. A new independent database could be set up to facilitate reporting since Internet services can easily track and record exactly what is consumed. Collecting societies would continue in their role as payment administrators, maintaining their existing relationships with artists while at the same time starting to compete across Europe.

The ownership and administration of such a database or exchange would have to be independent of all stakeholders. It is also essential that it remain flexible and has the ability to create new licensing categories, as new digital services will inevitably evolve.

This is undoubtedly a big task, but as with the EU regulations on roaming tariffs, the long-term benefits to business consumers and final listeners of digital content will be enormous. Compared to the US, the current copyright labyrinth in Europe is a huge barrier to building a successful creative and content delivery service, and discourages people from starting a business in the online media space.

Considering the importance that EU governments are placing on small business growth to support the recovering economy, it is vital that real action is taken on these issues.

In July 2012, the European Commission proposed a new Directive on the collective management of copyright and pan-European licensing for musical works online. The proposal for minimum standards follows a similar one put forward in the UK by the Hargreaves report, and promotes a code of conduct that should help improve the transparency and efficiency of collecting societies. As the digital world – with highly accurate listening data – becomes increasingly relevant, there is no excuse for not providing transparent transaction history, automation, and data on repertoire. It will be interesting to see how competition between collecting societies affects the rates that they charge online services.<sup>9</sup>

More than 500 years ago, Gutenberg innovated on the existing screw presses and helped bring about innumerable benefits to science, society and culture across Europe and the world. The Internet has an even greater potential for humanity. In order to benefit from the valuable creative and artistic works produced in Europe, it is essential to modernise the existing copyright framework to help facilitate innovation. **IP<sub>21</sub>**



# A new model for tomorrow's challenges

— Till Kreutzer

Till Kreutzer is a lawyer and partner at i.e., the Consultant Bureau for Information Law in Hamburg and Berlin. He is also founding member and editor of iRights.info, an online portal, and a member of the German Commission for UNESCO.

-paying for access to and use of creative content these days is more or less a voluntary act. You can get almost any protected work for free on the Internet. With a few mouse clicks you can store it on your computer within minutes. Anytime someone pays for an iTunes download, an Amazon e-book or a Sony movie download, they pay mostly because they are willing to pay.<sup>1</sup> But the world needs an effective and adequate regulatory system covering the creative industries, and the gap between that need and the present law is substantial and increasing. If we fail to take the right steps, the copyright system is in danger of simply collapsing.<sup>2</sup>

It cannot be in anyone's interest – least of all the involved parties – to let this happen. Politically and economically, there is no alternative but to start rethinking copyright law from scratch on the national and international levels. But what is to be done, exactly? If unfettered access doesn't work and stiffer traditional enforcement is politically and technically unfeasible, how can this problem be resolved?

To consider this question, the Internet and Society Co:llaboratory thinktank organised a working group in Germany to draft a study, *Copyright for the Information Society*.<sup>3</sup> Among the participants were artists, authors, journalists, composers, scholars, producers, lawyers, label managers, economists, librarians and archivists – more than 40 experts from different professions, including from the entertainment and information industry.<sup>4</sup> I had the honour of serving as chairman. The objective was to develop scenarios of how the world would look in 2035 with respect to the creation, production, and reception of creative works and, on the basis of these models, to propose a regulatory approach that would encourage positive scenarios while discouraging the negative.

To the extent possible, we developed our ideas on “blank paper,” as it were, trying to imagine solutions that were as appropriate as possible. We deliberately chose not to think about compliance issues (e.g. the compatibility of our ideas with supra-national copyright treaties like the Berne Convention or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)). We hoped this would enable the group to think out of the box and prevent existing conventions, traditions and terms from imposing a solution.<sup>5</sup>

We set out to draft guidelines for a 21<sup>st</sup> century regulatory system for creative informational goods. Because of the limited time and resources of the project, we focused on four essential aspects: the objectives and functions of such a

regulatory system; the relationship between exclusivity and limitations; moral rights; and terms of protection.

## Regulation: do we need to protect creative goods and if so, why?

The conclusions were fascinating. For starters, we agreed that a regulatory system for creative informational goods is not only required, it is essential. Its importance cannot be overestimated because it regulates the creation, production, access, and use of cultural and informational goods. However, we felt too that protection of authors' and publishers' rights is not an end in itself, but a means to reach a larger social objective: to encourage creative achievements and advance cultural, scientific and technological progress.

The drafting group also agreed that such protection should – to a certain extent – be based on “exclusive rights,” as it were, which grant the rights holder a monopoly to permit – or deny – use of the material he or she has created or for which he or she holds the rights. We saw this temporary monopoly as necessary to protect some of the interests essential for the promotion of cultural progress. However, the group also agreed that there should be no “natural rights” basis in granting exclusive rights, as the continental European authors' right approach seems to claim. We agreed that granting monopolies for creative goods requires a justification, which must be in line with the overall goal of promoting cultural progress. We agreed that this objective requires and indeed justifies certain restrictions of the free market (i.e. by granting exclusive rights) and freedom of contract (i.e. by protecting authors from unfair contracts). However, the justification for such measures lasts only as far as they are necessary to encourage creativity or investment in creative products. When the drawbacks of exclusivity outweigh their advantages, the monopoly should cease. And it is that balance that we set out to define. In a nutshell, we agreed that the interests of copyright holders should not be superior to the interests of the public – or vice versa.

## Rights and limitations: chicken or egg?

Renouncing an approach based on protection of individual rights in favour of a more neutral approach which seeks to empower the rights of society to use, view, and consume cultural goods requires abandoning the historically hierarchical relationship between rights and freedoms. The idea that a right is the rule and freedom is the exception

‘In a nutshell, we agreed that the interests of copyright holders should not be superior to the interests of the public – or vice versa.’

is based very much on traditional theories of intellectual property. As a matter of fact, such an orientation leads to a systematic imbalance between the interests of the rights holders and the general public. Under such principles, the overall objective we set out to protect – to promote creativity as effectively as possible – cannot be achieved.

We also agreed that strong regulatory techniques and methods are crucial for the effectiveness of regulatory systems. This is particularly true for the concept of exceptions and limitations in copyright law. In this sector, two very different approaches compete internationally: open norms (such as the US fair use doctrine) and circumscribed limitations and exceptions (such as the limitation approach chosen by the EU, which seeks to strictly define the areas where uses are legitimate without the consent of the rights holder).<sup>6</sup>

We compared the pros and cons of both concepts, and came to the conclusion that open norms (such as fair use) are superior to circumscribed limitations and exceptions from a methodological view.<sup>7</sup> This does not mean we concluded that open norms are a perfect regulatory method. They have their drawbacks as well, especially regarding legal transparency and predictability. Therefore we propose combining the concepts of open norms and circumscribed limitations. Such a combined approach should avoid the implicit methodological deficits of each concept. The proposal is to introduce an open norm, which is substantiated by a list or catalogue of concrete examples for particular types of content or material. Such a hybrid approach could read like this: “Any fair use of protected works is not subject to copyright. Fair uses are *inter alia*: Quotations, private copying ...”

## Special role of moral rights

We concluded that moral rights are of increasing value for creators in the digital age. Today, many creators do not earn their money by selling or licensing their works. The motive for the modern “prosumer” is driven more by the natural

human urge to create than the search for profit.<sup>8</sup> Extrinsic motives such as generating direct financial benefits from the exploitation of their work are often of lesser or no importance to this new generation of digital natives. The same is also true for some groups of professional creators, e.g. academics. If economic motives are more and more subordinate (at least for some groups of creators), ideational motivations come to the fore, including the widespread and understandable wish of the creators to get credit and appreciation for their work.

In many cases, credit is an even more important part of the economical interests of the creators than direct payment. For many creators, income now depends less on direct earnings made by selling or licensing the work itself (for some professions this was never true, again e.g. academic authors). For creators who work in an attention economy, publicity and reputation are essential. Moral rights support and protect these aspects, especially the right to name the author. Even for authors who make their works available for free, crediting can become an essential economic factor. No matter if it is a software developer who contributes to an open source project, a video remix artist who “mashes” iconic cinema scenes or simply teenagers who make funny videos to post on YouTube. Attention and publicity can lead to engagements, better jobs, lecture invitations, higher entrance fees for concerts and other reputation-based sources of income. However, the creators can gain these benefits only if crediting is ensured.

But it is important to distinguish between the moral rights (e.g. to credit) and the economical side of copyright ownership. Moral rights and exploitation rights serve different interests and they have a varying impact on the conflicts of interest that copyright deals with. As a matter of fact, monopolies (such as exclusive copyrights) lead to higher prices because they neutralise competition. And extensive exclusive exploitation rights often result in underuse or non-use of the work due to the artificially high transaction costs (e.g. licensing costs and labour). Moral rights do not have this impeding effect. The obligation to name an author will neither prevent a museum





from exhibiting their work nor a publisher from releasing their novel. The task of an archive to publish a collection of 100,000 in-copyright manuscripts is not as challenging as it is because of the right to name the author but because of the implied labour and costs for licensing them.<sup>9</sup>

Because of the potential to impede creativity and use, it appears necessary to consider and differentiate between moral rights and exploitation rights in all basic regulative aspects: their allocation, assignment, duration and restrictions.

### New times, new terms

The group suggested that the idea of using the same terms of protection to cover all kinds of works and all aspects of protection should be given up.<sup>10</sup>

Hence we recommended a differentiation between different terms relating to:

- exploitation and moral rights;
- exclusive rights and rights to economic participation; and
- different types of creative goods (considering the varying economical contexts in which creative goods are produced, exploited and investments are amortised).

On this last point, we reasoned that different goods have different exploitation cycles and exploitation claims and this has to be factored in the definition of an “appropriate term.” The protection period should not be tailored towards the out-of-the-ordinary possibility of a late return of investment or profit, which occurs only in some special cases. Instead, exclusive rights should only be granted until the costs usually incurred for the production of the informational good are amortised. Subsequently, the legal monopoly no longer applies and the initial rights owner enters into free competition with potential competitors. Producers and competitors enter into competition under the same conditions because the investments of the initial investor are already redeemed.

In our model, rights to economical participation complement limited exploitation rights after their termination.<sup>11</sup> Creators and producers would be entitled for a certain period of time to a fair share of the income that third parties derive from using their works. These rights compensate for the shortened duration of the

‘The motive for the modern “prosumer” is driven more by the natural human urge to create than the search for profit.’

exclusive rights. They should arise when the justification for the monopoly ceases. Claims for participation must be appropriate, i.e. not excessively high and not prohibitive in effect.

On the one hand, such claims seem necessary because they are needed to provide the needed economic “reward” for the producer/initial investor and the creator. On the other hand, a longer term for such participation claims seems adequate. The concerns against an excessively long monopolisation through exclusive rights – such as the protection of a computer programme for 70 years after the death of its developer – are simply less valid for claims regarding monetary participation.

## The reform imperative

We believe that reforming the terms surrounding copyright in the way described would be beneficial for all parties involved. The concept guarantees exclusivity for the period of time needed to amortise the investments, assuring adequate incentives for investments and innovation. Additionally, this right of exclusivity would secure a first-mover-advantage for the initial investor. Moreover, creators can rely on their exclusive rights during the most crucial period, which for many professional creators is the time before they assign or exclusively license their rights to a third party.

The exclusivity ends when its negative effects start to outweigh the benefits, in other words, when it begins to hamper creativity, competition, investments and innovation. Hereafter, free competition is ensured. Yet the subsequent right to a fair share of third-party use rewards the initial effort of producers and creators and secures their interests through adequate compensation.

All these benefits could be available without inadequate interventions in fundamental freedoms, the free market, or other public interests.

## Prospects

The initiative was an experiment that turned out quite successfully. We managed to discuss copyright law in a result-orientated and fruitful atmosphere. We came up with

a widely agreed outline of the most crucial steps for future copyright regulation despite a very limited time schedule.

The fact that we were able to finish the project successfully has many reasons, many of which are hard to pinpoint. Essential – in my opinion – was that we decided deliberately not to invite the “usual suspects,” i.e. lobbyists and stakeholders on both sides of the IP debate, but focused instead on recruiting people who have knowledge and experience of copyright and copyright law in their everyday life and job. That does not mean that we selected the participants randomly. On the contrary, they were invited on application and/or direct request. But all the invited participants had reflected on the matter for quite some time in publications, or expressed interesting ideas in their application and/or worked in interesting positions, institutions or companies.

This “multi-stakeholder” approach had its drawbacks too and it has to be further examined and optimised, especially when it shall be applied on projects about highly controversial questions. However, it seems that the traditional policy discourse on IP is stuck in the debate between the “pirates” and the “content-mafia.” Leading the debate away from emotions and back to rationality is an important goal that can be reached by changing the setting. In the meantime, the work on the guidelines will continue and, in the spirit of the age of the Internet, they will be constantly refined and hopefully improved. Policymakers in Germany and abroad are invited to take them as a basis for discussion, critique or even – as far as they can serve this purpose – as a basis for concrete approaches for upcoming copyright reforms.

What copyright could – or should – be like in 25 years is hard to tell. It is difficult to predict how society, technology, and the markets will evolve. The members of the drafting group knew our findings would raise more questions than answers, but we felt it was unavoidable. With an issue as complex as the future of copyright, simply defining the right questions is an essential first step. **IP<sub>21</sub>**

# The French exception

— Cédric Manara

Cédric Manara is associate professor of law, specialised in legal issues related to the Internet, intellectual property and marketing at EDHEC Business School in France.

“The VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone,” declared Jack Valenti to the US Congress in 1982, as he lobbied for a ban on new home devices for recording television programmes, claiming they would completely destroy the film industry. Years later, this representative of the Motion Picture Association of America has been proved wrong. Video recorders did not kill off the film industry – in fact they have had just the opposite effect.



Did Mr. Valenti's plea echo around the Paris Court of Appeal on 14 December 2011? That day, the French court upheld a ruling against Wizzgo, a company that supplies systems for consumers to record films on remote servers as opposed to on home devices. Their reasoning: "the copies made were not destined for the user's personal benefit but for that of the end user." Wizzgo was found guilty of copyright infringement and ordered to pay compensation totalling €2,043,952 to two television groups.

Now journalists and professors will have the difficult task of explaining to their incredulous readers or students that what has been legal for more than 30 years is now illegal. It is possible to record a television programme at home on your old video recorder or hard drive, but not on the servers rented to Wizzgo because, technically, it is Wizzgo that is making the copy, and this copy is not covered by the limited exceptions foreseen by French copyright law.

For copyright experts, this legal peculiarity explains how a home video recorder and a remote digital recorder can be treated differently. But how do you explain to the French people that clicking on a Wizzgo button is not the same as pressing the "record" button on their home device? And, if they want to keep a copy of a film, they must record it themselves at home and not remotely using new technology? Unfortunately, this is only one of many cases that show how technical and complex intellectual copyright laws can inhibit the development of innovative solutions for products or services.

Innovation brings new products and services to the market – first through discovery, followed by the development and marketing of a new product or service, or the launch of an improved version of an existing product or service. Innovations or discoveries are made by following through an idea with the help of a prototype or model. Development covers all the activities associated with modifying and perfecting the concept until it can be marketed. At this point, the innovator, who is now in a position to market the invention, may choose to set up a company (generally with financial backing or using his own money). Efforts will also be made to "educate the market" to create demand, if interest in the new product or service is latent. An innovator may also choose third parties to market the invention, distributing it through exclusive or multiple licences, or other agreements. Intellectual property rights are there at every step of the way to protect the innovator's creations or inventions. However, these same laws can also hinder the innovation process and be a source of uncertainty that is ultimately

detrimental to economic development. This is the conflict that will be considered briefly in this essay, using copyright as the example (which we see applied to all sorts of business contracts and at every stage in a company's lifecycle).

## Doubts over the scope of protection

A bolt. A salad basket. People often smile at these examples of things that can be protected under French copyright laws, but it's actually very depressing when you think about the practical consequences of the generous way judges give copyright protection to the strangest assortment of objects. This major increase in "creative works," as the term is now applied to works other than literary or artistic creations, enables companies to establish total monopolies for works unrelated to those the original law was designed to protect.

'A possibly better system might be to remove the legal barriers until the service proves its economic viability, reducing the chilling effect of copyright on innovation.'

At the same time, given the number of judicial cases – for example, over the terms and conditions associated with websites, technical notices, timetables or other seemingly ordinary things – one wonders whether so many things with purely commercial value should really be classified as "creative works." Originality is the key to protection and the granting of rights. Introducing tighter criteria and restricting protection to literary and artistic creations could help relieve the uncertainty over the legal status of creative works in France, for which at the moment only a judge can rule whether or not they are protected by copyright laws. From this point of view, it would be more logical and appropriate for companies to use unfair competition or anti-parasitism legislation to defend themselves against the unfair use of their creations.

‘Innovations or discoveries are made by following through an idea with the help of a prototype or model.’

### Problems accessing information about protected works

Uncertainty about how objects are qualified is also coupled with another problem – foreseeability. Unlike patents or trademarks, where registration leads to publication in a freely accessible database, it is impossible for an entrepreneur to know what works are protected by copyright law. Creating a database for these kinds of work would not only be delicate in terms of qualification, which would have to be precise, but could also be illegal if provided by a private enterprise, even though there is a clear need for one!

### An excessive copyright period

The duration of copyright and performing rights has been significantly extended over a number of decades. The former are protected in France for a period of at least 70 years following the death of the author. The latter will soon be protected for a period of 50 to 70 years. The justification? The increased life expectancy of the heirs. By choosing to protect possible sources of revenue for the second generation (and it often turns out that the heirs see only a small percentage of this revenue as the lion’s share goes to the production houses), we have totally lost touch with common sense, and lost sight of the founding principles of intellectual property rights: for the creators to enjoy a monopoly on their creative works for a temporary period before, ultimately, those works fall into the public domain. It is also out of touch with studies that show that, for the majority of these works, the economic lifecycle is never more than a few years, which in itself undermines the justification for extending the duration of the rights period.

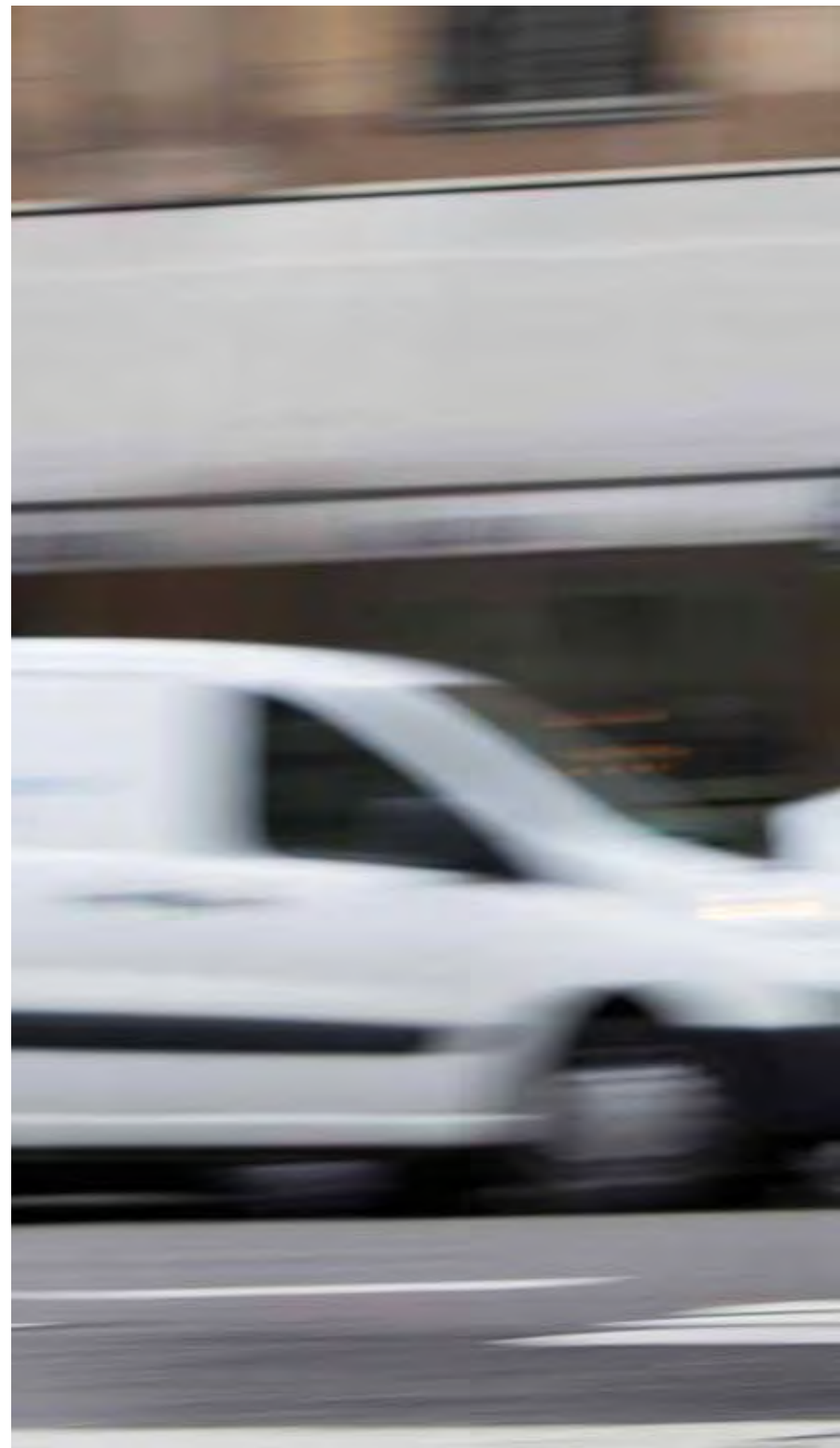
### Copyright coverage uncertainties

A variety of economic activities, including those of several information society intermediaries, are being developed that take advantage of loopholes in intellectual copyright laws. These businesses often juggle with extremely fine interpretations of exceptions. For example, it’s been calculated that there are at least 10,460,353,203 different ways of transposing the copyright directive into the information society (which contains 21 optional exceptions on the rights of reproduction, i.e.  $2^{21}$  possibilities, which when combined with the exceptions foreseen for distribution, total 10,460,353,203).

### A competitive disadvantage for French creators

When French creations are commercialised abroad, the purchasers are familiar with Anglo-American copyright laws, raising two export problems for French companies.

The first relates to the ownership of rights. Under the American system – which is the one used by most major film and music production companies – it is clear that the entertainment company holds the copyright. The



creative product is a “work made for hire” whereby the person paid to carry out the work automatically cedes his rights to the person paying them. In France, on the other hand, provision must be made to transfer rights from the employee to the employer, and/or from a supplier to the commissioning party. Foreign buyers are wary of systems that involve multiple players, as well as contract negotiations and transaction costs. They view this as a risk and so compare French creations to creations from other countries. “French” copyright laws can therefore sometimes be a competitive disadvantage for local firms.

The second issue is the existence of moral rights. In France, these rights, which give the author absolute control over his creation, can be modified, but never totally abandoned. Here again, it is often difficult to avoid dealing with American parties when it comes to selling creative works on international markets, and the perception of moral rights as a legal risk is definitely a disadvantage for French firms. Creators can be burdened by the image of French copyright and the inability to “elect a country of domicile” (in video game circles, for example, some studios order games but demand that Anglo-American copyright laws apply – thereby ruling out any work from French firms).



‘The process by which an idea becomes marketable is *per se* the fulfilment of what copyright was created for.’

### The need to renegotiate with every technological leap

If a copyright contract fails to mention a channel through which the creation may be commercialised or distributed, simply because it doesn't exist at the time the contract is established, then the contract must be renegotiated. And there is no obligation on the author or his heirs to accept an extension of the rights to cover this new form of exploitation. Because of technological developments, formats for commercialisation and distribution methods are likely to multiply, making this another source of legal insecurity. It would be more logical to apply the general economic terms and original intentions of the parties.

### An interventionist pricing formula

When it comes to using creative works, it is impossible to avoid royalty collection agencies. Their pricing systems are sometimes completely out of touch with market realities and likely to create barriers from the very start. This could be seen, for example, with the first pre-broadband websites, when the charges for music distribution were so high that producers preferred to use artists who had not yet signed with record labels. Faced with the same problems today, video game publishers prefer to sign foreign creators. The right to free competition does not quite play its intended role as companies need immediate operational solutions and cannot afford to await the outcome of litigation.

### Payment for private copies

Royalties levied on blank recording materials are much higher in France than in the rest of the European Union (for example the French pay 12 times more for a blank CD than the Germans and 15 times more for an audio player than the Belgians). This distorts competition, putting French operators at a disadvantage to the benefit of foreign online retailers – who avoid French taxes.

Many of these observations are not new. Others could have been added, have already been said elsewhere, and may not apply to France alone. For example, the issue of splitting up directories managed by copyright societies is a problem, as is the inconvenience caused by the lack of a single EU licence, which means creators and companies must get a whole string of licences for individual countries. The subtleties of copyright, its complexity for entrepreneurs, and the

existence of certain levies due to royalty collection agencies all constitute sources of uncertainty. The combination of all these legal costs can be quite high and tends to hinder innovation. And they most certainly stunt economic growth in France.

By looking at copyright in terms of innovation, it is possible to move away from thinking primarily about the traditional characteristics of copyright (creative works / rightful owner / public), and move towards a model that facilitates and encourages innovation. This could be done in numerous ways, such as by allowing companies to carry out the development phase on a product or service, based on rights held by a third party, without the need to obtain authorisation or pay royalties. Only if the developed product or service then became profitable at a later stage would the company have to pay the copyright holder retrospective royalties or compensation.

This brings to mind the case of Deezer, a French company offering an on-demand music service. The successful music service originally launched in France without an agreement with SACEM (the French music rights management and collection agency), and had to be shut down while rights were negotiated with SACEM. It later relaunched when an agreement was reached, and is now available all over the world. If it had been killed by copyright law at birth, all this value would not have developed. A possibly better system might be to remove the legal barriers until the service proves its economic viability, reducing the chilling effect of copyright on innovation. After all, retrospective royalties would yield more value to rights holders, entertainment producers, and consumers than protracted litigation.

If value is created, it's because consumers have found that a new product or service satisfies a demand. But it is also because copyright laws have achieved their objective, which is to assign rights to a creative work to a limited number of people so that, at the end of the day, it can benefit as many people as possible. The process by which an idea becomes marketable is *per se* the fulfilment of what copyright was created for, and it should be reassessed from this point of view – to see whether it really favours the emergence of new economic models that benefit the public. **IP**<sub>21</sub>



# Next steps in the UK

— Lilian Edwards

Lilian Edwards is professor of Internet law at Strathclyde University in Glasgow.

Copyright was invented simultaneously to provide a revenue stream for creators and to provide an incentive for the production of works useful to the public. As the Statute of Anne preface put it in 1710: “Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, 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: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books.”



The further development of copyright over the decades has identified a contract of a kind between creators and the public interest as equally important to the concept, such that the award of a limited monopoly to creators, in respect of their works, is balanced by limitations as to term and scope and exceptions for public benefit, such as the “fair use” or “fair dealing” exceptions variously found in different legal systems. In recent years, awareness has grown of the value both to users and to economic growth of a public domain created by such limitations and exceptions, complementing a productive copyright-protected zone.

The careful balances evolved over centuries, however, have been dangerously unbalanced by the arrival of the digital world. Over the last decade, the creative industries have been undeniably and beneficially revolutionised by information and communications technologies (ICT) and the digital economy. This has resulted in the emergence of new types of creators; cultural products and processes; new platforms, physical and virtual, for production and distribution; new intermediaries, finance sources and distributors (as well as disintermediation); and new engagements with consumers (notably, in the interactive user-generated content or “Web 2.0” world). In Europe, which historically has lagged behind the United States in reaping the benefits of the digital renaissance, we are arguably at a pivotal moment when we have the opportunity to build a cultural and regulatory infrastructure in which a next generation of first movers as successful as Google, Facebook or iTunes can flourish.

But the transition from analogue to digital for established creators and rights holders has sometimes been as problematic as it has been promising. The United Kingdom’s Hargreaves review has taken a lead on reshaping copyright as “fit for purpose” in the digital era and provides support for the optimistically non-Luddite notion that if technology has threatened the creative industries, it can also save them.<sup>1</sup> However, reform will fail if consensus and compromise on encouraging innovation cannot be found while supporting established industries during this digital transition. Policymaking in the digital intellectual property and creative industries arena is known to be a controversial matter, bedevilled by a well-funded lobbying community and a lack of technological expertise among legislators, as well as by the absence of a robust evidence base assembled via open and transparent methodologies to back policy proposals. The recent Stop Online Piracy Act debate in the US, prompting a personal intervention by President Obama, shows that copyright policy based on rhetoric, not research





– however well meaning – has the power to undermine the essential working of the Internet.

The author is part of a consortium of seven universities and around 80 non-research partners, including 45 small- and medium-sized enterprises (SMEs) or micro-creators, who, inspired by the Hargreaves report, are seeking to build a roadmap through the digital forests (or swamps) for the creative industries in the UK, the EU, and globally. Our participants are drawn from academic departments of law, business, economics, psychology, cultural studies and technology, and from every one of the creative sectors. Our preliminary work has identified what we see as a number of axiomatic starting points:

1. IP policy needs to be focused around the needs of SMEs and individual creators as the incubators of innovation, especially in the digital start-up era. In the past, IP policy, especially at the international treaty level, has been dominated by the needs of major rights holders, often themselves intermediaries or distributors, not original creative forces. Such an approach, while important to sustaining existing revenues, may fail to incentivise and sustain new growth and new types of innovation from the grass roots origins of creative revenues, namely, creators, and from the users who consume and build upon their products.
2. Work is needed to identify which business models can survive in the digital world and which cannot, and which new ones can succeed and scale to create growth and jobs in the cultural sectors, as well as support the public sector in times of recession (“good, bad, and emergent models”). Conditions in one creative sector are obviously not the same as in another, yet learning and experience may still be transferable. For example, the copyright infringement (“piracy”) problems of the music industry are well known, yet such infringement has been generally associated with a young adult demographic, and an anti-establishment, non-compliance tendency among youth. This has arguably driven some of the more punitive public enforcement measures, such as disconnection on allegation of file-sharing (“three strikes and you’re out”), which in its guise as “graduated response” has also been promoted on its “educational” qualities.<sup>2</sup>

Yet recent studies on the experience of infringement in the e-book industry show a very different pattern.<sup>3</sup> In a 2011 study, almost 30% of owners of e-book readers admitted

to downloading an unlicensed book; yet the predominant demographic involved was older women, with one in eight women over 35 admitting to having downloaded e-books without permission, compared to only one in 20 women of that age who had downloaded music in breach of copyright. Such evidence perhaps points to patterns of infringing consumption being driven more by the lack of legal alternative sources and the current system of “windowing” releases (e.g. a US-authored bestseller being available in paperback later in the EU than in the US) allied to confusion as to when a free copy is indeed legal (e.g. term-expired, as with many literary classics) than by sheer disdain for the law. This points to different solutions than punitive sanctions, such as enhancing the availability of legal online content in all markets, or the clearer marking of legal content.

Examinations of the computer game market – now producing more revenue than films, TV or music in most jurisdictions – also valuably illustrate how diverse business models can discourage or circumvent piracy. Online multi-player games, such as World of Warcraft, rely on the social element of gaming, which cannot be pirated; a fake download source would not connect to the WoW server, would not have your friends on it and would thus be of no attraction. At the other end of the scale, free games on mobile smartphones are big business, with Zynga, tied to Facebook and the maker of games like Farmville, making a profit of \$630 million [€471 million] in 2011.<sup>4</sup> Such profits come not from users paying for copies but from a variety of revenue streams, such as the sharing of profits derived from advertising revenue on Facebook, and the sale of in-game assets or levels. Other smaller game manufacturers make money by creating free “viral” games on commission for TV programmes or other marketing campaigns, distributed by the Web or by apps. One such company, Mudlark, has produced a game based on “checking in” to Transport for London tube and other transport stations, and hopes to use the platform created to sell

‘ Copyright policy based on rhetoric, not research – however well meaning – has the power to undermine the essential working of the Internet.’

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as a product in itself. Back in the e-book and publishing industry, a growing new development is the use of crowdsourcing to secure the publication of books that might not otherwise find commercial backing.<sup>5</sup> Such diversity and imagination are typically emerging from the SME innovation base of the digital entertainment industries. One project of the consortium will be to map such alternative business models and see if they can indeed be scaled, or transferred to other industries where “pay per copy” as the sole or main revenue model is faltering.

3. While copyright was established to incentivise creation, it is by no means empirically clear that copyright in its current form really does reward creators and creative work, rather than intermediaries such as publishers and distributors, who in many industries typically take control of copyrights by assignment from creators. Our work will thus include empirical studies on how far copyright really is uppermost in creatives’ minds and how far it focuses their working and business practices; on how far innovation may come from “open” business models, such as open film, open data and open publishing; and in particular on models where revenues go straight to creators via disintermediation, as has already been pioneered in the music market using sites like Myspace and individual artists’ websites.
4. Technology has, understandably, been seen by many of the copyright-founded industries as a disruptive threat. For real recovery and growth in these sectors, though, technology must now be embraced as a friend. One solution embraced by Prof. Hargreaves is the creation of easy, cheap, and fast automated licensing via a digital exchange.<sup>6</sup> Such systems will, it is hoped, ease the purchase of bundles of rights for specific business models, and help break down industry restrictive practices that have, among other things, caused the successful European online music service, Spotify, such trouble in breaking into the US market. Automated licensing may also have unforeseen positive spin offs; for instance, Lawrence Kaye, a well known London ICT lawyer, suggests that such licensing

‘Over the last decade, the creative industries have been undeniably and beneficially revolutionised by information and communications technologies (ICT) and the digital economy.’

might ease the copyright problems around data mining, i.e. deriving new data or products of worth from existing texts or data via analytics and pattern-spotting algorithms.<sup>7</sup> Prof. Hargreaves proposes a new data mining exception to clear the field for non-commercial researchers; such an approach is positive, but easier automated licensing permitting data mining could also instigate a productive market in commercial data mining. Another area where technology may aid is in creating new platforms for the group, crowdsourced, “open” or common-or-garden sale or exchange of creative and digitised works. One striking example of the usefulness of digital platforms can be seen in the US superhero comics market (Superman, Spiderman, et al.), which has for years been moribund and maintained primarily for film rights, as the avenues for distribution of hard-copy comics have narrowed to a small number of specialist shops aimed at a dwindling adult market. A new one-stop platform for the download of comics from all companies called Comixology (<http://www.comixology.com>) – an iTunes for comics, effectively – promises a potential explosion in the market as users young and old rediscover full-colour comics as a product perfect for the tablet and iPad age.

5. We see the role of online intermediaries, such as Internet service providers (ISPs), social networks, and mobile operators, as crucial in the production and distribution of cultural goods, as well as, more controversially, in the enforcement of copyright. Little work has taken into full account the role of these new digital intermediaries in the creative industry space (compared to traditional intermediaries such as booksellers, collecting societies, and record labels). This needs urgent attention given the important governing role of these bodies. Should they be subject to regulation like public bodies and, if so, how? How should competition law be applied to large multi-operation and multi-jurisdiction players like Google and Facebook? How, if at all, should creative revenues accrue to these new intermediaries, and in what proportion compared to the “offline” world?

6. Finally, we consider it vital to always keep in mind how the public interest and human rights, such as freedom of expression, privacy, and access to knowledge for the socially or physically excluded, may be affected either positively or negatively by new business models and new ways to enforce copyright. The future of the creative industries will always depend on the participation of the user community and if user rights are not considered, the “social contract” of copyright noted above will wear away.

The Hargreaves report is an invigorating, comprehensive and promising start to the process of reshaping copyright and business models for a vibrant and growing creative sector in the UK. It may yet come to be seen as a model for Europe as a whole, but only if the above points are also taken seriously as a starting place for academics, policymakers, and commercial enterprises working in this domain. **IP<sub>21</sub>**



# The way forward for France and the world

— Michel Vivant

Michel Vivant is full professor and academic director of the intellectual property programme of the master's in Droit économique at Sciences Po in Paris.

**B**ut if we examine this question more scientifically, we must better distinguish the nature and origins of the problems encountered. Modern French law is largely dependent on European law (or, to be more exact, European law *is* French law). While some problems are primarily French, others doubtless come up in France but are not specifically French in nature.

In patents, not many difficulties are specifically French. The French patent office functions well and the patent system works. The only way for France to have “better” patents would be to improve the patenting procedure to give more power to the office to control non-obvious requirements, which is not the standard procedure today. With trademarks, too, the problems that exist in the world are general and not unique to France.

In France, as in many countries, the question of whether intellectual property stimulates the economy or slows innovation down comes up often. Most likely it is linked to the incredible growth of IP, as today anything under the sun that is made by man is probably not only patentable but also likely protectable (“tolls” are everywhere). The problems stemming from IP could be linked to the lack of flexibility in legal rules regulating it; for instance, products as different as a new molecule or a software programme are potentially patentable under the same law, although the challenges involved in producing, creating, and developing goods like these are not at all the same.

By contrast, some of the biggest problems regarding copyright or “authors’ rights” (I will use this terminology to avoid the word “copyright” in this essay, although they are not the same thing) are uniquely French. Concerning authors’ rights, the most visible stumbling block is of course the French concept of “*droit moral*” or “moral rights.” There is a high degree of misunderstanding surrounding the French use of this concept in other countries (maybe owing to its bad representation by some dogmatic French authors). However, this is not the only potential stumbling block. Some real problems common to the French system of authors’ rights and copyright systems must also be examined.

‘If IP rights must be thought of as original tools of control (“fencing off”) of a potential market, then we have clearly failed to apprehend the dematerialised and globalised market that the Internet represents.’

## Old views, new views

The basic problem of French authors' rights is that they were conceived by academics and practitioners picturing the *Beaux Arts* and Modigliani on the *butte Montmartre* when today they apply to items as diverse as a basket salad, a depressing TV game show or a software programme. A deep gulf exists between the philosophy behind this right and its concrete application.

The original philosophy (conceived well before Modigliani) is not the version we usually encounter. At the time of the French Revolution (when French authors' rights were born), the idea was still not fully formed. Some contemporaneous authors noted that the difference between the copyright system and the authors' rights system was not always obvious in spite of the prevailing naturalist discourse of the time. But things changed during the 19<sup>th</sup> century. Under the influence of a new mode of analysis combining law and philosophy and with a particular reference to Immanuel Kant, the Prussian philosopher who argued that a book and its author were at a fundamental level the same, the author became the hero of the play. Afterwards, a certain academic dogmatism, which is still not completely dead, can perhaps explain the hardening of those views. So the dogmatic French authors' rights can be understood as "the author's coronation," performed, strangely enough, without (real) consideration of the public.

Considered in this light, it is easy to understand why the French system is rigid and why it is always unmanageable when strictly applied. It also explains why, in practice, lawyers so often take liberties with formal rules.

The most important issues in French copyright revolve around three main questions: ownership, contracts, and moral rights.

— Regarding ownership, in a not negligible number of disputes (which shows perhaps that the rules are not broadly and universally accepted), the Court de cassation has held that the existence of an employment contract is without consequence; even in a case where the author is an employee, the rights belong to him and not to the employer. It's a hotly debated issue and the High Council of "Artistic and Literary Property" has been incapable

'The most serious IP problems today are not primarily national in origin, but global.'

of finding a consensual solution adapted to the present. But, taking an unprejudiced view, this could be solved without great difficulty by adopting the more reasonable approach currently found in other countries that have "authors' rights," such as Belgium or Germany.

— More widely, while the legal text on authors' rights takes a synthesising approach in defining those rights, it is necessary to be very analytic in the

contracts and to aim precisely to express all the rights which must be assigned, as well as to specify the exploitation modes authorised. The principle is that everything not precisely allowed is prohibited. Once again, it would be good to favour a more practical and reasonable approach instead. However, it must be observed that different legal cases chose this kind of approach and ruled, for example, that it was not necessary to specify in the contract all the possible consequences pertaining to equity or usage (according to the general principles of the Civil Code), but not without some strong criticism.

— Finally, the question of the moral rights themselves must be put on the table. The right of attribution (to name the author) is in my view perfectly legitimate, and in practice does not create any problem. Integrity, however, is another matter. It's totally absurd to imagine that a basket salad cannot be changed because it's a protected work in the same way that a novel by Albert Camus or a play by Tennessee Williams is! I believe that we must adapt the answer to the specific subject matter. In other words, we must shun dogmatism and choose "fine tuning." But I am being a bit unrealistic. In the present French context, such an idea could easily trigger a strong ideological reaction. And admittedly it would not be very easy to implement. Is one ready to give specific power to a judge to decide whether the claim to integrity on one work merits respect while on another it does not? And yet the question is important when the same item is protected through authors' rights and design. Is it reasonable to treat in the same way a novel and a perfume bottle (which is eligible for protection by design and copyrightable at the same time)?

‘It’s totally absurd to imagine that a basket salad cannot be changed because it’s a protected work in the same way that a novel by Albert Camus or a play by Tennessee Williams is!’

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The question of exceptions is also very important although it is not specific to the French system.

From a French perspective, it would be important to accept the idea of balance of interest and to understand the exceptions in a dynamic way, taking into account different interests – an approach that is not in the French tradition. In many cases, it would not be necessary to create new exceptions but to understand them differently. To give a concrete example, in France the exception of “private copy” is understood as limited to writings, although it’s perfectly possible to apply it, for instance, in the case of a copy of a picture (which is more congruent with the idea of an information society as far as information is not limited to writings). It could also be necessary to rewrite the legal text, such as, for example, the text on the educational exception, which currently is a huge labyrinthine system. It’s not difficult if the will to do it exists. That being said, it could be opportune to create a new exception to solve a specific problem quickly, such as the “data mining exception” advocated in the UK report by Professor Hargreaves.<sup>1</sup> But a real problem lies in the fact that the European Union system is a closed list of exceptions. That’s why I believe mapping the “borders” of copyright or authors’ rights (which is something different) is very important, in order to keep outside the field of those rights what is not legitimately covered by them. For instance, it is not obvious that putting a work at disposal – that is, making it publically available, through printing, broadcasting or posting online – is always a communication in the legal sense (see my article “Droit d’auteur et théorie de l’accessoire” for more on this issue).<sup>2</sup>

If we try to identify which reforms can realistically be expected right away and which are desirable in terms of evolution, the main lines are drawn in the previous paragraphs. If it were possible to change things immediately, it might be good to modify existing texts (for instance, concerning contracts) or to introduce new ones. But my personal opinion is that the crux of the problem is a state of mind. The concept of “reasonable” is no stranger to the French legal system (as

‘Today anything under the sun that is made by man is probably not only patentable but also likely protectable (“tolls” are everywhere).’

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too many people believe), so to favour a reasonable understanding of the rules is certainly the best way to add the desired flexibility to the system. For instance, the right of integrity can be understood in a silly manner as described above. But it’s also possible to understand it in a manner that tries to find the right balance between the preservation of a work and other social necessities (as jurisprudence has done in particular in the case of architectural works, taking into account that such a work is also a “space of life”).

And, as “clues” indicate that such an evolutionary process is going on elsewhere (for instance in some of the case law mentioned above), I believe that this soft evolution is perfectly possible. This feeling is reinforced by the fact that the same challenges arise in France, the United Kingdom, Japan, the United States and elsewhere, and that the same challenges have produced (almost) the same responses. The case of software is a good illustration: in spite of differences in tradition, the legal statutes surrounding software development are very homogeneous across different national systems.

## Old patterns, new patterns

But the most important challenge for both authors’ rights and copyright is certainly that both ideas function on old patterns from the pre-digital era. If IP rights must be thought of as original tools of control (“fencing off”) of a potential market, then we have clearly failed to apprehend the dematerialised and globalised market that the Internet represents.

The Digital Millennium Act and several proposals in the United States, as well as the “*Dadvisi*” and “*Hadopi*” laws in France, are attempts to reactivate old formulas. In particular, they call for the introduction of technological measures of protection, which are not without danger for individual liberties, but artificially multiply the markets (without providing real security to the rights holder for all that trouble). This perhaps requires a quick comment. The subjects of IP were always “immaterial” items (a shape, a

‘The most important challenge for both authors’ rights and copyright is certainly that both ideas function on old patterns from the pre-digital era.’

technical “receipt”, a sign...) but at the end of the day they were part of something tangible, such as a book or an old record, i.e. a “seizable” object. This is no longer the case. Today, with digitalisation, the dematerialisation is complete. To compensate, some legislators paradoxically try to use technological measures to recreate a concrete object virtually or, in other words, create a false concrete object through virtual borders that aim to prohibit access to this virtual space. But, at the same time, they try to have it both ways – by regulating the same work differently depending on the medium, such as watching a film on a computer rather than on television or vice versa. And that breaks with the traditional economy of IP rights.

But what about such laws as the French *Hadopi* law (Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet)?<sup>3</sup> At first glance, it looks like little more than the enhanced enforcement of IP. In fact, *Hadopi* is a strange legal construct. A part of it wants to be pedagogical. The “High Authority” in charge of the file of Internet downloading believes he or she must send warning messages to people who are identified as illegitimate downloaders. But is it necessary to build a sophisticated system to reach this goal? The truth is that there are iron bars on the windows of the Hadopi classroom. For example, unusually, penalties are incurred not for infringement but for the (hypocritical?) reason that the computer user has not secured the access in such a way that prevents illegal downloading. Theoretically, it’s possible to be liable if somebody else hacks into your computer. And that does not dismiss the possibility you might be sentenced for infringement.

Moreover, even though reflection on the new practices is in my view necessary, as is new analysis (for instance downloading is very hastily assimilated to a “traditional” infringement), this kind of fundamental questioning was totally left out of the debate.

Nevertheless, in France and elsewhere, it’s imperative to ask this sort of question. Today, we still live in the world of Johannes Gutenberg and Leonardo da Vinci, but we live in other worlds as well. It would be useful if the law understood that.

The final challenge to IP in France and Europe is enforcement, because without real possibilities of enforcement, IP is a weapon without great effectiveness. Once again, the problems are general. The Anti-Counterfeiting Trade Agreement (ACTA) is a good example of this search for effectiveness.<sup>4</sup> The passage, at the European level, of the French “*saisie-contrefaçon*” (seizure in case of suspected infringement with minimalist conditions) is certainly progress in this area also. Bringing together the courts’ different national practices would also help.

But a real problem lies in the fact that anti-infringement legal actions are usually badly compensated. Damages in many countries, including France, are insufficient, mostly because judges are not sensitive to the economic problems and to the companies’ worlds. It would be good to educate them in this regard. But damages are also insufficient, from my point of view, owing to a lack of (theoretical) legal analysis. Infringement is often viewed as a banal problem of liability. If IP is a kind of (original) property, a legal action for infringement must be understood as encouraging the protection of this property, which in my analysis (which I don’t have space to develop here) can only be achieved through better compensation.

These notes are just an outline of a much more complex topic. However, I hope this brief review makes clear that the most serious IP problems today are not primarily national in origin, but global. **IP<sub>21</sub>**

# Licensing for competition, innovation and creation

— Reto Hilty

Reto Hilty is professor of intellectual property law at the University of Zurich and director of the Max Planck Institute for Intellectual Property and Competition Law in Munich.



The question whether intellectual property encourages innovation and creation, and thus ultimately contributes to growth and wealth, is by no means new. Many countries that today hold the patent system in high esteem struggled to introduce it in the course of the 19<sup>th</sup> century. And even decades later, the question still appeared to be controversial. In 1958, the economist Fritz Machlup delivered an “Economic Review of the Patent System” to the subcommittee on patents, trademarks and copyrights of the judiciary committee of the US Congress that came to a conclusion that has since become famous: “If one does not know whether a system ‘as a whole’ (in contrast to certain features of it) is good or bad, the safest ‘policy conclusion’ is to ‘muddle through’ – either with it, if one has long lived with it, or without it, if one has lived without it. If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it.”<sup>1</sup>

## Views as times have changed

What has changed since? The patent system has become much more complex and varied. Many new areas are now included, such as the field of substance protection for medicinal products, which has acquired such huge importance (for a long time, it had not been possible to protect the substance *per se*, but only the method for its manufacture), followed by biotechnology – in contrast to biological breeding methods, which are still excluded. Information technology, from data-processing to data transmission, has also opened up new dimensions to patent law; more recently, the building blocks of nanotechnology that can be used across technologies have given the patent system a further boost.

In recent years, however, not only has the effect of patent law on innovation been called into question; copyright, too, has increasingly become the focus of public awareness. This was provoked by the advance of the Internet. The application of approaches that date largely from the age of book printing to this new technology has demonstrated to broad circles of the population how anachronistic the effect of traditional copyright can be in the context of the modern information society.

And nevertheless, even today, we do not know much more than Fritz Machlup about the effective impact of IP systems – even if a number of aspects are more intensively

illuminated than ever before. Increased attention is paid, for instance, to areas that appear to flourish without IP rights – or in any event without the complete exclusiveness that these rights generate, demonstrating that there are also alternative incentive models for the creation of the new. The open source movement for software was followed by the Creative Commons discussion, reflected for instance in the open access paradigm in the field of academic publishing. There has also recently been a demand for more open systems in the field of patent law under the heading “open innovation.”

Outside these special areas, too, it is gradually becoming apparent that IP rights do not simply constitute a kind of “private property.” Behind the grant of time-limited privileged competitive positions, there are complex considerations that are based on competition law ideas, which basically have hardly anything to do with classical property rights as applied to tangible goods. This is expressed in the “liability approach” – interpreted as a contrast to the “property approach” – according to which the rights holder cannot *a priori* exclude third parties from using the protected object, but can instead only make them “liable” to pay remuneration for such use. However, even leaving aside this differentiation, it is largely acknowledged today that IP rights must not be unrestrictedly comprehensive or strong. On the contrary, they are to be limited in terms of content so that they do not fail to achieve the objectives for which they were granted in the first place.

## Practical implications

Admittedly, IP rights are in principle intended to be a positive encouragement of competition by securing the investments that, without protection, could be exploited by third parties

‘ Information technology, from data-processing to data transmission, has opened up new dimensions to patent law.’

‘It is gradually becoming apparent that IP rights do not simply constitute a kind of “private property.”’

in a way that would prevent an appropriate return being made on the investments. If this prevents potential investors from making investments in the future, it is obvious – at least theoretically (Schumpeter, Clark) – that the lead time of the first mover, which *de facto* always exists, must be extended, i.e. the start of the imitation phase must be delayed. In this respect, an exclusiveness that is restricted in time and backed up by law, alongside other advantages, strengthens competition mechanisms; the investor is guaranteed a return on his investment.

However, if this exclusive period is longer than necessary, it threatens to have a negative effect on competition: if after a sufficient return has been earned on the investments, competition forces cannot develop; instead, third parties continue to be excluded in whole or in part from using the protected object. If there are no alternatives, there is then no competition based on price or quality. Such competition develops, however, if a number of competitors are able to use the same protected object, which ultimately also serves competition based on innovation and creativity. If, instead, third parties cannot use the protected object for their own innovations or new creations, technological and economic progress slow down.

In fact, certain rights holders succeed in practice in exploiting IP rights dysfunctionally, thereby impeding competition. This observation leads to the conclusion that the mechanisms inherent in IP rights do not limit protection sufficiently to allow the positive effects of dynamic competition to prevail. This prevents the necessary permanent “process of creative destruction,” which Joseph Schumpeter described so well.<sup>2</sup>

## Comparison between patent rights and copyright

At first sight, the problems of the different IP rights do not appear to be comparable. In copyright, problems today are primarily perceived where right holders (e.g. music producers) and end users are in conflict – hence in the business-to-consumer (B2C) sector. Such constellations are almost unknown in patent law. Instead, the focus here is on the relationship between competitors, i.e. the party directly affected by the protection is himself an entrepreneur who likewise also wishes to make use of the protected object used exclusively by the rights holder.

Such business-to-business (B2B) constellations, if observed at close quarters, also lead to serious problems in copyright, namely where market participants must make use of protected works in order to operate their own enterprises – such as broadcasting stations that broadcast music or films. In practice, such constellations are no problem; either individual contracts on the terms of use are negotiated, or, if provided for by the applicable legal system, the rights can be asserted on a collective basis (such as in the case of the retransmission of broadcast signals by cable operators).

However, there are also areas in which third parties are not in a position to procure the necessary user rights – one example being Google, which scanned countless books and made them accessible to the public via the Internet in breach of copyright. This was admittedly doing what a modern information society actually needs. However, it would not have been possible without infringing rights since the publishers (as rights holders) simply did not want Google as a competitor and hence were not willing to license the necessary rights – not even in return for fair remuneration.

In patents too, third parties are occasionally refused user rights. Admittedly, such constellations attract less attention than those in which different independent rights holders collude or coordinate their conduct, thereby impairing competition between the enterprises. These include, for instance, patent pools, cross licensing or grant-back clauses.<sup>3</sup> These cases are of course very important but, given the deliberate collusion between the parties, they lead as a rule directly to antitrust law issues. Much more difficult to regulate, on the other hand, are the cases of unilateral restrictions on competition where the rights holder (abusively) refuses to enter into contractual relationships with the third party in order to maintain or extend his exclusive market position. Against this background, the frequent argument that any dysfunctional effects of excessive legal protection can be corrected by antitrust law is not convincing.

From practise, we know how rarely antitrust law is applied in such cases, but this is hardly surprising. The possibilities for intervention are subject to very strict general, i.e. not IP but rather market-related, preconditions. Accordingly, most of the constellations of facts of the only seven cases concerning a refusal of contract that have been decided under European antitrust law over the last 15 years have been untypical (in any event Magill, IMS Health and Microsoft), since there had been doubts as to the very grant of

protection *per se*. In these cases, antitrust law was, as it were, only the last recourse, since the European Court of Justice lacked jurisdiction to refuse the legal protection granted, a protection that was ultimately inconsistent with the system at a national level. Hence antitrust law as a rule is of little assistance in overcoming unjustified refusals of licences.

### Mechanisms against the refusal of a licence

Primarily, the refusal of a licence is problematic in cases in which the broadest possible use of the protected object is in the public interest. The most suitable instrument for dealing with such refusals is the compulsory licence. However, it is a striking fact that the instrument is hardly used in practice. Nevertheless, the compulsory licence has rarely been the subject matter of research, leaving many questions unanswered. This applies in particular to the distinction between the obligation to conclude a contract under antitrust law and the institution of the compulsory licence that derives directly from intellectual property systems. However, precisely this distinction is essential. If a compulsory licence under intellectual property law – such as in the case of Google for the scanning of books – could only be granted subject to the preconditions that must be complied with under antitrust law, the institution would be restricted to a number of special constellations, in particular such where there is a sufficient market power. Instead, there must be an independent basis for the claim, located directly in intellectual property law, that can be used to cover competition related constellations if the preconditions for intervention under antitrust law are not satisfied.

Of course, not much is gained merely by finding that the compulsory licence under IP law is to be interpreted as an independent legal institution. If it is to have positive effects in practice, it is not only necessary to define the preconditions for its grant. Also needed is a number of flanking measures, specifically in procedural law, that at present are lacking. The first issue to be considered is the time factor. It is obvious that, in light of ever shorter innovation and product cycles, the institution of the compulsory licence makes no sense if the right to use is only awarded after years of litigation. Instead, what is necessary is that the third party should have the same possibilities as the right holder himself, who can stop an alleged infringer by means of provisional measures with immediate effect. Naturally, this also requires corresponding



‘If, on the one hand, it is recognised that IP protection must not stop at national borders, this also applies to the limits of protection; like the rights holders, third parties must also face a uniform legal situation in order to be able to benefit from the advantages of the internal market.’

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safety mechanisms; thus the plaintiff must bear the risk of and must provide security for any corresponding claims to costs and damages should the final trial show that the preconditions for a compulsory licence were not satisfied.

However, even where a compulsory licence is granted lawfully, manageable methods are required to permit the determination of the reasonable licence fee to be paid to the rights holder. Here too, it must be ensured that the period necessary to determine this issue is not used to delay the third party’s ability to exploit the licence. Instead, it should be noted that the grant of a compulsory licence is always also in the public interest, hence a negative situation that derives from the exclusive nature of the intellectual property right must be capable of being terminated as quickly as possible.

Certainly, the compulsory licence is not a cure-all. It will remain unused precisely where the market does not provide the necessary incentives to justify the efforts needed to obtain a compulsory licence – namely where it does not open up a profitable market. Art. 31<sup>bis</sup> of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), introduced following the World Trade Organization Doha Round, shows this clearly. It is obvious that a business enterprise will not be interested in manufacturing cheap generic products on the basis of another’s patent, particularly in the absence of purchase power on the part of potential purchasers on a strictly limited sales market. Instead, it would be necessary to create special incentives outside competition (e.g. government subsidies). However, such considerations are not an argument against the institution of the compulsory licence as such.

## View towards Europe

The fact that compulsory licences in their present form are not used is due to the general conditions. The transaction

costs must be reduced, the incentives increased. This has not happened, in particular at the level of European legislation – which is where this issue belongs. If, on the one hand, it is recognised that IP protection must not stop at national borders, this also applies to the limits of protection; like the rights holders, third parties must also face a uniform legal situation in order to be able to benefit from the advantages of the internal market – in the general interest, it should be noted.

Patent law provides a particularly deterrent example. The now proposed enhanced co-operation between 25 member states is admittedly intended to open up to the rights holder the advantages of the internal market, similar to those that a genuine European Union patent would provide. Specifically, what is in formal terms a national patent is to be subjected to a unitary effect and the defence of patent protection is to be made possible by means of central mechanisms. On the other hand, third parties are excluded from these improvements. Anyone who wishes to obtain the user right by means of a compulsory licence must conduct 25 separate national civil actions – and win them all in order to be able to use the invention without geographical limits.

If the signs of the times were to be recognised, this deficit could still be eliminated in the future European patent system. However, this would far from constitute the completion of what must be done in terms of flanking measures, which likewise require a harmonised legal situation in Europe. In general, too, the European legislature must in the future turn its attention to the limits on protection. Just as in the case of the enforcement of rights, which for good reason is not left to national legislatures but has instead been channelled by means of a directive, it must be ensured that any third party, who through his own initiative is able to ensure that existing IP rights do not impede future innovation and creativity, will find a uniform legal situation throughout the internal market. **IP<sub>21</sub>**

# The Dutch case for flexibility

— Bernt Hugenholtz

Bernt Hugenholtz is professor of intellectual property law and director of the Institute for Information Law of the University of Amsterdam.

Everyone agrees that copyright in the European Union is in a state of crisis.<sup>1</sup> But there is disagreement on what caused it and what to do about it. Rights holders generally complain that copyright law has left them defenceless against mass-scale infringement over digital networks, and call for enhanced copyright enforcement mechanisms. Authors lament that the law does little to protect their right to receive fair compensation from the copyright industries and the users of their works alike. Users and consumers accuse the copyright industries of abusing copyright, and using it as an instrument to conserve monopoly power and sustain outdated business models.





Nevertheless, all stakeholders agree that the current crisis in copyright is essentially an issue of social legitimacy. Whereas the idea and ideals of copyright were largely uncontroversial until the end of the last millennium, with the rise of the Internet and the more recent emergence of the social media, copyright law is rapidly losing the support of the general public.

A major cause of this loss of faith in copyright is the increasing gap between the rules of the law and the social norms that have been shaped by technology. Of course, technological development has *always* outpaced the process of law making, but with the spectacular advances of information technology in recent years, the law–norm gap in copyright has become so wide that the system is now almost at the breaking point. In the EU, this problem is exacerbated by two additional factors. One is the complexity of EU law making, which requires up to 10 years for a harmonisation directive to be adopted or revised. The other is the general lack of flexibility in copyright law in the EU and its member states, which – unlike the United States – do not generally permit “fair use” and thus allow little leeway for new uses not foreseen by the legislature.

Consequently, there is an increasing mismatch between copyright law and emerging social norms in the EU. Examples abound. Whereas social media has become an essential tool of social and cultural communication, current copyright law leaves little room for sharing “user-generated content” that builds upon pre-existing works.<sup>2</sup> By the same token, the law in most EU member states fails to take into account emerging educational and scholarly practices, such as the use of copyright-protected content in PowerPoint presentations, in digital classrooms, on Blackboard sites, or in scholarly e-mail correspondence.<sup>3</sup> Copyright law in the EU also makes it hard to accommodate information location tools, such as search engines and aggregation sites. By obstructing these and other uses that many believe should remain outside the reach of copyright protection (and would probably qualify as “fair use” in the US), the law impedes cultural, social, and economic progress and undermines the social legitimacy of copyright law.

The need for more flexibility in copyright law is particularly pressing as regards the limitations and exceptions to copyright. Copyright laws in EU member states traditionally provide for “closed lists” of limitations and exceptions that enumerate uses of works that are permitted without the authorisation of copyright holders. Examples of such uses are: quotation, private copying, library privileges, and uses by the media. More often than not these exceptions are highly



detailed and connected to specific states of technology, and therefore easily outdated. To make matters worse, the legal framework leaves EU member states little room to update or expand existing limitations and exceptions. The Copyright in the Information Society Directive of 2001 lists some 21 limitations and exceptions that member states may provide for in their national laws, but does not allow exceptions beyond this “shopping list.”

The good news is that the idea of introducing a measure of flexibility in the European system of circumscribed limitations and exceptions is now gradually taking shape. Already in 2006, the Gowers review in the United Kingdom recommended that an exception be created for “creative, transformative or derivative works,” particularly in the context of user-generated content.<sup>4</sup> In 2008, the European Commission took this suggestion on board in its Green Paper on Copyright in the Knowledge Economy.<sup>5</sup> The Dutch government has repeatedly stated its commitment to initiate a discussion at the European political level on a European-style fair use rule.<sup>6</sup> In May 2011 the Hargreaves review in the United Kingdom recommended “that the UK could achieve many of its benefits by taking up copyright exceptions already permitted under EU law and arguing for an additional exception, designed to enable EU copyright law to accommodate future technological change where it does not threaten copyright owners.”<sup>7</sup> The UK government’s response to the review underscored the need for more flexibility in EU copyright law.<sup>8</sup> Most recently, in Ireland, the Copyright Review Committee has advised the Irish government to consider the introduction of a general fair use rule.<sup>9</sup>



‘There is an increasing mismatch between copyright law and emerging social norms in the EU.’

Clearly, the time is ripe for a critical assessment of the EU’s closed list of permitted limitations and exceptions to copyright. The Directive of 2001, which sought to deal with the early challenges of the digital environment, is now more than 10 years old, but has never been properly reviewed by the European Commission.<sup>10</sup> Revising the Directive’s structure of strictly enumerated, optional exceptions and limitations should feature very high on the EU’s legislative agenda. A straightforward way to do this would be to allow member states to provide for *other* (non-enumerated) limitations and exceptions permitting unauthorised uses, subject to the application of the “three-step test” used in a number of treaties, requiring that such uses not conflict with the normal exploitation of copyright works and not otherwise unreasonably affect the interests of authors and copyright holders. The three-step test, which is part of the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and various other international treaties, is already incorporated in the Directive (Article 5.5) as an overarching rule preventing member states from introducing overly broad copyright limitations. By combining the present system of enumerated exceptions with an open norm that would allow other fair uses, a revised Directive would much better serve the combined goals of copyright harmonisation and the promotion of innovation. An example of such a semi-open structure of limitations can be found in the proposed European copyright code released by a group of leading European copyright scholars (the “Wittem Group”) in April 2001.<sup>11</sup>

However, any revision of the 2001 Directive will take many years to achieve. In the meantime, member states are faced with a dilemma. Should they refer calls for increased flexibility to the

EU legislature and wait – possibly for many years? This would require a stoic attitude that not all national lawmakers are able to afford. Or should member states simply take concrete steps to enhance flexibility, regardless of what transpires in Brussels?

A closer look at the legal framework suggests that EU member states actually have more regulatory flexibility than the Directive *prima facie* suggests. In the first place, some of the limitations and exceptions listed in the Directive leave member states more room to move than is sometimes believed. For example, a rather loosely drafted Article 5(3) (a) of the Directive seems to allow member states to exempt a much wider range of educational and scientific uses than many national laws presently permit. The quotation right set forth in Article 5(3)(d) might arguably leave room for an exception permitting the fair use of copyright protected material for the purposes of search engines and other reference tools. And Article 5(3)(i), which allows the “incidental inclusion of a work or other subject-matter in other material” apparently leaves room for a whole range of unspecified “incidental” uses.

In the second place, it is often overlooked that the Directive does not harmonise the entire spectrum of economic rights that copyright holders normally enjoy. The Directive only harmonises the rights of reproduction, communication to the public, and distribution. The Directive does not deal with a right of adaptation that allows rights holders to control transformative uses of works, such as film versions, translations, and other “derivative works.” By implication, the Directive’s list of permitted limitations and exceptions does not concern this right. Member states remain free to provide for limitations and exceptions to the right of adaptation at their own discretion, subject only to the “three-step test.”

Using the policy space left by the Directive, member states remain free to provide for limitations and exceptions permitting, for instance, fair (i.e. non-commercial) transformative uses in the context of user-generated content. Such an exception could, for example, be modelled on a proposal currently before the Canadian parliament.<sup>12</sup> Another more recent example comes from the Netherlands. The Dutch Copyright Committee that advises the Ministry of Justice on matters of copyright law and policy proposes to legally permit the use of user-generated content by way of integrating such uses in any one of two limitations that currently exist in Dutch copyright law – the parody exemption and the quotation right.<sup>13</sup> In its report, the Committee endorses the analysis of the Hugenholtz /Senftleben study.<sup>14</sup> The proposed legislative solution would seem to be well within the discretion left by the EU legislature to the member states. **IP<sub>21</sub>**

## Notes

### Ian Hargreaves

- 1 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 2 *Ibid.*.
- 3 For more information, visit the Google Book Search Copyright Class Action Settlement website at <http://www.googlebooksettlement.com/index.html>.
- 4 Vince Cable, George Osborne and Jeremy Hunt, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 5 *Ibid.*.
- 6 Richard Hooper, *Rights and Wrongs: Is Copyright Licensing Fit for Purpose for the Digital Age? The First Report of the Digital Copyright Exchange Feasibility Study* (Newport: Intellectual Property Office, 2012).
- 7 *Ibid.*.
- 8 Richard Hooper and Ros Lynch, *Copyright Works: Streamlining Copyright Licensing for the Digital Age* (London: Intellectual Property Office, 2012).
- 9 Visit [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org) for more.
- 10 Ann Mettler and Anthony D. Williams, *Wired for Growth and Innovation: How Digital Technologies are Reshaping Small- and Medium-Sized Businesses and Empowering Entrepreneurs* (Brussels: Lisbon Council, 2012).
- 11 European Policy Centre and Copenhagen Economics, *The Economic Impact of a European Digital Single Market* (Brussels: EPC, 2010).
- 12 Matthieu Pélissier du Rausas et al., *Internet Matters: The Net's Sweeping Impact on Growth, Jobs and Prosperity* (San Francisco: McKinsey, 2011).
- 13 European Commission, *A Single Market for Intellectual Property Rights. Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe*, Communication COM(2011) 287 final (Brussels: European Commission, 2011).

### Jeff Lynn

- 1 There were certainly exceptions, such as in music composition. Long before “sampling” became commonplace among rap artists, rules were established as to how many bars of a piece could be borrowed for another piece. But by and large, when we think of pre-digital copyright violations, we think of a dodgy man with a printing press running off pirated word-for-word copies of a popular novel.
- 2 The video went viral on the Internet in the summer of 2010 but was quickly removed from YouTube when a music label claimed copyright infringement.

### Paul Klimpel

- 1 The *Gowers Review of Intellectual Property*, a study prepared for then Prime Minister Gordon Brown by then *Financial Times* Editor Andrew Gowers, clearly disapproved of an extended term of protection for related rights. See Gowers et al., *Gowers Review of Intellectual Property* (London: HM Treasury, 2006).
- 2 Internet and Society Co:llaboratory, *Regelungssysteme für informationelle Güter* (Berlin: Co:llaboratory, 2011).

### Nico Perez

- 1 Gordon Moore, founder of Intel, once suggested that central processing unit power would double every 18 months. This prediction has proven to be astonishingly accurate over the last four decades.
- 2 The Berne Convention for the Protection of Literary and Artistic Works, usually known as the Berne Convention, is an international agreement governing copyright, which was first accepted in Bern, Switzerland in 1886.
- 3 Last.fm is a successful Internet radio service based in London. It was acquired by CBS in 2007.
- 4 Ian Hargreaves: *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).

- 5 Pandora is an Internet radio provider based in Oakland, California. It recently went public and floated on the New York Stock Exchange for \$1.6 billion.
- 6 See Vice-President Reding's comments at the launch of the eYouGuide in “Consumer Rights: Commission Wants Consumers to Surf the Web without Borders,” *IP/09/702* (Brussels: European Commission, 2009). At the time, Vice-President Reding was commissioner for information society and media.
- 7 Hargreaves, *op. cit.*.
- 8 Francis Gurry, director general of the World Intellectual Property Organisation, described a global repertoire database as “an idea whose time has come” in November 2010.
- 9 The challenging state of pan-European licensing has clearly been heard and understood by Brussels. And the proposed solution is similar in many regards to the “new solutions” I propose in this essay, and will undoubtedly help new online operators like Mixcloud grow across Europe within a framework that provides more certainty and fewer barriers to entry. However, the proposal only addresses the author's rights and not the sound recording rights, and this is in stark contrast to the US where SoundExchange was created by Congress to administer statutory licensing of these rights. Also, while the proposed directive looks good on paper, it is worth considering that the Commission's past proposal to simplify pan-European licensing was not particularly effective. Ultimately, the effectiveness of this new proposal will rely on the legislation passing through the EU Parliament and being adopted by member states for it to make an impact.

### Till Kreutzer

- 1 People nowadays pay not for content but for convenience and – maybe – for a good conscience. The task for market players in the online world is to offer intangibles that cannot be copied, i.e., to provide the consumer added value to the content. According to Kevin Kelly, such intangibles can be immediacy, personalisation, authenticity, accessibility, embodiment (like vinyl records, live performances), patronage, and findability. See Kevin Kelly, *Better than Free: How Value is Generated in a Free Copy World* (New York: Edge, 2008).
- 2 Already, the social consensus around copyright protection seems to be receding. Just recently, two efforts to create stronger copyright protections for the Internet era failed in the face of massive public protests. The Stop Online Piracy Act (SOPA) and the Prevent Internet Piracy Act (PIPA) in the US were killed suddenly on 18 January 2012 when 115,000 websites (among them Wikipedia and Mozilla) closed down for the whole day, displaying information about the legislative initiatives or redirecting their users to online petitions against them. More than one billion users were blocked trying to reach one of the shut down websites and more than 10 million people signed petitions against the implementation of SOPA and PIPA. A few weeks later, a mass protest against the Anti-Counterfeiting Trade Agreement (ACTA) broke out in Europe. Tens of thousands of people took to the streets to demonstrate against the ratification of the multilateral treaty on Intellectual Property Rights by the European Union. As a result, numerous European and national politicians hastened to state that a ratification of ACTA by the EU or the member states needed further evaluation.
- 3 Internet and Society Co:llaboratory, *Regelungssysteme für informationelle Güter* (Berlin: Co:llaboratory, 2011).
- 4 For the complete list of participants, visit <http://collaboratory.de>.
- 5 To encourage uninhibited thinking, the group deliberately decided *inter alia* not to use the terms copyright or authors' right for the regulatory approach. Another reason for this decision was that the alternative regulatory system acknowledges and balances a great variety of interests and aspects on a coequal basis (no main focus or emphasis on the interest of the author or the user or specific kinds of use like copying).
- 6 This system became part of the European “acquis communautaire” through the so-called “InfoSoc Directive.” See *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* (Brussels: European Commission, 2001).

- 7 This finding applies even more when the implementation or modification of the limitations is severely restricted by a supra-national closed-shop catalogue such as Art. 5 of the InfoSoc Directive – a combination that leads to a degree of inflexibility that makes it impossible either to react in time to the degree of change generated in a highly dynamic information society or to maintain a permanent fair balance of interests. Despite the obvious reticence of the European regulator to acknowledge this fact and act accordingly, this seems self-evident. See also P. Bernt Hugenholtz and Martin R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities* (Amsterdam: IViR, 2011): “The need for more openness in copyright law is almost self-evident in this information society of highly dynamic and unpredictable change.”
- 8 Prosumer is a term derived from the words “producer” and “consumer” describing that the roles of producers and consumers merge under the influence of information technology. This perception is not new. Marshall McLuhan and Barrington Nevitt anticipated that transition for the information society already in 1972. The Web 2.0 is proof that they were right. See McLuhan and Nevitt, *Take Today, the Executive as Dropout* (San Diego: Harcourt Brace Jovanovich, 1972).
- 9 Certainly, this argument is limited when it comes to orphan works. However, the problem can be solved easily with an adequate exception from the obligation to name the author in case they are unknown or undiscoverable.
- 10 We came to this result despite our common sense that standardised rules have certain obvious benefits (especially in terms of predictability).
- 11 Another option we considered to protect the interests of creators and producers is a possibility to extend the exclusive rights for a certain time through registration. See the reasons for this consideration on page 17 of the Co:laboratory guidelines.

#### Lilian Edwards

- 1 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 2 Nate Anderson “IFPI: ‘Three Strikes’ Efforts Hit Worldwide Home Run,” *Ars Technica* 2008.
- 3 Christopher Williams, “E-books Drive Older Women to Piracy,” *The Telegraph*, 17 May 2011.
- 4 Agustino Fontevicchia, “Zynga Reveals Profit and Revenues as It Looks to Raise \$500 Million,” *Forbes*, 02 March 2011.
- 5 Katie Scott, “Monty Python’s Terry Jones Crowdfunds Funding for Book,” *Wired*, 05 August 2011.
- 6 Richard Hooper, *Rights and Wrongs: Is Copyright Licensing Fit for Purpose for the Digital Age? The First Report of the Digital Copyright Exchange Feasibility Study* (Newport: Intellectual Property Office, 2012).
- 7 Lawrence Kaye, “Hargreaves and ‘Text Mining’: Digging Up Copyright?,” 22 September 2011, at <http://laurencekaye.typepad.com>.

#### Michel Vivant

- 1 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 2 Michel Vivant, “Droit d’auteur et théorie de l’accessoire: et si l’accessoire révélait l’essentiel?” *La semaine juridique Edition Générale* n° 28, 2011.
- 3 A 2009 French law intended to combat online piracy.
- 4 ACTA is a multinational treaty signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United States. Currently over 30 countries have signed the agreement, but so far none has ratified it.

#### Reto Hilty

- 1 Fritz Machlup, *Economic Review of the Patent System* (Washington DC: US Government Printing Office, 1958).
- 2 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Oxford: Routledge, 1996).
- 3 A grant-back clause is a provision in a licensing agreement under which the licensee is required to disclose and transfer all improvements made (including related know-how acquired) in the licensed technology during the licensing period.

#### Bernt Hugenholtz

- 1 This essay is partly based on P. Bernt Hugenholtz and Martin R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities* (Amsterdam: IViR, 2011).
- 2 OECD, *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking*, Document DSTI/ICCP/IE(2006)7/Final (2007) (Paris: OECD, 2007).
- 3 For other examples, see J. Tehranian, “Infringement Nation: Copyright Reform and the Law/Norm Gap,” *Utah Law Review*, Vol. 2007.
- 4 See recommendation 11 in Andrew Gowers et al., *Gowers Review of Intellectual Property* (London: HM Treasury, 2006).
- 5 European Commission, *Green Paper on Copyright in the Knowledge Economy*, Communication COM (2008) 466/3 (Brussels: European Commission, 2008).
- 6 Parliamentary Record 21501-34, no. 155. (The Hague: House of Representatives, 2011).
- 7 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 8 Vince Cable, George Osborne and Jeremy Hunt, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* (London: HM Government, 2011).
- 9 Copyright Review Committee, *Copyright and Innovation. A Consultation Paper* (Dublin: Copyright Review Committee, 2012).
- 10 Lucie Guibault et al., *Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Report to the European Commission* (Amsterdam: IViR, 2007).
- 11 For more information about European Copyright Code, visit [www.copyrightcode.eu](http://www.copyrightcode.eu).
- 12 Bill C-11 (formerly C-32) (*Copyright Modernization Act*), Article 29.21, available at <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/home>. The Canadian proposal reads: “It is not an infringement of copyright for an individual to use an existing work or other subject matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject matter in which copyright subsists and for the individual – or, with the individual’s authorisation, a member of their household – to use the new work or other subject matter or to authorise an intermediary to disseminate it, if (a) the use of, or the authorisation to disseminate, the new work or other subject matter is done solely for noncommercial purposes; (b) the source – and, if given in the source, the name of the author, performer, maker or broadcaster – of the existing work or other subject matter or copy of it are mentioned, if it is reasonable in the circumstances to do so; (c) the individual had reasonable grounds to believe that the existing work or other subject matter or copy of it, as the case may be, was not infringing copyright; and (d) the use of, or the authorisation to disseminate, the new work or other subject matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject matter – or copy of it – or on an existing or potential market for it, including that the new work or other subject matter is not a substitute for the existing one.” For more information, read G. Reynolds, “Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression,” in M. Geist (ed.), *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010).
- 13 Dutch Copyright Committee, Report to the Minister of Justice, not yet published.
- 14 See footnote 1 above.

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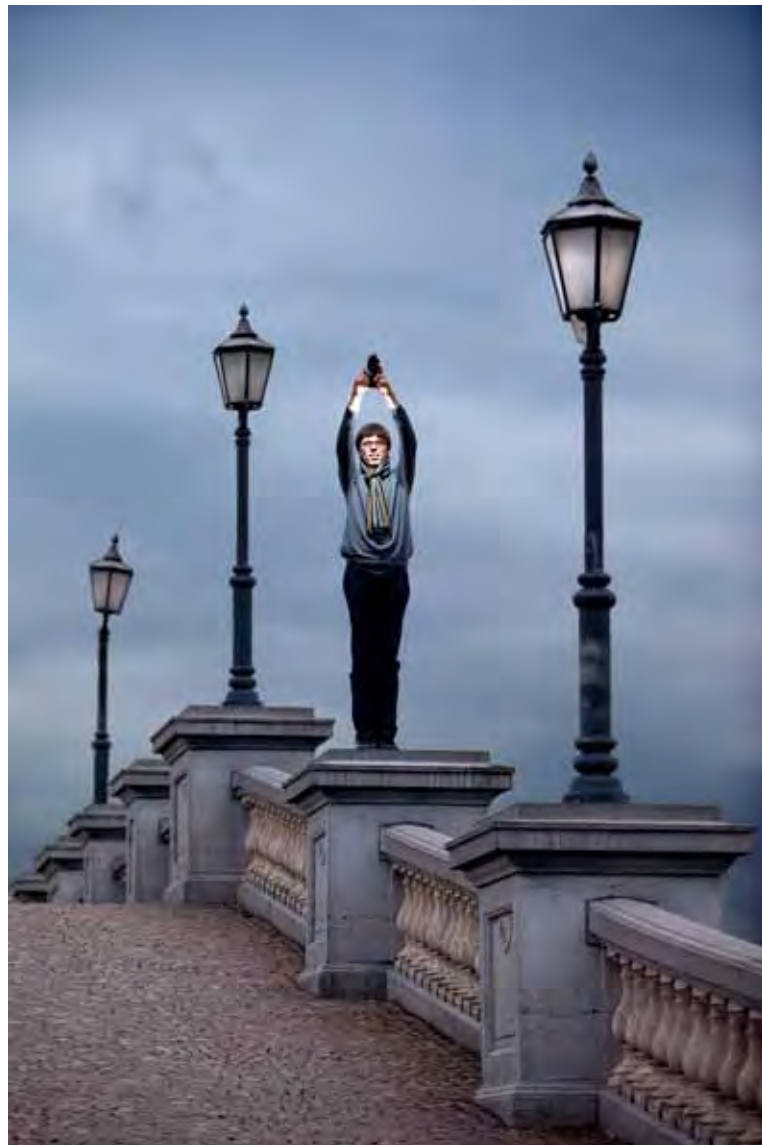
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On pages 38-39, Lilian Edwards appears alongside *Tourists*, a sculpture by Duane Hanson (© SABAM Belgium 2012). The original is housed in the [Scottish National Gallery of Modern Art](#) in Edinburgh.

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Bart Goossens is a photographer, technology journalist, magazine translator, copywriter and car lover based in Antwerp, Belgium. His work has appeared in *Clickx*, *Vacature*, *Data News*, *Touring* and *Actief Wonen/Déco Idées*. He visited five countries in three weeks to shoot the photo portraits for this collection. Check out [www.mbargo.be](http://www.mbargo.be).







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[www.lisboncouncil.net](http://www.lisboncouncil.net)

The Lisbon Council asbl  
IPC-Residence Palace  
155 rue de la Loi  
1040 Brussels, Belgium  
T. +32 2 647 9575  
F. +32 2 640 9828  
twitter @lisboncouncil  
info@lisboncouncil.net



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The Lisbon Council asbl  
IPC-Residence Palace  
155 rue de la Loi  
1040 Brussels, Belgium  
T. +32 2 647 9575  
F. +32 2 640 9828  
twitter @lisboncouncil  
info@lisboncouncil.net



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