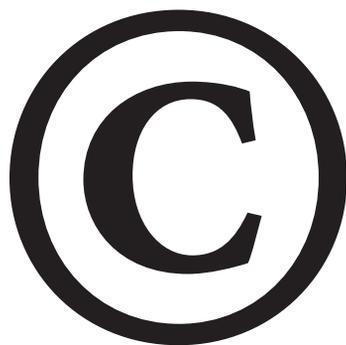


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UNDERSTANDING COPYRIGHT

INTELLECTUAL PROPERTY
IN THE DIGITAL AGE



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INTRODUCTION: UNDERSTANDING COPYRIGHT IN THE DIGITAL AGE

INTRODUCTION

Few aspects of our professional and personal lives have gone untouched by the digital shift. Digital technology is the current that runs through the way we communicate with one another and engage with the world around us. It has changed the manner in which news and entertainment media is produced, distributed and consumed, and it has collapsed the boundaries and roles related to such activities. As a consequence, laws that worked in an analogue world have struggled to keep pace with new digital developments. One area that has been especially stretched to breaking point by digital technologies and activities is intellectual property (IP), and copyright in particular.

How do we know when a law is no longer working as it intended? We might notice that many people do not realize if and when they are breaking the law and we may find that behaviour considered normal or ordinary crosses the line into illegality. We might also recognize that regulatory or enforcement responses to illegal activities seem to many people heavy-handed or inappropriate. Surveys suggest that the line between legal and illegal activity around copyright is, for many, a blurred one (Ofcom, 2012; A. Hill, 2013), and the increasing number of sites and technologies through which we access media has only added to the confusion, with streaming, downloading and sharing legitimated through above-board platforms and subscription-based or advertising-supported services. Furthermore, the distinction between sharing analogue and digital versions of media, while significant to media companies and creators, isn't always recognized by users, who may view digital sharing as a simple extension of an activity which has long taken place between friends and family members (Cenite et al., 2009; Caraway, 2012; Edwards et al., 2013b). Finally, the overzealous approach to enforcement by some corporations in the cultural industries, especially in the early days of peer-to-peer (P2P), resulted in lawsuits that were sometimes filed against sympathetic defendants, from young children and digitally illiterate grandparents to victims of mistaken identity (see Brainz, n.d.). As these examples suggest, the digital context has widened and revealed a gulf between copyright law and everyday practices.

While the presence of copyright in the lives of ordinary people may have raised the profile of the law, disagreement about copyright protection and enforcement is hardly new. Copyright has been the subject of longstanding debates since its earliest

inception. Questions of copyright's objectives, scope and beneficiaries have driven adaptations to the law and have formed the basis of key legal cases which have sought to define and test boundaries around such concepts as parody and plagiarism, fair use and fair dealing, limitations and exceptions. The digital context reignited and modified old copyright debates and introduced new ones. In other words, digitization did not disrupt the functioning of a well-oiled machine: it poured a bucket of water onto a rusted machine. Lots of people disagreed about how to fix it, and that is what brings us to the current situation and to this book, which seeks to understand the copyright debate and propose a strategy for moving the debate forward.

In this chapter, we describe our approach to understanding copyright through a focus on the various parties involved in copyright debates and activities. We seek to understand copyright by focusing not just on the law itself, but through the discourses used to justify particular positions in the copyright debate. We then explain the organization of the book, highlighting the focus of subsequent chapters.

OUR APPROACH TO UNDERSTANDING COPYRIGHT

Copyright is a form of intellectual property (IP) which, in legal terms, describes intangible ideas and creations that come from the mind. (See Box 1.1 for definitions of key terms used throughout this book.) Because IP is not physical property, determining ownership, identifying theft and enforcing protection are not straightforward. Agreements between creators, users and beneficiaries of IP are shaped by the law and formalized in contracts, but vary across geography, industry and circumstance. Copyright is an automatic right which applies when a creative work is 'fixed' through being written down or recorded. Creative works may be musical, literary, theatrical or artistic and can range from a relatively uncomplicated case of a song written and recorded by a single singer-songwriter to a complex production such as a feature film involving the input of hundreds of creators. While anything any of us produces may be protected by copyright as a form of IP, copyright plays a particularly significant financial role in the cultural industries. The rise in the twentieth century of cultural industries based around models of mass distribution and the commercialization of culture set the stage for a more significant role for copyright as a business tool. At the same time, the emergence of new 'information economies' since the 1980s, built on digital technology, provided a political boost for the cultural industries as sectors where commercialized creativity forms the foundation for re-energized economies and communities at the local, regional and national levels (O'Connor, 2000; Bakhshi et al., 2013). As the political and economic importance of cultural industries increased, so too did their involvement in policymaking: protection for rights holders in the digital age has become central to discussions between government and cultural industry representatives, and has played an important role in shaping copyright policy and law.

The advent of digital technologies has been both blessing and burden for the cultural industries. On the one hand, the digital world holds immense possibilities: new forms of cultural texts have emerged; new, and often cheaper, ways of producing and distributing

texts have become possible; audiences can be reached in innovative ways — on the move, in their home, and on personal devices with tailored advertising and promotional material. They can consume cultural texts anywhere, and at any time, which means there is no longer any geographical or temporal limit to who can be reached by the cultural industries, and the return on ‘big hits’ can be in the billions. However, digital technology has also led to new possibilities for creators and users of cultural texts that challenge industry control over production, price and distribution. Digital technology gives creators more freedom to connect directly or through online platforms with their audiences (SoundCloud and Bandcamp are two popular examples for musicians), rather than having to adhere to the processes of production and distribution on which the cultural industries depend. For users, one of the great advantages of digital technology is the fact that it can be used to make copies of texts that are as good as the original. Digital formats can be distributed easily and widely: the architecture of the internet means that users can send copies instantaneously to multiple contacts and download copies from the internet to their personal devices (Lessig, 2006). Users can also engage with cultural texts in ways not intended by the cultural industries, creating parodies, mashups and spoofs, activities that challenge both control over meaning and the limits of copyright.

In sum, digitization has made unauthorized access and distribution of copyrighted work easy and ordinary which, in turn, has provided a catalyst to conversations not simply about how to enforce copyright and punish transgression, but whether copyright, as it is currently understood and regulated, is the right way to encourage and reward creative expression. We could seek to understand copyright by studying the laws themselves but, while changes in the laws over time can suggest a context of shifting perspectives, such an approach cannot fully capture all the noise made behind the scenes: the justifications for copyright protection, the challenges, the drive to produce international standards, the themes of ongoing debates.

Contemporary debates about copyright bring together a number of parties and many perspectives: in order to understand copyright in the digital age, it is essential that we understand how copyright is communicated. Communication has played a crucial and yet arguably under-researched role in the evolution of copyright. In this book, we analyse the digital copyright debate through the perspectives of cultural industries, policymakers, creative workers, intermediaries, and media users. The groups are not discrete: intermediaries and creative workers may also be rights holders, for example, and all parties are made up of media users. Furthermore, competing perspectives on copyright vary not simply between these groups but within them. Yet breaking the debate up into groups — even as the messiness of reality poses obstacles to doing so — allows us to understand copyright as a structured disagreement, where different parties are positioned in particular ways, possess varying degrees of power, and coalesce around specific issues, if not always around the same perspectives on the issues. One way to identify and analyse the position of these groups is through the *discourses* they use. By bringing discourse to the forefront of our analysis, we aim to examine how the different parties involved in the copyright debate view and reflect on copyright and related practices and values.

Box 1.1**Definitions of key terms**

Intellectual property: The World Intellectual Property Organization (WIPO) defines intellectual property as ‘creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce’ (WIPO, 2014a).

Copyright: Copyright is a form of intellectual property and a legal right given to the originator of a creative work, for a limited period of time, to make copies, distribute, licence and otherwise exploit a creative work. It applies to the breadth of artistic and creative work, from literature, music and art to software, motion pictures and other audio-visual forms.

Copyright exception: Copyright exceptions refer to instances, defined in law, where the use of a copyrighted work is in the public interest and the obligation to inform and pay the rights holder for the use of the work is waived. Exceptions vary from country to country (WIPO, 2014b).

Discourse: The use of spoken or written language as a form of social practice. It contributes to the reproduction of social practices and the constitution of social order (Fairclough, 2003). The term is explored in greater detail below.

Cultural industries: The definition of the cultural industries has been contested, but in this book we use Hesmondhalgh’s definition of cultural industries as those industries that produce commodities in the form of symbolic texts that ‘influence our understanding and knowledge of the world’ (Hesmondhalgh, 2013: 4).

Internet intermediaries: Internet intermediaries are organizations that provide services for distributing, hosting or locating internet content for users (Edwards, 2009).

Our understanding of discourse draws on the work of Fairclough (2003), who uses the term ‘discourse’ in both a general and a more specific way. In its general sense, discourse is used to emphasize the central role that language (as well as other forms of meaning making, such as visual imagery) plays in social life and its importance in analysing and explaining it. Discourse is an important part of what makes up and holds social practices together and operates alongside other elements of social life, such as material resources, social networks and social actors themselves. At the same time, discourse is also used in a more specific sense to refer to particular ways of understanding and representing the social world. The term may be used, for example, to describe the discourse of the ‘free market’ or of the ‘Romantic artist’. It may also be used to refer to the types of talk and language that characterize particular social groups, as in, for example, the discourse of policymakers or the discourse of file sharers.

Discourse is bound up with power and power relations. Fairclough (2003: 9) describes how certain discourses become dominant and play an ideological role in legitimating and reproducing particular social practices and power relations. Discourse

therefore contributes to the power some groups have over others, often combining with other sources of power, such as access to material resources or social networks. However, while certain discourses may be dominant and difficult to displace, social groups have the capacity to resist, reflect on and critique discourses (Dryzek, 2000). Groups may challenge discourses externally by drawing on different and competing ways of representing how the world should be: ‘alternative’, ‘marginal’ or ‘oppositional’ discourses (Fairclough, 2003: 206). They may also critique discourses more internally by questioning them in their own terms.

What do we mean by the idea that discourses may be questioned in their own terms? The discourses that are used to legitimate particular social practices and arrangements involve using justificatory principles or claims about what is good, right and just (Boltanski and Chiapello, 2005 [1999]; Boltanski and Thévenot, 2006 [1991]). So copyright, for example, is commonly defended discursively as being just since it is a legitimate recognition and reward for the labour of creative workers. Such justificatory claims provide some scope for opposition and critique, as other groups contest the interpretation of these principles and the evidence used to support them (Edwards et al., 2014). For example, claims that copyright needs to be strengthened in order to reward and recognize creative workers may be challenged by pointing to the low percentage of music sales that actually go to the artist and so how the interests of corporations and creative workers can diverge. In this case, the justificatory principle that creative workers deserve recognition and reward for their work may be accepted, but the interpretation and realization of this principle in practice is challenged.

We argue in this book that the debate about digital copyright and piracy is especially apt for an analysis focused on competing discourses and justifications. Fairclough (2004) argues that discourse becomes strategically important during periods of economic uncertainty and change, when a previously stable set of practices are challenged and economic actors must compete to re-establish their position. The environment for copyright regulation is constantly changing, and so debates about copyright are ongoing, with discourses mobilized over time by different invested groups to argue their case. In addition, the debate about digital copyright has been riven by ‘moral panic’, especially concerning the activity of so-called ‘pirates’ (May, 2003; Lindgren, 2013). Duff (2008) has written of a ‘normative crisis’ surrounding digital media, referring to ‘a breakdown of the framework for value judgments specifically with respect to the social principles and policy bases of the information society’. By focusing on the discourses of the different groups affected by copyright policy, and in particular on the types of justificatory claims they employ, we hope to shed light on the moral dimension of the copyright debate and its connection with questions of justice.

At the same time, we are agnostic about the actual outcomes of the digital copyright debate. We do not aim in this book to set out one particular ‘model’ of how copyright should work. As will become clear, we are more concerned with the process of the copyright debate than its outcomes. Given disparities in power among groups, we think that certain voices — most notably, those of the public — are less often heard and tend to be excluded or included only asymmetrically in the debate. In normative terms, our perspective is driven by the belief that legitimate copyright policy must

involve the public in its construction. We defend a particular form of public engagement in policymaking called ‘deliberative’. Deliberative engagement is defined by certain ideals (Habermas, 1997; Mansbridge et al., 2010: 65–72). Firstly, the process of policymaking should be inclusive so that all groups affected by the policy can participate. Secondly, the process should involve open discussion where all options are considered and where participants seek to convince others through arguments, rather than through other sources of influence and power. Thirdly, policy decisions should reflect an agreement among all groups about the common good or, if such a ‘rationally motivated consensus’ is not possible, at least ‘a negotiated agreement’ that balances competing interests and values in a fair way (Habermas, 1997: 166). Deliberative ideals may not be realized fully in practice: we may need, as Coleman and Blumler suggest, ‘to settle for a more *deliberative democracy*’ (2009: 38). Nonetheless, deliberative ideals provide a critical yardstick with which we can evaluate the current copyright debate and policymaking process.

HOW THIS BOOK IS ORGANIZED

While the motivations, perspectives and justifications of the various parties involved in debates over copyright remain necessarily intertwined, this book separates the key groups by chapter in order to explore distinctions between the positions and the discourses that underpin them. But first, it is important to understand the circumstances and legal frameworks in and against which groups have located themselves in the debate, and so we begin with some copyright fundamentals and key historical moments. Chapter 2 sets out the basic historical context of copyright, and describes the way in which digitization relates to important copyright debates. Key moments in the history of copyright are considered and connected to significant questions. For instance, early decisions about copyright often hinged on a belief in serving the public interest through ensuring the distribution of creative work, and so it is notable that the public interest rarely enters modern discussions. When it does, as in recent reviews of copyright policy that acknowledge the importance of the ‘public interest’ and of copyright exceptions, such recognition has not been substantively incorporated into copyright regulation and policy. Similarly, in the US, extensive industry lobbying against the Public Domain Enhancement Act blocked the possibility of further public interest legislation (Lessig, 2004a). The chapter then looks at digitization as throwing a (golden) spanner in the works: it is the basis of global trade flows in IP and for industrial efficiency savings in terms of production and distribution, but because of the ease with which identical copies can be made and shared, it also threatens cultural industries’ revenue, at least in theory. Industry claims to this effect over the last decade have been consistently challenged. Digitization has both revived old debates (for example, in terms of extending the term of copyright and determining what is covered by copyright) and produced new ones (such as how to respond to ordinary infringers, as opposed to the more serious, criminally-connected pirates who were previously the main focus of copyright enforcement).

Chapter 3 explores the role of copyright in the modern creative economy and the approach that cultural industries have taken to shore up their existing power and garner the support of policymakers. Through ‘modalities of regulation’ (Lessig, 2006) the mainstream, traditional cultural industries (for example, major film and record companies) have sought to influence government decisions and user behaviour, and Chapter 3 will explore some of the approaches taken. As well as attempting to influence the law itself (through precedents set by lawsuits and lobbying), industry players have been involved in less direct forms of regulation. Efforts have been made to modify social norms through education or by running advertising campaigns that characterize file sharers negatively; such efforts have varied in terms of success, with some campaigns resulting in unanticipated consumer backlash or parody. The same scepticism cast on the *Home Taping is Killing Music* campaign in the 1980s was applied to the campaign’s digital equivalents in the 2000s. Likewise, public relations work by industry players suggesting copyright infringement activity is damaging the health of the cultural industries has been challenged by contradictory facts and figures.

Arguably more successful than the attempts of industry to influence consumer attitudes and behaviour have been the attempts to determine the market (and thus encourage legal media consumption) and code (technical instructions embedded in software and hardware that will simply make it more difficult to resist regulation). In some cases, such changes have gone beyond protecting copyright to extending copyright, as May (2007) argues of Digital Rights Management. Chapter 3 also explores in detail and through specific cases the range of ways in which copyright is exploited in the cultural industries.

Sitting sometimes uncomfortably between the pressure from industry and government and the activities of media users are intermediaries, like internet service providers (ISPs), technology companies and online platforms like Google or The Pirate Bay; they are the focus of Chapter 4. ISPs, for example, have found themselves pushed by industry and governments to police the end use of their services. Some intermediaries have taken a decidedly oppositional role in the debate: TalkTalk’s *Don’t Disconnect Us* campaign against the UK’s Digital Economy Act revealed the ISP as not only a hesitant enforcement officer, but indeed an ally of ordinary media users. File-sharing platforms like The Pirate Bay (now officially blocked in the UK) make no secret of their anti-copyright position. On the other hand, online platforms such as Google have been generally supportive of the government and cultural industries stance on copyright, though it is notable that they have adopted alternative perspectives in relation to some policies and that Google’s own use of copyright material (through linking to and digitizing content) has been subject to debate. Chapter 4 will explore the position of internet intermediaries, located on both sides of the debate (and sometimes as double-agents).

Copyright law can be understood as one of a set of laws and norms that defines and delimits what it means to be a creative worker in the cultural industries. Chapter 5 draws on recent work addressing issues related to creative authorship and creative work in order to frame the various creator perspectives that emerge with respect to copyright.

It considers the experiences of creative workers and the relationship between labour and copyright laws.

Creators have at times served as mouthpieces for industries while others have adopted alternative and oppositional perspectives. Critical perspectives on copyright infringement have been expressed by creative workers, sometimes through lawsuits, though these views are not always well-received by a public that considers many creative workers to be wealthy, privileged and already over-compensated for the work they do. On the other hand, some film and television creators have voiced a more nuanced understanding of piracy as, for example, fan behaviour, a promotional tool and a prompt to examine existing business models. Indeed, many musicians have spoken out in favour of illegal downloading as a means of distribution, relying on profits from touring and merchandising to sustain themselves (although major label contracts are beginning to chase these secondary revenue streams); some have become active proponents of alternative models for making (and making a living through) creative work. The open source movement is one example of an alternative to production and distribution that has gained momentum within the software industry and the philosophy has also been adopted by some creators in other cultural industries. Scholars have explored how copyright law can be understood as actually hindering creativity and innovation and privileging particular (Western, capitalistic) models of cultural production. Chapter 5 looks at creator perspectives in relation to key debates around creative labour.

Users — the focus of Chapter 6 — occupy a shadow presence in the debates that take place among industry, government and intermediaries, and over the years have been positioned through discussion in a number of roles, from naïf to criminal, consumer to citizen, user to producer, with the lines between them frequently obscured. Much of the existing research on users has been initiated by industry and policy researchers, who tend to be closely aligned in their desire to ensure the existence of a copyright system that will protect the commercial benefit derived from creative work. Likewise, many academic contributions across and at the intersections of ethics, marketing and criminology take for granted the legal foundation of copyright and, like policy research, set out to explore why users violate copyright and how legal behaviour might be encouraged. Conversely, scholars adopting a more sociological approach to the system of copyright offer a more contextualized understanding of user behaviour, acknowledging online cultures and communities of sharing, rather than focusing on the so-called deviant behaviour of criminalized individuals. Chapter 6 looks at the user positions outlined across these perspectives and also features the voices of users themselves, made audible through user-based research.

The disjuncture between everyday norms and practices of internet users, on the one hand, and norms that are reflected most prominently in copyright policy and regulation, on the other, suggests widespread rejection of the underlying rationales. Chapter 6 maintains that the dominance of industry and government perspectives in the copyright debate must incorporate an engagement with user perspectives on the fundamental concepts and ideologies that underpin regulation, and around which there are multiple, legitimate competing discourses.

The shape of copyright policy and regulation is ultimately determined through political processes. Chapter 7 examines these processes in more depth, focusing on the nature of copyright policymaking at both national and international levels. The process that decides copyright policy would ideally be a democratic and deliberative one, where the interests and values of all the groups considered in this book are represented and reflected upon equally. In practice, though, the process typically falls short of this ideal. Major corporations tend to dominate, using their economic resources and position to have more influence over decision making. Meanwhile, the imbalance of power in the policymaking process at a national level is mirrored at an international level, where certain governments have been able to internationalize and export their own copyright policies through various international agreements. Yet, despite these inequalities, we describe recent examples where the public have been able to mobilize and influence copyright policy. What the ongoing debate around digital copyright suggests more than anything, we argue, is that public involvement needs to become a more integral part of the policymaking process. We advocate our specifically deliberative understanding of public engagement and ideal policymaking, where decisions are based on the consideration of all viewpoints and where the aim is to reach an outcome that reflects the common good or at least represents a fair compromise among the different perspectives and interests of all groups involved.

Chapter 8 highlights the threads that run throughout the book and summarizes the main tensions and disagreements evident through an analysis of discourses, before looking towards the future. It is clear that in its current state, copyright policy satisfies no one and has limited effectiveness. We suggest that one reason for this is the highly contested nature of the core themes in the copyright debate — the competitiveness and economic health of the cultural industries, the creation and circulation of cultural work, and the relative power of different actors in the cultural industries. We reflect on the different positions taken by different actors in relation to these three ideas, and consider how disagreement prompts shifts in those positions, suggesting that the future of copyright in the digital age is more open to change than might initially be apparent. In our view, an inclusive debate about copyright is essential to developing effective policy that satisfies all parties. Most urgently, users need the tools to be able to voice their position and feel they are heard and understood. We consider the opportunities and limitations of a ‘literacy’ approach to public engagement with media policy and policymaking and again emphasize the need for a more democratic and deliberative copyright policymaking process.