

Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity – The Third Paradigm* (Edward Elgar, 2018) 400 pp

Marc D Mimler

PhD (London) & LL.M. (London); Senior Lecturer in Law, Bournemouth University

The query on whether creativity is fostered or rather hampered by the tools of intellectual property (IP) lies at the heart of the academic debate in IP scholarship. The rise of digitization and the ubiquity of the internet has challenged traditional paradigms of copyright's alleged purpose in supporting creativity. The inception of the internet has not only changed the way creative works are consumed but also how they are created. There is open debate as to whether the traditional model based on exclusivity is becoming obsolete. This is the hook on which Giancarlo Frosio's book analyses the role of copyright in promoting creativity. From the outset, the author argues that the exclusivity paradigm promoted by copyright is hampering creativity in the internet era and inhibits mash ups, mix ups and fanfictions. By applying a thorough historical analysis of creative practices, he argues that human creation always relied on some forms of borrowing from others and even plagiarising.

In tracing the history of human creativity, the book divides its narrative in three paradigms. The first paradigm, which Frosio coins the imitative creative paradigm, relates to the pre-romantic ages where individual and collective creativity would coexist in perfect harmony. This is then followed by the second paradigm, in which this harmonious co-existence has vanished, supplanted with individual creativity along with absolute originality as its *Grundnorm*. This era would also see the emergence of copyright law. Fuelled by digitisation, the third paradigm would then provide for a reconciliation of the earlier paradigms of creativity. The baseline of Frosio's line of argumentation is that we have a flawed understanding of the creative process, or rather that we have lost sight of it. In this book he firmly underlines the cumulateness of the creative process of human beings. He applies a multidisciplinary approach to trace the constituent elements of creativity which would remain opaque by solely applying a legal discourse. This promises an interesting and stimulating intellectual voyage back in time to which Frosio invites us in his monograph.

The first paradigm traces the history of creativity before the inception of copyright law. Frosio argues that creativity thrived in the period spanning from the days of Homer to those of Elizabethan sonneteers. Cumulative creation in the stone age, the practices of ancient Greece, e.g. the Platonic *mimesis*, up until the practices in Shakespearean times are discussed by Frosio and presents interesting findings and insights in these creative practices. The roots of the term plagiarism are discussed, as well as the forms of literary imitation in ancient Rome: *interpretatio*, *imitatio* and *aemulatio*. As such, Frosio states that even *aemulatio*, i.e. a form of literary rivalry and a looser form of imitation when compared to the others, would be prohibited under modern copyright laws.¹ The first paradigm then continues to elaborate on historical practices, such as the oral transmission of stories and epics exemplified by the Iliad, the epic of Gilgamesh, the Arthur tale and the Nibelungenlied. All these tales which still capture the imagination of our generation relied heavily on borrowing.

The dawning of the second paradigm is already touched upon within the latter parts of the first within the book. The rise of the romantic conception of the author - the individual genius – as embodied through Renaissance personalities of Dürer, Michelangelo and Rafael, would herald a new approach which would distance “itself from the 1st paradigm’s harmonious coexistence of multiple creative models.”² This push for individualism was seconded by arising property theories with regard to intellectual creations on which modern copyright- or author’s rights regimes are built upon. This growing enclosure has been propelled by economic considerations, the commoditization of information, as well as technological advancement which have led to a new digital land grab: The 2nd paradigm saw the expansion of property rights, through expansion of subject matter and the terms of protection. This landgrab can also be seen through the rhetorical “stunt” which labelled provisions safeguarding the public domain as exceptions to exclusive rights.³ This enclosure is seconded through contractual and technological means which may extend the protection of copyright beyond its legal boundaries. The consequence of this proliferation of layers of protection would lead to a chilling effect with regard to using copyright protected materials. The chilling effect is exacerbated by statutory damages for copyright infringement and obscure interpretation of exception provisions.

¹ Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity – The Third Paradigm* (Edward Elgar, 2018) 35.

² Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity – The Third Paradigm* (Edward Elgar, 2018) 158-159.

³ Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity – The Third Paradigm* (Edward Elgar, 2018) 198.

Frosio highlights these effects by showcasing how characters such as Tintin, James Bond, ET, Harry Potter and Star Trek are fiercely guarded by their right holder which would affect the making of fan adaptations or productions. Ironically, the creators of these work would lend heavily from the public domain in the creation of the works, while their control over these works through the tools of copyright would often make further adaptations very burdensome. Copyright safeguards, such as the idea expression dichotomy would often not suffice to enable further discourse with these works.⁴ Finally, the expansion and fierce enforcement of copyright would stifle democratic debate and cultural diversity. Finally, this post-romantic paradigm which aims at promoting creativity has now become global due to the TRIPS and is affecting communities which relied on systems of cumulative creativity outlined within the first paradigm. Before addressing these enclosures within the third paradigm, Frosio outlines and debunks the myth of a threat of digitization. This should rather be seen as an opportunity and he suggests that this would entail positive spill over effects which would lead to a Digital Renaissance.

This last point is where Frosio sees the inception of the 3rd paradigm, a paradigm which will use the digitization and the internet to foster digital creativity, such as mash-ups, remixes and fanfiction. This user-driven creativity would not require the economic incentive which was so important under the 2nd paradigm. In addition, technology would challenge the traditional ways of content distribution on which the copyright laws of the 2nd paradigm are founded on. These new forms of creativity powered by digital networks would revoke arguments for a permission culture and would strongly oppose further copyright expansion. Frosio posits that the internet may reinvigorate the tenets of the first paradigm. In order to facilitate this conciliation between paradigms 1 and 2, the final chapter, called “The temple of Digital Enlightenment”, Frosio provides a roadmap on how reform should be shaped in which the miscellaneous forms of creativity may coexist. This metaphorical temple which is dedicated to the enhancement of creativity is built upon 4 pillars: the politics of user rights, access and public domain as well as inclusivity. This chapter combines the pertinent discussion and suggestions surrounding these elements in a compelling way and provides concrete examples of legislative and policy changes which ought to be made.

⁴ Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity – The Third Paradigm* (Edward Elgar, 2018) 234.

In summary, Giancarlo Frosio's book, which is part of the CEIPI Studies in Intellectual Property, is a fine read for anyone who is interesting in the debate on the ongoing purpose of copyright law in the digital age. The author provides and analyses vast amounts of historical and anthropological sources to show us that we might have lost sight of these early, cumulative practice of creating. Frosio argues that copyright law with its premise of exclusivity has side-lined these traits of cumulative creativity. He furthermore states that the rationality of this paradigm has radicalized in recent years, perhaps fuelled by the threat of digitization and the internet. But rather than seeing this as a threat and fighting back against what is doomed to be a futile battle, Frosio invites us to embrace the possibilities which the digital era might have in stall for human creativity.